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**COMPLEMENTARITY AND CULTURAL SENSITIVITY:
DECISION-MAKING BY THE ICC PROSECUTOR IN
RELATION TO THE SITUATIONS IN
THE DARFUR REGION OF THE SUDAN AND
THE DEMOCRATIC REPUBLIC OF THE CONGO (DRC)**

THE DEGREE OF DOCTOR OF PHILOSOPHY

SHAHRZAD FOULADVAND

**SUSSEX LAW SCHOOL
UNIVERSITY OF SUSSEX**

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DECLARATION

I hereby declare that this thesis has not been submitted, either in the same or different form, to this or any other University for a degree and the work produced here is my own except stated otherwise.

Sign:

Shahrzad Fouladvand

Date:

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ABBREVIATIONS

AFDL	Alliance des Forces Democratiques pour la Liberation
AI	Amnesty International
APC	Armee Populaire Congolaise
ASF	Avocats Sans Frontieres
ASP	Assembly of State Partiy
AU	African Union
AUDP	African Union High-Level Panel on Darfur
CEDAW	Convention on the Elimination of All Froms of Discrimination against Women
CICC	Coalition for the International Criminal Court
CMJ	Comite Mixed de la Justice
CNDP	Congres National pour la Defense du Peuple
COM	Comprehensive Peace Agreement
CRC	Convention on the Rights of the Child
CSJ	Cour Supreme de la Magistrature
DRC	Democratic Republic of Congo
EU	European Union
FARDC	Forces Armee de la Republique Democratique du Congo
FIDH	International Federation for Human Rights
FIPI	Front pour l'Integration et la Paix en Ituri
HRW	Human Rights Watch
IAP	International Association of Prosecutor
IBAHRI	International Bar Association Human Rights Institute
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICD	Inter-Congolese Dialogue
ICERD	Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Convention of Economics, Social and Cultural Rights
ICJ	International Court of Justice
ICTY	International Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IICJ	International Islamic Court of Justice
ILAC	International Legal Association Consortium
ILC	International Law Commission
INC	International National Constitution
JEM	Justice and Equality Movement
LRA	Lord's Resistance Army
MLC	Mouvement pour la Liberation du Congo
MONUC	United Nations Organization Mission in the Democratic Republic of Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of Congo
NATO	North Atlantic Treaty Organization
NCOI	National Commission of Inquiry
NCP	National Congress Party
NGOs	Non Governmental Organizations
NIF	National Islamic Front

OIC	Organization of the Islamic Conference
OSISA	Open Society Initiative for Southern Africa
OTP	Office of the Prosecutor
PCP	Public Congress Party
PNC	Police Nationale Congolaise
PrepCom	Preparatory Committee for the Establishment of an International Criminal Court
RCC-NS	Revolutionary Command Council for National Salvation
RCD	Rassemblement Congolais pour la Démocratie
RCD-ML	Rassemblement congolais pour la Démocratie – Mouvement de Liberation
REJUSCO	Restoring Justice to the East of the DRC
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
SCA	Special Criminal Act
SCCED	Special Criminal Court on the Event of Darfur
SLA	Sudan Liberation Army
SLM/A	Sudan Liberation Movement/Army
SPLA	Sudan People’s Liberation Army
UN	United Nations
UNCOI	United Nation Commission of Inquiry on Darfur
UNHRC	United Nations Human Rights Council
UNMIS	United Nations Mission in Sudan
UNSCR	United Nations Security Council Resolution
UPC	Union des Patriotes Congolais
WWI	World War I
FDLR	Forces Decmocratiques de Liberation du Rwanda
FNI/FRPI	Fron des Nationalists et Integrationnistes – Front de Resistance Patriotique d’Ituri
UPC/FPLC	Union des Patriotes – the Forces Patriotiques pour la Liberation du Congo
PTC	Pre-Trial Chamber
SIU	Special Investigations Unit
UPDF	Uganda People’s Defence Force

ABSTRACT

The complementarity regime created by the Rome Statute of the International Criminal Court (ICC) marked a radical departure for international criminal justice. It represented a significant break with the Westphalian state system of national sovereignty and a step towards a regime of global governance based on the rule of law. The ICC is rooted in a Kantian notion of cosmopolitan justice where there is a need for a response to state failures to eliminate gross human rights violations. However, it has also been seen as a post-colonial court representing the hegemony of western justice and western authority over local traditions, particularly in the Islamic world. The operation of the operation of the complementarity regime does not reflect all types of juridical traditions and is therefore viewed with suspicion by nations with different criminal justice ideologies and policies.

This thesis examines the practical and moral legitimacy of the complementarity regime of the ICC from two possible perspectives, both of which in their different ways support the idea of universal jurisdiction. Kant's moral philosophy represents the western justification for the regime, whereas the tradition of Islamic *Shari'a* epitomises the potential resistance from the developing world. Through an analysis of the exercise of prosecutorial discretion under the complementarity regime in relation to the Ituri region of the Democratic Republic of Congo (DRC) and the Darfur situation in Sudan, the thesis examines both the logistics of the decision-making in these cases, as well as the moral justifications for intervention. The fieldwork included a six month programme of participant observation and interviewing in the Office of the ICC Prosecutor in The Hague.

The ICC is an independent court with a global jurisdiction which grants the Prosecutor a broad discretion to apply the complementarity regime to meet the expectations of the entire international community, regardless of the status, national origin or state citizenship of the accused. This thesis argues that a careful consideration of the moral case for the exercise of authority under the complementarity regime is important and depends upon an understanding of the inherent differences between the Rome Statute and national justice systems. The research highlights the fact that moral obligations do not end at national borders. It asserts that a credible complementarity mechanism requires the effective prosecution of international crimes in a manner which is legitimate in terms of local culture and traditions. Otherwise, as the research demonstrates, the Court will enjoy little support, particularly as enforcement has so far focused only on Islamic or less developed countries.

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Introduction

The relationship between the nature of institutions and principles lies at the heart of a normative theory of justice. Major changes in the patterns of human interactions have challenged this complex relationship.¹ Take into consideration the fact that there is a demand for morality 'based on a common set of norms and values shared by the entire international community'²; it is argued that the creation of the International Criminal Court (ICC) provides a moral duty to interfere in national jurisdictions to prosecute and punish violations of international core crimes. In the ICC, the Prosecutor is granted broad discretion in the initiation and conduct of criminal proceedings, such as the selection of the concrete cases for prosecution.³ However, as Knoop has stated, the legal-political foundation of prosecutorial discretion to initiate international criminal proceedings remains uncertain⁴ and the criteria upon which the Prosecutor's discretion is based are complex.⁵ Furthermore, the prosecutorial decision-making process is based upon the assumption that the ICC presents 'a universally recognized type of justice'.⁶ However, it is important to take into consideration the cultural differences, such as traditional African justice⁷ and *Sharia* law, when the Prosecutor considers whether to proceed. As Stigen has noted, prosecutorial discretion is at the heart of the ICC complementarity regime and its purpose is to determine whether ICC interference is desired.⁸

The goals of the ICC as outlined in the Preamble are the prosecution of the most serious international crimes and the ending of impunity for the perpetrators thereof.⁹ Accordingly, Arsanjani writes, the Rome Statute was built on three principles.¹⁰ The

¹ Hayden, P. (2004). "Cosmopolitanism and the Need for Transnational Criminal Justice The Case of the International Criminal Court." Theoria: A Journal of Social and Political Theory 51(2): 69-95. p.74.

² Tibi, B. (1994). "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations." Human Rights Quarterly 16(2): 277-299. p. 277.

³ Ambos, K., L. Arbour, et al., Eds. (1998). The Prosecutor of a Permanent International Criminal Court: International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR). Freiburg im Breisgau, Max-Planck-Institut. p. 210.

⁴ Knoop, G.-J. A. (2004). "Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective." Criminal Law Forum 15(2): 365-390. p. 366.

⁵ Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, December 8, 1997, at 7-8.

⁶ Stigen, J. (2008). The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity. Martinus, Nijhoff. p. 366.

⁷ *Ibid.*, p. 365.

⁸ *Ibid.*, p. 4.

⁹ Preamble of the Rome Statute, para 4.

¹⁰ Arsanjani, M. (1999). "The Rome Conference on an International Criminal Court: The Negotiating Process." The American Journal of International Law 93: 22-43. p. 24.

first principle is that of complementarity which upholds the primacy of national courts over the ICC.¹¹ This principle has been described as the cornerstone of the Rome Statute, without which the realization of a permanent ICC would not have been possible:¹² it ‘permeates the entire structure and functioning of the Court’.¹³ In fact, as Evans has stated, whether or not the Court will succeed in its goals will depend on the Court’s interpretation of the complementarity provisions.¹⁴ The second principle confines the Court to dealing only with the most serious crimes of concern to the international community as a whole.¹⁵ The third principle is that the Statute should, to the extent that it is possible, remain within the realm of customary international law.¹⁶

Therefore, complementarity is one of the founding principles of the Court and has been the subject of extensive academic commentary and debate.¹⁷ For instance,

¹¹ *Ibid.*,

¹² Williams, S. A. "Article 17: Issues of Admissibility", in O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) pp. 390-392.

¹³ Benzing, M. (2003). "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity." *Max Planck Yearbook of United Nations Law* 7: 591-632. p. 593.

¹⁴ Evans, R. D. (2005). *Amnesties, Pardons And Complementarity: Does The International Criminal Court Have The Tools To End Impunity?* *The Human Rights Law Centre* from www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2005/amnestiespardonscomplementarity.pdf [accessed on 10th September 2011]

¹⁵ Arsanjani, *Op. cit.*, p. 25

¹⁶ *Ibid.*,

¹⁷ See Stigen, *Op. cit.*, Benzing, *Op. cit.*, Newton, M. A. (2001). "Comparative Complementarity: Domestic Jurisdiction Consistent with The Rome Statute Of The International Criminal Court." *Military Law Review* 167: 20-73. ElZeidy, M. (2002). "The Principle of Complementarity: A New Machinery to Implement International Criminal Law." *Michigan Journal Of International Law* 23: 869-975. Guruk, J. (2002). "United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?" *Cornell International Law Journal* 35: 1-45. Holmes, J. T. (2002). *Complementarity: National Courts vs. The ICC. The Rome Statute of the International Criminal Court: A Commentary* A. Cassese, P. Gaeta and J. Jones. Oxford, Oxford University Press. Kleffner, J. K. (2003). "The Impact of Complementarity on National Implementation of Substantive International Criminal Law." *Journal of International Criminal Justice* 86(1): 86-113. Arsanjani, M. and M. Reisman (2005). "The Law-In-Action of the International Criminal Court." *American Journal of International Law* 99: 385-405. Megret, F. (2005). "In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice." *Cornell International Law Journal* 38: 725-751. Olasolo, H. (2005). *The Triggering Procedure of the International Criminal Court*. Martinus, Nijhoff. Yang, L. (2005). "On the Principle of Complementarity in the Rome Statute of the International Criminal Court." *Chinese Journal of International Law* 4(1): 121-132. Martin, J. B. (2006). "The International Criminal Court: Defining Complementarity and Divining Implications for the United States." *Loyola University Chicago International Law Review* 4(1): 107-133. Razesberger, F. (2006). *The International Criminal Court: The Principle of Complementarity*. Frankfurt am main, Peter Lang. ElZeidy, M. (2008). *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* Martinus, Nijhoff. Kleffner, J. K. (2008). *Complementarity in the Rome Statute and National Criminal Jurisdictions*. Oxford, Oxford University Press. Politi, M. and F. Gioia, Eds. (2008). *The International Criminal Court and National Jurisdictions*. Aldershot, Ashgate. Burke-White, W. W. and S. Kaplan (2009). "Shaping the Contours of Domestic Justice: The International Criminal Court and the Admissibility Challenge in the Ugandan Situation." *Journal of International Criminal Justice* 7(2): 257-

Jo Stigen has focused on several issues in relation to the complementarity regime, 'by interpreting the relevant provisions of the Rome Statute and discussing them in a broad context'.¹⁸ He has analysed the procedures of the complementarity principle¹⁹ and legal issues regarding the relationship between the ICC and national jurisdictions.²⁰ Although he has attempted to assess the policy and political considerations concerning Article 17, 'the focus of his interest lies in the realm of law, and not in that of policy.'²¹ Stigen has also aimed to answer the question of whether or when the ICC Prosecutor should interfere *vis-à-vis* national judicial systems.²² However, he has only focused on the interest of justice criterion in the prosecutorial decision-making process of selecting appropriate situations and cases.²³

Florian Razesberger has addressed the principle of complementarity as a new concept in international criminal law and critically analyzed the core provisions of the Rome Statute which deal with this principle. He has also examined different trigger mechanisms and stages of proceedings in which the Court deals with complementarity, such as the preliminary examination phase, the initiation of an investigation and challenges to the jurisdiction of the Court or the admissibility of a case.²⁴ Razesberger has claimed that one of the functions of complementarity is to prevent politically motivated prosecutions and 'minimize the factual political role of the Prosecutor'.²⁵ However, in this regard, he has analyzed only the relevant statutory provisions rather than delving into the origins of prosecutorial discretion based on the complementarity regime of the ICC.

Another comprehensive work on complementarity has been carried out by Mohamed El Zeidy. In his 2008 study²⁶, he explores the history of the notion of complementarity from the aftermath of WWI when proposals were submitted by official and non-official bodies to the League of Nations for the creation of an international criminal court.

279. Greenawalt, A. K. A. (2009). "Complementarity in Crisis: Uganda, Alternative justice, and The International Criminal Court." *Virginia Journal of International Law* 50(1): 107-162. Stahn, C. and G. Sluiter, Eds. (2009). *The Emerging Practice of the International Criminal Court*. Martinus, Nijhoff.

¹⁸ Stigen, *Op, cit.*, Preface at xi.

¹⁹ *Ibid.*, Chapter 4 and 5

²⁰ For further information refer to chapter 6 of Stigen's Book

²¹ Hein, D. P. (2009). "Book review:Jo Stigen, The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity." *Journal of International Criminal Justice* 7(2): 439-444. p. 439.

²² *Ibid.*, p. 440.

²³ Stigen, *Op, cit.*, Chapter 11

²⁴ Razesberger, *Op, cit.*, Chapter three broadly examines preliminary examination phase, etc.

²⁵ *Ibid.*, p. 28.

²⁶ El Zeidy, *Op, cit.*,

El Zeidy has also comprehensively analyzed the development of the doctrine of complementarity during the *travaux préparatoires* of the International Law Commission (ILC) in preparing the draft Statute of the ICC. Furthermore, he has widely examined the main provisions which govern the application of the complementarity principle, in particular addressing the practice of self-referral.²⁷ He has argued that the Rome Statute constitutes two regimes, a regime of mandatory complementarity where a state is unwilling or unable to deal with a situation or a case within its domestic courts: and a regime of optional complementarity, which applies as a result of self-referral when a state consents to relinquish its jurisdiction in favour of the Court's. Like Stigen, he has also observed the inactivity scenario and referred to the same conduct test in the Lubanga and Darfur decisions. He writes 'it is a *condition sine qua non* for a case (...) that national proceedings encompass both the person and the conduct which is subject before the Court'.²⁸

Jaan Kleffner, along with other scholars, has clarified the formal framework of complementarity in the Rome Statute by interpreting the relevant provisions, which set forth the criteria for admissibility and the procedural aspects of their application. In doing so, he has considered the emergence of complementarity as a legal principle, as a criterion for admissibility, and the importance of this principle in the relationship between the ICC and national criminal jurisdictions. He has examined the procedural settings of complementarity and the obligations of states to exercise their jurisdiction over core crimes as it is declared in paragraph 6 of the Preamble of the Rome Statute. He has critically examined the notions of unwillingness and inability and suggested that a criterion of effectiveness of national proceedings should be used to 'replace the terms unwillingness and inability.'²⁹ He has argued that 'complete inaction on the national level would thus allow the ICC to take up a case without having to enter into an assessment of the admissibility criteria in Article 17 (1) (a) to (c). The provisions on

²⁷ El Zeidy's book, Chapters 3 and 4.

²⁸ El Zeidy, *Op. cit.*, p. 161. See also *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, No. ICC-01/04-01/06-8-US-Corr, 10/02/2006, paras. 31-37. Unsealed pursuant to Decision ICC-01/04-01/06-37 dated 17/03/2006; *Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali-Abd-Al Rahman (Ali Kushayb)*, Decision on the Prosecution Application under Article 58 (7) of the Statute, No. ICC-02/05-01/07-1-Corr, 27/04/2007, paras. 24-25.

²⁹ Kleffner, *Op. cit.*, Complementarity in the Rome Statute and National Criminal Jurisdictions, pp. 160-161.

complementarity only apply once a state takes, at minimum, initial investigation steps'.³⁰

He has also addressed the question of self-referral, which he names 'auto-referral', and its tension with the formal framework of complementarity in general and the procedural setting of complementarity in particular.³¹ Kleffner briefly considers prosecutorial discretion and refers to the diversity of criminal justice systems. He states that, 'the diversity between different criminal justice systems gives rise to varied procedures for the exercise of that discretion and different forms and degrees of checks and balance'.³² In addition, he claims that the 'complexity of a discussion of prosecutorial discretion increases due to the fact that ICC crimes may be subject to different branches of a state's criminal justice system, for instance civil and military, which in turn may differ as far as investigative and prosecutorial discretion is concerned'.³³ Kleffner has attempted to establish grounds for the exercise of prosecutorial discretion during proceedings, providing two potential justifications: a lack of evidence and political expediency. He has mainly examined these issues from the point of view of competent national authorities, whether they are entitled 'to abandon an ongoing investigation for lack of evidence or for policy considerations, a lack of public interest'.³⁴ He has claimed that the discretionary power of these authorities to decline initiation of an investigation when one or more ICC crimes may have been committed is incompatible with the requirements imposed by Article 17 of the Rome Statute.³⁵ Finally, Kleffner has looked at the legitimacy of complementarity by focusing on the consent of states to the Rome Statute and the legitimacy with which complementarity safeguards state sovereignty.³⁶

At the heart of the ICC is the principle of complementarity under which national courts have become significant fora for prosecuting international crimes. In contrast to the primacy over national courts of the two *ad hoc* tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the complementarity regime of the ICC precludes admissibility under the special circumstances set forth in Articles 17-20 of the Rome Statute. The

³⁰ *Ibid.*, p. 120.

³¹ *Ibid.*, p. 237.

³² *Ibid.*, p. 284.

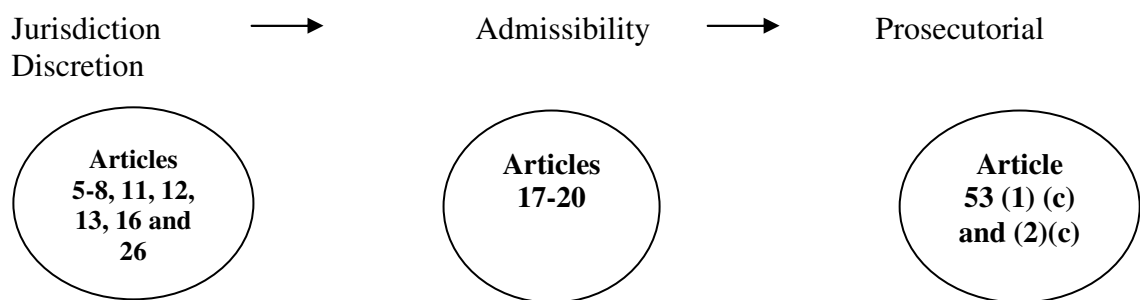
³³ *Ibid.*,

³⁴ *Ibid.*, p. 287.

³⁵ *Ibid.*, p. 285.

³⁶ *Ibid.*, p. 342.

complementarity principle empowers states to become more effective at investigating and prosecuting cases of international crimes through the good faith application of domestic criminal process and strong jurisdictional connection with cases. Therefore, an examination of the *ad hoc* international criminal tribunals is beyond the scope of this thesis which instead focuses on the uniqueness of the ICC in order to examine the practical and moral legitimacy of its complementarity regime and how the Court should ensure that national court systems have the capacity to provide local justice for international crimes. It is worth mentioning here that the Rome Statute defines the question of complementarity as pertaining to the admissibility of a case rather than to the jurisdiction of the Court. The issues of admissibility and jurisdiction have to be distinguished.³⁷ The Court cannot exercise the jurisdiction that it has if a case is inadmissible.³⁸ The principle of complementarity does not affect the existence of the jurisdiction of the Court but it regulates when the Court may exercise this jurisdiction,³⁹ as illustrated in the following graph (from Stigen, p. 3).



As a jurisdictional precondition, the situation within which the alleged crime was committed may refer to the Court through one of the trigger mechanisms. The Prosecutor then has the power to consider the admissibility of the case to determine whether to initiate an investigation.⁴⁰ In other words, ‘the procedural aspect of complementarity is embodied in the regime of admissibility to which all cases are subject’, and ‘it refers to the policy choices made in deciding what kinds of cases’ should be heard at the ICC rather than national courts.⁴¹ Therefore, even where states or the Security Council refers situations, the Prosecutor must make an independent

³⁷ Benzing, *Op, cit.*, p. 594.

³⁸ Holmes, *Op, cit.*, p. 627.

³⁹ Benzing, *Op, cit.*,

⁴⁰ Benvenuti, P. (1999). Complementarity of the International Criminal Court to National Criminal Jurisdiction. *Essays on the Rome Statute of the International Criminal Court*. W. Schabas and F. Lattanzi. Fagnano Alto, il Sirente 1. p. 42.

⁴¹ Sadat, L. N. and S. R. Carden (2000). "The New International Criminal Court: An Uneasy Revolution." *The Georgetown Law Journal* 88: 380-474. pp. 383 - 414.

assessment on jurisdiction and the admissibility criteria, namely the complementarity principle.⁴²

This research does not purport to describe conclusively the complementarity regime in all its substantive and procedural aspects, but rather seeks to focus on the role of the ICC Prosecutor as a primary guardian of the complementarity regime of the ICC in exercising his or her power to initiate investigations and prosecutions. There are limits on how many perpetrators can be prosecuted by the ICC, and this raises an important question as to how to determine the division of labour between the ICC and domestic jurisdictions. This largely depends on how the complementarity regime will develop in practice in relation to the impunity gap - large numbers of perpetrators of genocide, crimes against humanity, and war crimes do not appear before a domestic court or international tribunal.⁴³

The main contribution of this study is its emphasis on the importance of ethics and rationality in the prosecutorial decision-making process in order to close the impunity gaps both at the international and at the national level. Since the complementarity regime has a global reach, I have tried to assess it in terms of normative principles from both the developed and the developing world. I have therefore chosen both a Western and an Islamic perspective to demonstrate how an independent prosecutor could be capable of holding any person accountable for committing crimes of universal concern regardless of their power or position. Hitherto, there has been little attempt, if any, to critically analyse the discretionary power of the prosecutor from a socio-legal perspective and to address the important political and moral dimension of the exercise of prosecutorial discretion at the ICC. There are two main factors that significantly influenced me to pursue my doctoral research on the complementarity regime of the ICC. On the one hand, coming from a country with an Islamic system gave me strong motivation to explore the triggering procedure of the ICC, since the Rome Statute does not include the Islamic legal system as one of the legal traditions of the world. In addition, I was interested in the controversial arguments regarding the mixed approach on prosecutorial discretion negotiated during the Preparatory Committee on the establishment of the ICC by participants from different legal backgrounds. They

⁴² Brubacher, M. R. (2004). "Prosecutorial Discretion within the International Criminal Court." Journal of International Criminal Justice 2: 71-95. p. 78. Rastan, R. (2007). The Power of the Prosecutor in Initiating Investigations. The Symposium on the International Criminal Court. China, International Centre for Criminal Law Reform and Criminal Justice Policy: p. 4.

⁴³ Vancouver Dialogue on the Impunity Gap, www.ligi.ubc.ca/?p2=modules/liu/publications/view.jsp&id=66 [accessed 10th September 2011]

reached the conclusion that broad discretion should be granted to the Prosecutor to initiate and conduct criminal proceedings. However, the exercise of discretion by the Prosecutor has been criticized by a number of scholars and Non Governmental Organizations (NGOs), such as the International Federation for Human Rights (FIDH) and Human Rights Watch, on the basis of a lack of clarity in the ICC Statute and an ambiguous procedural system. Among scholars, Goldston has criticized prosecutorial discretion in relation to the failure of the Prosecutor to bring charges against one side in a conflict (e.g. in Democratic Republic of Congo), and out side of a particular region (e.g. beyond Africa).⁴⁴ Furthermore, the Prosecutor has also been criticized for those he has brought to the Court (e.g. in DRC and Darfur).

My work centres around three key research questions. It will examine how the complementarity procedures work in the DRC and Darfur situations, which were referred to the ICC Prosecutor. More specifically, the central question is how does prosecutorial discretion in these selected case studies affect the legitimacy and credibility of the Court? It will ask whether the exercise of a complementarity decision is ethically justified and, finally, what reforms may be needed in terms of norms or guidelines within the Prosecutor's strategies.

Appropriate prosecutorial policy:

Despite the significant guidance in the Rome Statute and the Rules of Procedure that seeks a balance between complementarity and the effectiveness of the ICC, there are some important gaps and unresolved questions that could undermine the actual practice of the ICC regarding the principle of complementarity. Newton has argued that if the ICC and its Prosecutor 'do not adhere to provisions for respecting the complementarity principle; the political backlash could eviscerate the ICC as a functioning institution with international credibility and support.'⁴⁵ He has further claimed that complementarity is 'an intellectually simple concept that masks the deep philosophical and political difficulties that the International Criminal Court' faces.⁴⁶ Complementarity is in theory an impartial, reliable, and de-politicized process for identifying the cases of international concern, and hence international jurisdiction. However, 'the thicket of

⁴⁴ Goldston, J. A. (2010). "More candour about criteria: The exercise of discretion by the prosecutor of the international criminal court." *Journal of International Criminal Justice* 8(2): 1-24. p. 7.

⁴⁵ Newton, M. A. (2001). "Comparative Complementarity: Domestic Jurisdiction Consistent with The Rome Statute Of The International Criminal Court." *Military Law Review* 167: 20-73. p. 63.

⁴⁶ *Ibid.*, p. 72.

subjective provisions designed to implement complementarity allows treaty opponents to argue that national justice systems are threatened with displacement at the hands of an unrestrained international prosecutor.⁴⁷ For instance, in theory, complementarity would require the ICC to recognize the discretion of the domestic authorities regarding the scope and form of the domestic charges. In reality, complementarity 'may be an incomplete restraint on a zealous ICC prosecutor, motivated by a strong awareness of moral and legal obligations to serve the needs of international accountability, who could use the form of domestic charges as a pretext to exert ICC authority.'⁴⁸

Although the principle of complementarity is intended to offer states and the international community a possible way out when the absence of trial or punishment for international crimes would be unacceptable, it should not, however, be analysed only in the light of the provisions of the ICC Statute. Each national context must be taken into account, as it will influence the state's ability to exercise its jurisdiction over international crimes. This implies an analysis of national criminal justice systems to evaluate their ability to assert jurisdiction.⁴⁹ Without going into detail, it can logically be assumed that the inherent differences between legal systems will influence the way in which the principle of complementarity will be implemented. It will, therefore, not be uniformly applied. This must be acknowledged as a normal interaction between the international and national legal systems and taken into consideration.⁵⁰ In this context, even if international crimes are defined in the same way at the international and national level, differences in criminal procedure and admissibility of evidence may lead to divergences of application. For instance, if one person is accused of an international crime but insufficient evidence is gathered or the rules for a fair trial are not met, national judges may be reluctant to or refuse to prosecute the accused. They would comply with their national judicial framework, but not necessarily with the international requirement.⁵¹ An important question that may be raised here is: would the ICC accept such a situation, or would it initiate proceedings on grounds of unwillingness or inability to prosecute those accused of international crimes?

Wessel has claimed that Article 17 leaves open the crucial question of whether mere intent by the state to protect an individual from the Court's jurisdiction is enough,

⁴⁷ *Ibid.*, p. 73.

⁴⁸ *Ibid.*, p. 72.

⁴⁹ Philippe, X. (2006). "The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?" *International Review of the Red Cross* **88**(862): 375-398. p. 384.

⁵⁰ *Ibid.*,.

⁵¹ *Ibid.*, p. 391.

standing alone, to revoke complementarity even where the state has done nothing objectively wrong.⁵² Some scholars, such as Delmont and Kovacs, have observed the ambiguity of the complementarity regime and claimed that this ambiguity ‘invites both judicial gap-filling and activism.’⁵³ The complementarity regime is designed to find a balance between the sovereign right of all states to exercise criminal jurisdiction over acts within their jurisdiction,⁵⁴ and the effective prosecution of international crimes of concern to the international community as a whole.⁵⁵ However, the effective prosecution of international crimes depends on action at the national level on the one hand,⁵⁶ and for the Prosecutor to monitor the situation in states with a view to identifying possible situations in which the goals of the Statute are in danger of being disregarded on the other.⁵⁷ In essence, alongside the concept of state sovereignty, the interest of the international community in the effective prosecution of international crimes⁵⁸ is important to put an end to impunity, which falls in the process of analysis and decision-making of the Prosecutor.

Perhaps the most important challenge facing the Prosecutor is determining which crimes to select for a preliminary examination *proprio motu* pursuant to Article 15 (1) and (2) of the Rome Statute, for an investigation pursuant to Article 15 (3), and for investigations based on referrals by the Security Council pursuant to Article 13 (b), or by a state party pursuant to Articles 13 (a) and 14.⁵⁹ Although there will be significant differences between a preliminary examination and an investigation, the decision as to whether to conduct a preliminary examination or an investigation will usually involve most of the same considerations and the Prosecutor needs the same guidelines for both. In addition, although there will be a number of important differences between investigations based on what triggers them, as Rule 48 makes clear, in determining whether there is a reasonable basis to proceed with an investigation under Article 15 (3), the Prosecutor shall consider the factors in Article 53 (1) (a) to (c), which apply to state or Security Council referrals.⁶⁰ In determining which crimes should be preliminarily

⁵² Wessel, J. (2006). "Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analysing International Adjudication." *Columbia Journal of Transnational Law* 44: 377-452. p. 403.

⁵³ Delmont, A. T. (2001). "The International Criminal Court: The United States Should Ratify the Rome Statute Despite its Objections." *Journal of Legislation* 27(2): 335-359. p. 339.

⁵⁴ Benzing, *Op, cit.*, p. 632.

⁵⁵ Preamble of the Rome Statute, para. 4.

⁵⁶ Benzing, *Op, cit.*,

⁵⁷ *Ibid.*,

⁵⁸ *Ibid.*, p. 597.

⁵⁹ Articles 13, 14, and 15 of the Rome Statute

⁶⁰ The Analysis of the ICC Prosecutor, from confidential source, p. 157

examined or investigated, and in deciding which crimes and individuals should be prosecuted, the Prosecutor should consider what the role of national criminal justice systems will be in dealing with the crimes that are not investigated or prosecuted at the international level.⁶¹ Although the Prosecutor will not be able to investigate and prosecute every crime within the Court's jurisdiction, the Prosecutor's investigation and prosecution strategy should be seen as part of a global partnership in building and operating a new framework of international justice between the Court and national courts.⁶² In other words, the Prosecutor should have both global and situational anti-impunity complementarity strategies, designed to encourage efforts to bring all persons responsible for crimes under international law to justice.⁶³ Neither the Statute nor its Rules of Procedure and Evidence (RPE) provide much guidance for the Prosecutor in deciding whether or not to initiate an investigation and to proceed with a prosecution. Thus the Prosecutor is faced with making certain difficult choices, among which are whether to prosecute the greatest number of perpetrators or whether to try to the highest possible standards in prosecutions.⁶⁴ As Roper has suggested, the coercive powers of the state in domestic criminal justice systems should not be 'extrapolated to international criminal proceedings'.⁶⁵ Many of the tools available to prosecutors in domestic criminal justice systems, such as subpoenas, are not available in an international criminal context.⁶⁶ In fact, the national institutions may be in a better position to conduct the investigations due to their closer access to the facts and their context of meaning, their knowledge of the language and the society, and the available resources.⁶⁷ In deciding the appropriate guidelines for determining when the Prosecutor will conduct preliminary examinations or investigations of crimes, the Prosecutor needs to have clear ideas about the desired caseload in terms of numbers of crimes, numbers of suspects and accused, and the locations where the crimes occur that he or she wants to investigate each year. Once these difficult decisions are made about desired

⁶¹ *Ibid.*, p. 173.

⁶² *Ibid.*,

⁶³ *Ibid.*,

⁶⁴ *Ibid.*, p. 269.

⁶⁵ Roper, Steven. and Barria, Lilian. "Evaluating the Influence of the International Criminal Court" *Paper presented at the annual meeting of the American Political Science Association, Marriott, Loews Philadelphia, and the Pennsylvania Convention Center, Philadelphia, PA, Aug 31, 2006* www.allacademic.com/meta/p152795_index.html

⁶⁶ *Ibid.*,

⁶⁷ Proposal for methodology, mandate and organization, from confidential source, p. 4.

outcomes, various types of guidelines can be developed for deciding when to conduct preliminary examinations or investigations.⁶⁸

Several commentators have advocated a guidelines-based approach to constraining prosecutorial discretion. For example, as participants in a process of expert consultations organized by the ICC Prosecutor, Avril McDonald and Roelof Haveman urged the Prosecutor to ‘objectify’ the use of prosecutorial discretion, arguing that ‘it is of vital importance that guidelines are developed - and made public - giving direction to the decision either [to initiate] or not to initiate an investigation. ‘Vital’, as the danger looms large that the court is accused of starting investigations on entirely arbitrary grounds, and even based on political considerations.’⁶⁹ Allison Danner has also argued that prosecutorial guidelines rooted in ‘good process’ may ‘enhance’ the legitimacy of the Prosecutor. She suggests a regulated system of prosecutorial policy based on publicly promulgated guidelines developed by the Prosecutor and approved eventually by a vote of the Assembly of States Parties. This approach, argues Danner, will enhance legitimacy by rooting the Prosecutor’s decision-making in neutral *ex ante* criteria that ‘provid[e] for a transparent standard that the Prosecutor will consistently apply.’⁷⁰ Having said that the guidelines represent an effort to facilitate transparent decision-making,⁷¹ these guidelines will also ensure that the prosecutor makes his or her decisions on principled, impartial bases and assist in the public understanding that he or she is, in fact, making decisions in this way.⁷² Clearly, if the Prosecutor declines to promulgate such guidelines, he or she risks the credibility and public legitimacy that are important in the success of the Court.⁷³

Furthermore, it is necessary to decide what the applicable criteria for guiding these choices are. What are the types of discretion that the prosecutor can exercise: legal, political, ethical/moral, practical/pragmatic, and how should the Prosecutor exercise this discretion? In order to answer these questions, it is critical to consider the moral

⁶⁸ *Ibid.*, p. 166.

⁶⁹ Greenawalt, A. (2007). "Justice without Politics? Prosecutorial Discretion and the International Criminal Court." *International Law and Politics* 39: 583-673. p. 652. See also Avril McDonald & Roelof Haveman, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Apr. 15, 2003, ICC-OTP, at www.wold.icc-cpi.int/library/organs/otp/mcdonald_haveman.pdf

⁷⁰ Danner, A. M. (2003). "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court " *The American Journal of International Law* 97: 510-552. p. 512.

⁷¹ Danner, A. M. (2003). "Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel " *Stanford Law Review* 55(5): 1633-1665 p. 1660.

⁷² *Ibid.*, p. 1656.

⁷³ *Ibid.*,

dimension of prosecutorial discretion as the basis on which the legitimacy of the ICC depends.

Organization of the Thesis

The thesis has been organized into eight chapters. Chapter Two, following this introductory chapter, will provide the philosophical underpinning of the thesis from a normative approach in order to examine the legitimacy of the existing prosecutorial decision-making process. It is worth mentioning here that as my thesis is not a philosophical one, it does not delve deeply into philosophical debates about the origins of morality. In addition, it will not analyse the legitimacy of the ICC from a conventional and jurisprudential point of view. Given that legitimacy is the fundamental question of my thesis, the following page will establish a background for the work that follows.

Clearly, the drafters of an international criminal court intended to create a system of global justice that would be justifiable to the whole world to complement national jurisdictions. Therefore, the establishment of the ICC as a permanent international criminal court is an enormous achievement attempting to bring alleged perpetrators to justice for the most serious crimes against humanity around the world. However, an important question has to be answered as to how the ICC can justify its intervention in domestic jurisdictions to proceed. Crucially, the ICC has to be legitimate not only in the West but for the whole world, including Islamic jurisdictions. In fact, the support of the entire international community is essential for a credible complementarity mechanism to make proceedings more accessible for affected communities, with a view to ending the impunity gap for serious crimes. The philosophy chapter will elaborate two possible ethical perspectives that may satisfy the moral obligations of the ICC. It will explain why Kant's moral philosophy and Islamic law have been chosen to frame this thesis.

Whereas the Western, Kantian approach is based upon reason, morality and ethics in Islam are derived from divine law. However, although these approaches contrast with each other and deal with ethics in different ways, the focal point of both perspectives is their aim to reach a universal law. The extent to which Islamic law is compatible with modern international law has already been studied by scholars such as Nassar⁷⁴ and An-

⁷⁴ Nassar, A. E. (2006). "The International Criminal Court and the Applicability of International Jurisdiction under Islamic Law." *Chicago Journal of International Law* 4(2): 587-596.

Naim.⁷⁵ As Nassar has correctly observed, to answer the question of whether there is an international duty to prosecute, a basic issue of coexistence has to be considered.⁷⁶ At the Rome Conference, in July 1998, seven countries voted against the creation of the ICC. Of these seven 'four were countries with predominantly Muslim populations purporting to apply at least some measures of Islamic law'.⁷⁷

Little attention has been focused on why the Court has enjoyed no support from Islamic states, particularly in Africa and the Middle East. Moreover, consideration of moral obligations whether derived from Islam or not seem to play an important role in the legitimacy of the Court. From the *Quranic* point of view regarding Muslim Ummah (society), the norms of Islamic law are global and should be applied equally to the whole world.⁷⁸ As will be examined later in this study, the solution for the two competing systems at the international level is to accommodate both sides.

The right to hold individuals responsible and accountable towards international humanitarianism is a part of the cosmopolitan ideology. The advanced technology available to the international community enables it to look into events within state territories. Bharadwaj has claimed that 'the spatial reach of the international community is leading towards the construction of an international moral solidarity against infringement of individual rights'.⁷⁹ Concannon has suggested that international prosecutions are only one tool in the struggle for accountability and should be used as a backup to national prosecutions'.⁸⁰ As has been highlighted in the Rome Statute, 'national prosecutions should remain the primary option...because they can handle many more cases and are usually preferable from the perspectives of victims and local justice systems'.⁸¹ As such, the Court's mandate limits it to 'the most serious crimes of concern to the international community as a whole',⁸² as international courts can only prosecute a small fraction of the large-scale human rights violations that occur.⁸³ The

⁷⁵ An-Na'im, A. A. (1987). "Islamic Law, International Relations, and Human Rights: Challenge and Response." *Cornell International Law Journal* **20**(2): 317-335.

⁷⁶ Nassar, *Op. cit.*, p. 588.

⁷⁷ *Ibid.*, p. 593.

⁷⁸ Nyazee, I. A. K. (2009). "Islamic Law is International Law." nyazee.org/islaw/international/islint.pdf

⁷⁹ Bharadwaj, A. (2003). "International Criminal Court and the Question of Sovereignty." *Strategic Analysis* **27**(1): 5-20. p. 15.

⁸⁰ Concannon, B. (2000). "Beyond Complementarity: The International Criminal Court and National Prosecutors, A View from Haiti." *Columbia Human Rights Law Review* **32**(2): 201-250. p. 202.

⁸¹ *Ibid.*,.

⁸² Preamble of the Rome Statute.

⁸³ *Ibid.*, p. 225.

national courts can try many more cases than the ICC ever could, and it is generally better for the victim's community and for developing national systems.⁸⁴

In this context, having said that international prosecution can be seen as an extraordinary mechanism, critical thinking on moral and ethical parameters for initiating international proceedings in general is still needed in order to establish legality and legitimacy.⁸⁵ The legal-ethical and political foundation of the ICC is important for the moral justifiability of international criminal prosecutions and for 'restricting arbitrariness *vis-à-vis* prosecutorial discretion.'⁸⁶ As Megret has written, the ethical standards of the profession seem essential to safeguarding the legitimacy of international criminal justice.⁸⁷ Although there is no universal codified judicial and prosecutorial ethics and morality, there is nevertheless an inescapable ongoing process. With the greater significance of their role in society, the importance of the codification of professional deontology also increases.⁸⁸ Therefore, as DeGuzman has noted, the Court's normative legitimacy is an intrinsically important question and its sociological legitimacy is a critical component of its effectiveness.⁸⁹

In Chapter Three, I will be looking at the conceptual framework of the prosecutorial policy at the ICC. Having said that the Prosecutor has been granted a broad discretion with potentially global reach, this chapter will examine how important the position of the Prosecutor is in terms of the complementarity principle, which obliges the Prosecutor to defer to national legal systems and guides his or her work. The emphasis will be on the exercise of prosecutorial discretion in answering difficult questions such as what situations should be investigated and who should be prosecuted, which are crucial to designing a prosecutorial strategy based on the global nature of the ICC. The chapter will also analyse prosecutorial guideline at the ICC since it is important to consider whether his or her decisions will be taken in a rational and consistent way.

Chapter Four will provide some context to the Darfur conflict, which was referred to the Prosecutor by the Security Council. In particular, I will be looking at the legal and

⁸⁴ *Ibid.*, p. 248.

⁸⁵ Knoops, G.-J. A. (2004). "Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective." *Criminal Law Forum* 15(2): 365-390. p. 366.

⁸⁶ *Ibid.*,

⁸⁷ Megret, F. (2008). "International Prosecutors: Accountability and Ethics." from papers.ssrn.com/sol3/papers.cfm?abstract_id=1313691 [accessed on 10 September 2011]

⁸⁸ *Ibid.*,

⁸⁹ DeGuzman, M. M. (2009). "Gravity and the Legitimacy of the International Criminal Court." *Fordham International Law Journal* 32(5): 1400-1436. p. 1436.

political developments of the Sudanese criminal justice system and will explore how Islamization has been used as a weapon of political power. The chapter will observe the operation of various mechanisms and committees, such as special courts, which were established by the Government of Sudan in order to satisfy the criteria of the complementarity test and handle prosecutions domestically, as well looking at the failure of Sudan to engage with its international obligations regarding international crimes under the Rome Statute. Finally, it will set the scene for the next chapter by considering whether Sudanese criminal procedures are adequate in terms of Article 17 of the Rome Statute.

Chapter Five will evaluate the prosecutorial decision-making process in the Darfur situation. I will start by exploring the extent to which the Prosecutor is bound by the findings of the Security Council's investigation, and whether the admissibility criteria will still apply for this type of trigger mechanism. The chapter will mainly deal with the legitimacy of prosecutorial strategy in Darfur in terms of whether it is truly committed to ending the impunity gap. In doing so, I will look at the decision-making process in terms of the admissibility of the situation and cases by reviewing the Prosecutor's reports to the Security Council and quoting interview statements to demonstrate the vagueness of prosecutorial strategy in order in assessing the situation and, more importantly, in selecting specific cases. Given that the on-going insecurities in Darfur halted inside investigation in Darfur even by national judicial bodies, this chapter will examine how the prosecutorial discretion can be exercised to determine whether or not selected cases are the subject of genuine national investigation or prosecution. Additionally, the Pre-Trial Chamber decisions will be critically examined to highlight the performance of the Prosecutor in applying the complementarity principle, which started with cases of government involvement in the conflict.

Chapter Six and seven take other examples of the practical application of the complementarity principle in the DRC. I should note here that although the two case studies presented in this thesis, Darfur and DRC, were referred to the Prosecutor through different trigger mechanisms, I will follow a similar structure to the Darfur chapters in considering the prosecutorial decision-making process in the DRC, particularly the potential abuse of prosecutorial discretion. Chapter Six will look at the very complicated conflict in the Ituri region of the DRC with the presence of various armed groups - governmental, rebel, national and foreign - who participated in the conflict and committed widespread human rights crimes. Due to the massive incidence

of human rights atrocities in the DRC, the Security Council established a UN peacekeeping mission there (United Nations Organization Mission in the Democratic Republic of the Congo – MONUC ⁹⁰) given authority under Chapter VII, and the largest peacekeeping mission in the world. This chapter will further examine the development of the Congolese criminal justice system, in particular the military justice reform and the operation of the justice system in the DRC. In addition, it will attempt an overall evaluation of the adequacy of the Congolese criminal justice system in light of Article 17 of the Rome Statute. It will also consider the Prosecutor's discretion in indicating the Ituri region as the first priority.

Chapter Seven will explore the exercise of the discretionary power of the Prosecutor in the DRC. I will start by analysing the legitimacy of self-referral in order to pave the way for examining the DRC referral to the Prosecutor. I will further discuss the admissibility test for this type of referral and will argue that the practice of self-referral could result in political abuse of the ICC by the referring state. The chapter will trace how the decision regarding the admissibility of the situation and cases was made by the Prosecutor and will critically examine the selected DRC cases, which are selected from rebel groups, to evaluate the legitimacy of prosecutorial discretion in this situation where domestic criminal justice was able to proceed.

Chapter Eight is the conclusion, in which I will recommend on the one hand the need for a code of prosecutorial ethics and normative standards, and on the other the need for sensitivity to different legal traditions in prosecutorial decisions. The ICC Prosecutor should actively work at building trust and building the moral legitimacy of the Court, particularly in the eyes of people in Africa and Islamic countries, in order to bring perpetrators to justice.

⁹⁰ In accordance with Security Council resolution 1925 of 28 May 2010, MONUC was renamed as of 1 July the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo.

Chapter Two: The Normative Basis of the Complementarity Regime of the ICC

Introduction:

The failure of many states to protect the rights of the individual has necessitated the transfer of sovereignty to another entity. This failure is seen in the extensive number of humanitarian law violations that have gone unpunished.¹ Normative political theory provides the appropriate framing of the relationship between the nature of the institutions and the principles of justice (the balance between law and morality). Major changes in the patterns of human interactions have challenged this complex relationship, particularly in the last decade of the 20th century.² As Michael Ignatieff has observed, these changes and events alert us to 'the needs of strangers.'³ Since the start of the new century, as Tibi has argued, there has been a tremendous demand for morality based on a common set of norms and values shared by the entire international community.⁴ Taking into consideration the existing cultural diversity,⁵ a question may arise here as to how to reach universal morality.

The creation of the ICC fulfils a moral duty under which the Court is able to interfere in the international system for the prosecution of serious crimes - regardless of the national, political or other identity of the perpetrators - when a domestic system is unwilling or unable to do so.⁶ In this sense, the Court can be understood as a project of public interest versus the particular interests of states. Public interest is based upon universal morality: impartiality and equality, the fundamental principles shared by all major law systems.⁷ With regards to the need for transnational criminal justice, Hayden

¹ Leonard, E. K. (2005). "Discovering the New Face of Sovereignty: Complementarity and the International Criminal Court." New Political Science 27(1): 87-104. p. 103.

² Hayden, P. (2004). "Cosmopolitanism and the Need for Transnational Criminal Justice The Case of the International Criminal Court " Theoria: A Journal of Social and Political Theory 51(2): 69-95. editorial, p. vii.

³ *Ibid.*,

⁴ Tibi, B. (1994). "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations." Human Rights Quarterly 16: 277-299. p. 276.

⁵ *Ibid.*, p. 285.

⁶ Deitelhoff, N. (2007). "The Discursive Construction of Legal Norms and Institutions: Law and Politics in Negotiations on the International Criminal Court." Comparative Research in Law and Political Economy (CLPE) Research Paper Series 3(6): 2-48. p. 52.

⁷ *Ibid.*, p. 53.

has argued that the ICC is an example of a global institution that has moral obligations to rectify injustice since it is designed to prosecute and punish violations of cosmopolitan morality, in particular genocide and crimes against humanity.⁸

The Preamble of the Rome Statute notes that ‘during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’ and recognizes that ‘such grave crimes threaten the peace, security and well-being of the world’.⁹ In fact, the intent of the drafters was to create a court and procedures that could be acceptable to the nations of the world in spite of the different policies and ideologies governing their criminal justice systems.¹⁰ However, as Bassiouni remarks, due to diplomatic disputes, lack of time and oversight during the review stage, the Drafting Committee on the establishment of an international criminal court - which he chaired - was left with the ‘task of putting together the pieces of an enormous jigsaw puzzle.’¹¹ Furthermore, in his book he admits that the Statute ‘contains certain ambiguities, overlaps, inconsistencies, and gaps.’¹² Therefore, it does not represent all types of jurisprudence, such as Islamic jurisprudence, which is why the Court does not receive support from the Islamic states of North Africa and the Middle East.¹³ Although the ICC has the potential to fulfil the role of a universal system of justice it has excluded all non-western global ideologies, including Islamic law. In fact, the operation of ICC complementarity regime does not reflect all types of juridical traditions and is, therefore, viewed with suspicion by nations with different criminal justice ideologies and policies. Islamic countries where the most widespread contemporary conflicts are taking place, often challenge the legitimacy of the ICC based on allegations of selectivity of cases and political interference from major powers which has resulted in mistrust towards the emerging practice of the ICC.

Before the ICC was established, national criminal jurisdictions were involved in prosecuting violations of humanitarian law or extraditing perpetrators. However, the

⁸ Hayden, *Op, cit.*,

⁹ Preamble of the Rome Statute

¹⁰ Karadsheh, R. M. (1996). "Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States." *Dickinson Journal of International Law* 14(2): 243-289. p. 243.

¹¹ Bassiouni, C. (2005). *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text (International and Comparative Criminal Law)*, Ardsley, NY : Transnational Publishers, Vol. 1, p.193.

¹² *Ibid.*, p. 85.

¹³ Gaynor, F. and L. K. Morris (2008). "Review of The Legislative History of the International Criminal Court, by M. Cherif Bassiouni." *Journal of International Criminal Justice* 6(4): 815-819. p. 817.

creation of the ICC reflects a major shift in the normative structure at the international level concerning the prosecution of serious violations of humanitarian law, and it has highlighted an international duty to prosecute core crimes if states prove unwilling or unable to do so themselves.¹⁴

An important question may be raised here about the moral authority or legitimacy of the ICC and its appropriate procedures in relation to different criminal justice systems. We may ask on what moral authority it acts to bring to justice those who commit serious crimes which ‘deeply shock the conscience of humanity’¹⁵, and are ‘of concern to the international community as a whole’¹⁶, particularly when the domestic courts will not or cannot act effectively. In the context of international criminal law, some difficult philosophical questions may arise about whether moral obligations and political responsibilities end at national borders.¹⁷ In discussing this issue, this chapter has been organised around two philosophies, Kantian moral philosophy and Islamic philosophy, to consider the normative foundations of the legitimacy of the complementarity regime of the ICC. It is organized in three sections. The first section looks at the two moral approaches: the Kantian and the Islamic. It first justifies choosing the Kantian moral approach towards the creation of the ICC, while arguing that Islamic considerations need to be incorporated. It will argue that Kant’s moral philosophy represents the western justification for the complementarity regime whereas, the tradition of *Shari’a* epitomises the potential resistance from the developing world. The second section will grapple with the revolutionary concept of sovereignty, which has an important role in the application of the principle of complementarity. The final section will focus on the normative legitimacy of the ICC and will address the nature of the differing relations that exist between Islamic countries and the ICC.

¹⁴ Deitelhoff, *Op, cit.*, p.33.

¹⁵ Preamble of the Rome Statute, para. 2.

¹⁶ *Ibid.*, para. 9.

¹⁷ Voice, P. (2004). "Global Justice and the Challenge of Radical Pluralism." Theoria: A Journal of Social and Political Theory 51(104): 15-37. p. 24.

General justification for the normative foundations of the Complementarity regime of the ICC

Criminal law is distinct from other aspects of law as either an efficient technique helping us to achieve worthwhile ends, or as an essentially appropriate response to certain kinds of wrongful conduct. Philosophical theories of criminal law can make a distinction here from analytical or normative points of view. As Wacks has observed, there are two principal forms of legal theory, descriptive legal theory, which includes positivist theories, and normative legal theory. Legal positivism, as an analytical and descriptive theory, seeks to explain the concept of criminal law, while normative legal theories are concerned with what the law ought to be.¹⁸ Descriptive legal theories are about facts and do not attempt to morally evaluate or justify law, whereas normative legal theories are about values.¹⁹ It is also important to distinguish between procedural and substantive criminal law. While the latter is related to detailed knowledge of the basic doctrines of the substantive criminal law, the former emphasises a profound philosophical curiosity about the analysis and rationale for these doctrines.²⁰ In fact, these theories have different theoretical traditions. Positivist theorists see the status of law as it has been laid down in a certain way recognised by the legal system, whereas natural law theorists present a particular view of the legitimacy of law based upon morality for its authority.²¹ According to the positive law approach, morality is removed from the law.²² In other words, legal positivists contend that there is no necessary connection between law and morality.²³ Natural law theorists, on the other hand, view law and morality as related²⁴ and attempt to resolve the tension between what 'is' and

¹⁸ Wacks, R. (2005). Understanding Jurisprudence: An Introduction to Legal Theory. Oxford, Oxford University Press, p. 7.

¹⁹ *Ibid.*,

²⁰ Murphy, J. G. (1992). "Review of Philosophy of Criminal Law by Douglas N. Husak " Noûs 26(4): 527-532. p. 528.

²¹ Sandberg, R. (2007). "Religion and Morality: A Socio-Legal Approach." The journal of the British Association for the Study of Religions (BASR) 8, from www.basr.ac.uk/diskus/diskus8/sandberg.htm [accessed on 10th September 2011]

²² Roberson, C. and D. K.Das (2008). An Introduction to Comparative Legal Models of Criminal Justice. Boca Raton, Taylor & Francis Group, p. 6.

²³ Wacks, *Op. cit.*, p. 151.

²⁴ Rossi, J. (1993). "Review of Liability and Responsibility: Essays in Law and Morals by R. G. Frey ; Christopher W. Morris." Law and Philosophy 12(4): 407-416. p.407.

what 'ought' to be.²⁵ They regard the law as a moral instrument which includes principles of reason and conscience found in human nature.²⁶

Positivist international law replaced natural law as the dominant theory in the eighteenth and nineteenth century, and was considered as law not because of some moral code, but because states freely consented to obey it.²⁷ Despite this, war has still been used as an instrument of national policy. Massive atrocities have occurred both within the boundaries of single states and in international conflicts.²⁸ It can also be seen that many of the problems of international security subjected to a criminal law enforcement system cannot be resolved simply by the application of positive international law,²⁹ since legal positivism separated law as a distinct area from knowledge and practice, and 'purified' it of ethical, political, and social scientific considerations.³⁰ In this context, the authorities under positive international law have failed to respond to atrocities through legal means.³¹ Therefore, Finch has argued that 'the weakness of international law is not due to the lack of enforcement, but to the absence of an international moral sense,'³² and consequently, in the twentieth century, natural law has received new attention partly in reaction to these new circumstances. In particular, the more liberal consciousness of the Post World War II era has raised a number of moral principles that have been elevated above the will of the state, and which include some minimal standards of human rights that belong to all of mankind.³³ Wind has claimed that the Nuremberg Trials, the Universal Declaration of Human Rights in 1948, and the adoption of the Genocide Convention by the UN are good examples, which illustrate the re-emergence of natural law principles in world politics.³⁴

Since the end of the Cold War, an increase in humanitarian intervention and genocidal civil war in the 1990s paved the way for the establishment of *ad hoc* International

²⁵ Wacks, *Op. cit.*, p. 15.

²⁶ Roberson, *Op. cit.*, p. 7.

²⁷ Wind, M. (2009). "Challenging sovereignty? The USA and the establishment of the International Criminal Court." *Ethics & Global Politics* 2(2): 83-108. p. 97.

²⁸ Rubin, A. (1999). "Challenging the Conventional Wisdom: Another View of the International Criminal Court." *Journal of International Affairs* 52(2): 783-794. p. 784.

²⁹ *Ibid.*,

³⁰ Cotterrell, R. (1992). *The Sociology of Law: An Introduction*. London, Butterworths, p. 25.

³¹ Rubin, *Op. cit.*, p. 785.

³² Finch, J. D. (1979). *Introduction to Legal Theory*. London, Sweet & Maxwell, p. 37.

³³ Wind, *Op. cit.*, p. 98

³⁴ *Ibid.*,

Criminal Tribunals in The Hague and Arusha,³⁵ as Wind has noted. Cassese has also asserted that:

‘The idea of prosecuting those who committed international crimes now acquired a broad-based support in world opinion and many governments. The international community in turn became more vocal about a permanent institution with universal recognition that would not suffer from the problems of ad hoc institutions.’³⁶

As Kumm has claimed, the legitimacy of international law has been challenged in recent years,³⁷ particularly since the subject matter of international law has been expanded by a normative consensus. In this regard he suggests the ICC is one of the innovations which is based upon ‘a normative attachment to basic principles of human rights.’³⁸ In addition, Cassese has also observed that the establishment of the ICC is a revolutionary step in the context of ‘the emerging vision of the international community’³⁹ and ‘has the potential for introducing a revolutionary paradigmatic change in our conception of international law.’⁴⁰ The creation of the ICC demonstrated a tension in the international legal system regarding the status of sovereignty between the Grotian and the Kantian visions of international law.⁴¹ In other words, the ICC is the ultimate manifestation of an increasing split between ‘traditional inter-state law and an emerging cosmopolitan legal order.’⁴² The rationale behind the creation of the ICC can be considered from these two different approaches. Cassese has argued that there are two models of international legal relations, the Grotian model and the Kantian model.⁴³ The key difference between them in international theory is that the Grotian tradition observes the international society of states as ‘an unimprovable *via media*’, while the

³⁵ *Ibid.*,

³⁶ Cassese, A., P. Gaeta, et al., Eds. (2002). From Nuremberg to Rome: International Military Tribunals to the International Criminal Court. The Rome Statute of the International Criminal Court: A Commentary. Oxford, Oxford University Press, p. 18.

³⁷ Kumm, M. (2004). "The Legitimacy of International Law: A Constitutionalist Framework of Analysis." European Journal of International Law 15(5): 907-931. p. 913.

³⁸ *Ibid.*, p. 907.

³⁹ Cassese, A. (2003). "A Big Step Forward for International Justice."

www.crimesofwar.org/icc_magazine/icc-cassese.html [accessed on 10th September 2011]

⁴⁰ Mégret, F. (2001). "Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law." European Journal of International Law 12(2): 247-268. p. 248.

⁴¹ *Ibid.*, p. 251.

⁴² *Ibid.*, p. 260.

⁴³ Cassese, A. (2003). "A Big Step Forward for International Justice." *Op. cit.*,

Kantian tradition views international society as the 'chrysalis for the community of mankind.'⁴⁴

The Grotian model is a traditional one, coming into existence after the 17th century with emphasis on the notion of state sovereignty and the idea of state self-interest.⁴⁵ The Grotian tradition emphasises the primacy of the state over individuals and cosmopolitical justice from a conservative point of view, in order to form the jurisdictional and substantive range of international law.⁴⁶ From a jurisdictional point of view, this tradition emphasises state responsibility mechanisms and regards states as the enforcement arms of international law when it comes to the principle of individual criminal responsibility.⁴⁷ In this regard, Cassese has noted that national enforcement of humanitarian international law has been 'at least until recent years a dead letter.'⁴⁸ From a substantive point of view, the Grotian tradition is more interested in violence arising out of international rather than domestic conflicts, and focuses more on 'violence committed by the sovereign in times of war (international humanitarian law) than in times of peace (human rights).'⁴⁹

By contrast, according to the Kantian approach to international community, individuals have become subjects of international dealings in their own right.⁵⁰ It focuses on peace and respect for all members of the international community. In this regard, Teson has argued that the international law of human rights fails to recognise the important normative status of the individual. Whilst traditional international legal theory focuses on the rights and duties of states, it rejects the connection that the rights of states derive from the rights and interests of individuals.⁵¹ In addition, Teson has suggested that the common set of values among the countries of the world provide legitimacy to international law,⁵² while sovereignty is a function of government to control its population and self-interest rather than to justly represent its people.⁵³

⁴⁴ Megret, *Op. cit.*, p. 258.

⁴⁵ Cassese, From Nuremburg to Rome: International Military Tribunals to the International Criminal Court, *Op. cit.*,

⁴⁶ Megret, *Op. cit.*, p. 257.

⁴⁷ *Ibid.*, p. 258.

⁴⁸ Cassese, From Nuremburg to Rome: International Military Tribunals to the International Criminal Court, *Op. cit.*,

⁴⁹ *Ibid.*,

⁵⁰ Cassese, A. (2003). "A Big Step Forward for International Justice." *Op. cit.*,

⁵¹ Teson, F. R. (1992). "The Kantian Theory of International Law " Columbia Law Review **92**: 53-102. p. 53.

⁵² Teson, F. R. (1998). A Philosophy of International Law. Boulder, Westview Press, p. 91.

⁵³ Teson, Columbia Law Review, *Op. cit.*,

Ralph has claimed that 'we might equate 1998 with 1648 as a pivotal moment in international politics.'⁵⁴ He has argued that the creation of the ICC 'might well one day precipitate a revolution of Westphalian proportions which would certainly rest its legitimacy on an entirely different footing.'⁵⁵ As Cassese has noted, ours is a time when common interests and concerns prevail over private interests⁵⁶ and international legal order is now increasingly focused on the rights and obligations of individuals rather than national interests and mutual relations of states.⁵⁷ While the Grotian society is based on jurisdiction, which is enforced only by states, the Kantian society is based on a specific concept of jurisdiction, which is enforced by the ICC under the principle of complementarity.

As Ralph has mentioned, Kantian philosophy can be identified as 'the figurehead of the revolutionary tradition'⁵⁸ which sees in the society of states 'the revival of a *civitas maxima*, which exercises authority over a world society of individuals.'⁵⁹ This can be read as saying that the revolutionist idea of 'world society' is identified by those rights claims of individuals and non-state groups that are asserted by 'a third image of international [or cosmopolitan] law' and enforced by global institutions at the global level when states are unable or unwilling to do so themselves.⁶⁰ Kant as a founding father of universal cosmopolitanism, as Archibugi has observed, did not believe that a 'peaceful and democratic international society could be achieved within individual countries, [but] rather that it also required the establishing of appropriate institutions and the development of a consistent body of law.'⁶¹

As for the ICC, the Rome Statute, as a revolutionary document, conceives of a 'world society of humankind' to bring to justice the perpetrators of core crimes if a state is unwilling or unable to fulfil its obligations to the society of humankind. In fact, under the rules and norms of international society, states are obliged to prosecute those

⁵⁴ Ralph, J. (2004). "The International Criminal Court and the 'Uneasy Revolution' in international society." The International Journal of Human Rights 8(2): 235-247. p. 239.

⁵⁵ *Ibid.*,

⁵⁶ Cassese, From Nuremburg to Rome: International Military Tribunals to the International Criminal Court, *Op. cit.*,

⁵⁷ Greenwalt, A. K. A. (2007). "Justice without Politics? Prosecutorial Discretion and the International Criminal Court " International Law and Politics 39: 583-673. p. 584.

⁵⁸ Ralph, J. (2005). "International society, the International Criminal Court and American foreign policy." Review of International Studies 31: 27-44. p. 33.

⁵⁹ *Ibid.*,

⁶⁰ Hurrell, A. 'Conclusion: International Law and the Changing Constitution of International Society', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* Oxford: Oxford University Press, 2000), p. 337.

⁶¹ Archibugi, D. (1995). "Immanuel Kant, Cosmopolitan Law and Peace." European Journal of International Relations 1(4): 429-456. p. 430.

charged with committing a serious crime.⁶² It is important to note that Kant did not ‘sanction intervention’, which would be a violation of the rights of an independent nation. He emphasized a cosmopolitan law, which should be respected by states.⁶³ From the Kantian point of view, cosmopolitan right is a ‘complement of the unwritten code of law - constitutional as well as international law - necessary for the public rights of mankind in general and thus for the realisation of perpetual peace.’⁶⁴ In this sense, by challenging states which are unwilling or unable to enforce universal values, ‘the Kantian ICC forces solidarists to prioritise *either* a commitment to universal values *or* state enforcement.’⁶⁵

Therefore, Kantian moral philosophy can be applied as a mode of thinking in order to explore a legitimate authority for the establishment of the ICC and its complementarity regime. According to the Kantian model of international community, the international criminal court should be established to focus on individual responsibility under international law,⁶⁶ and to bring into effect the fundamental norms of international law such as human dignity and the respect for human rights.⁶⁷ Prosecution and punishment of serious offences against human dignity are still entrusted to the national or the territorial state, but if the national criminal justice systems fail to secure justice, it is the ICC that administers justice impartially over heinous crimes against humanity on behalf of the international community as a whole.⁶⁸ As such, the ICC will not pursue cases against alleged criminals unless the competent state authorities are ‘unwilling or unable’ to do so.⁶⁹ That is to say, national courts should bring to trial those alleged to be responsible for breaches of internationally agreed values and should operate not only on behalf of their own national authorities but on behalf of the whole international community to protect ethnic, religious and racial groups.⁷⁰

Therefore, based upon the moral authority of the ICC, it does not matter whether ‘the guilty are citizens of a neglected African nation, or the leadership of a powerful Western democracy’⁷¹ As Malekian has noted, there should not exist any form of discrimination

⁶² Ralph, *Review of International Studies*, *Op, cit.*, p. 28.

⁶³ *Ibid.*, p. 35.

⁶⁴ Smith, M. C. (1917). *Immanuel Kant, Perpetual Peace: A Philosophical Essay*. London, George Allen and Unwin. p. 142.

⁶⁵ Ralph, *Review of International Studies*, *Op, cit.*, p. 38.

⁶⁶ Mégrét, *Op, cit.*,

⁶⁷ Cassese, A. (2003) “A Big Step Forward for International Justice”, *Op, cit.*,

⁶⁸ *Ibid.*,

⁶⁹ Article 17 of the Rome Statute

⁷⁰ Cassese, “A Big Step Forward for International Justice”, *Op, cit.*,

⁷¹ Greenwalt, *Op, cit.*, p. 663.

between different ethnic, political or religious groups and the international rights of all should be respected in Islamic and non-Islamic societies.⁷² Justice is a core value of *Shari'a* and it is an aspiration of Islamic states to find a global system of justice capable of enforcing the rules of international criminal law amongst all nations equally,⁷³ regardless of whether offenders are powerful or weak. However, more conflicts, with a variety of different actors, are taking place in the Islamic world than in any other part of the globe, making it a 'field of experiment of international criminal justice'; see, for instance, the Iraqi High Tribunal, the Lebanese Special Tribunal and the proceedings on Darfur pending before the ICC.⁷⁴ Is it, therefore, legitimate to choose Islam as a representative of the non-Kantian justification for a global system of justice?

Two moral approaches

Issues relating to ethics and morals, in the contemporary world have been raised both in the Muslim world based upon classical Islamic knowledge and in non-Muslim countries based upon European culture. As mentioned earlier, during the twentieth century there has been an enormous need for a morality shared by the entire international community towards cruel and inhumane treatments which have happened in different parts of the world, to ensure that 'no ruler, no State, no junta and no army anywhere can abuse human rights with impunity.'⁷⁵ This chapter will put forward Kantian moral theory and Islamic law among other approaches to consider the moral legitimacy of the ICC. The moral basis of the complementarity regime must be established not merely from a Kantian perspective, but in a way which is acceptable in other parts of the world, for example in conformity with Islamic moral precepts. Islamic law like Kantian cosmopolitanism is a doctrine of universality and has become the philosophy of court's victims (defendants) whereas Kant's deontology is the ideology of the judges and prosecutors. The Kantian moral theory and Islamic law (*Shari'a*) have similarities as well as differences. However, both of these possible moral approaches in their different ways, support the idea of universal system of justice. The following paragraphs highlight some of the differences between them and then focus on their

⁷² Malekian, F. (1994). The Concept of Islamic International Criminal Law: A Comparative Study. London, Graham & Trotman, p. 3.

⁷³ Maged, A. (2008). "Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice." International Criminal Law Review 8: 477-507, p. 480.

⁷⁴ *Ibid.*,

⁷⁵ Former UN Secretary-General, Kofi Annan, available at untreaty.un.org/cod/icc/general/overview.htm [accessed on 10th September 2011]

similarities, for the purpose of this chapter and the philosophical justification of my thesis. Given that there is a tension between philosophy and religion, I have attempted to consider international justice in the world from an ethical perspective.

The primacy of ethics over metaphysics is the principle similarity between the Kantian and Islamic approaches, but there are great differences in their methodology. In fact, whereas in Islamic philosophy ethics are religious, Kant's ethics are rational.⁷⁶ Siddiqui has claimed that philosophical ethics draws its resources from human reason and human experiences and does not consider the role of faith. By contrast, religious ethics draws its resources from revelation. For instance, in Islam the sense of God's guidance becomes the guiding principle.⁷⁷ Nonetheless, the same set of questions can be raised by both philosophical and Islamic ethics to find out what acts are right and what acts are wrong? What values should be pursued?

Islam rejects differing worldviews and also refuses to recognize changes in moral perspectives which emphasize the interrelatedness of individuals and community and their mutual responsibility for one another.⁷⁸ Kant rejects divine command theory. He argues that we fulfil our duty by obeying the moral law and achieving the highest good. Kant rejects the idea that either reason or experience is any certain basis for claiming the existence of God and says this gap can be filled by faith in God.⁷⁹ From the Kantian point of view, the themes of freedom, morality and religion are 'postulates of pure practical reason.'⁸⁰ Kant's ethical system is based on a belief that reason and 'the moral law within' are the final authority for morality, whereas from an Islamic viewpoint reason needs to be filtered through scripture and not the other way round.⁸¹ According to Suseelan, the rationalists' approach to ethics placed too much emphasis on the contribution of reason,⁸² whereas *Shari'a* does not allow behavior norms based on individual conscience.⁸³

⁷⁶ Abdullah, A. (1992). The Idea of Universality of Ethical Norms in Ghazali and Immanuel Kant Ankara, Turkiye Diyanat Vakfi, p. 4.

⁷⁷ Siddiqui, A. (1997). "Ethics in Islam: Key Concepts and Contemporary Challenges." Journal of Moral Education 26(4): 423-431. p. 423.

⁷⁸ Suseelan, B. (2008). "Can Muslim Fundamentalists be Moral?". www.think-israel.org/suseelan.muslimsmoral.html [accessed on 10th September 2011]

⁷⁹ Iqbal, A. (2005). 'Kantian Philosophy from an Islamic Viewpoint' www.bismikaallahuma.org/archives/2005/kantian-philosophy-from-an-islamic-viewpoint [accessed on 10th September 2011]

⁸⁰ Moore, A. W. (2003). Noble in Reason, Infinite in Faculty: Themes and Variations in Kant's Moral and Religious Philosophy. London, Routledge, p. 272.

⁸¹ Iqbal, *Op. cit.*,

⁸² *Ibid.*,

⁸³ Suseelan, *Op. cit.*,

As Sandberg has argued, religious liberty can be limited in the interests of public morality, although there has been a historical connection between religion and morality. He writes, ‘the state can justify interfering with an individual’s right to practise religion on the grounds of public morality’.⁸⁴ In other words, as Moore has noted, in Kantian ethical thought, ‘religion can, although by no means must, serve to sustain us in making sense, and particularly ethical sense, of the world.’⁸⁵ Therefore, it can be argued that some of the ideas in Kant’s view of faith are in line with the broad Islamic perspective, in the sense that the existence of the immortal soul, free will, and faith in a creator are clearly Islamic ideological strains. Likewise, the existence of *a priori* information in human consciousness to distinguish between right and wrong is an idea that finds mention in the *Qur’an*:⁸⁶

‘We showed him the Way: whether he is grateful or ungrateful (rests on his will).’⁸⁷

‘By the Soul, and the proportion and order given to it; And its enlightenment as to its wrong and its right.’⁸⁸

In addition to the above points of difference and similarity between these two moral approaches, Kant’s assertion that goodwill determines whether or not the action was morally right, not the consequences of the action, appears to come close to the Islamic concept of *Niyyah* (intention)⁸⁹ which can be a focal point for discussion of a universal sense of justice. The following section will consider Kant’s moral law and the Islamic philosophy of law in relation to the international criminal justice system and the moral legitimacy of the ICC in particular.

⁸⁴ Sandberg, R. (2007). "Religion and Morality: A Socio-Legal Approach." The journal of the British Association for the Study of Religions (BASR) 8, from www.basr.ac.uk/diskus/diskus8/sandberg.htm [accessed on 10th September 2011]

⁸⁵ Quadrio, P. (2005). "Review of Noble in Reason, Infinite in Faculty: Themes and Variations in Kant’s Moral and Religious Philosophy, by Adrian W. Moore." Australian Religion Studies Review 18(2): 251-258. p. 251.

⁸⁶ Iqbal, *Op. cit.*,

⁸⁷ The Qur’an, Al-Insan, 76:3.

⁸⁸ The Qur’an, Al-Shams, 91:7-8.

⁸⁹ Iqbal, *Op. cit.*,

1. The Kantian approach

Kant maintained a universal law of morality (moral cosmopolitan) based upon the categorical imperative. In essence, moral requirements are based on a standard of rationality, which is 'reason's guide to action' for the purpose of discovering a universal law and particularly perpetual peace.⁹⁰ From the Kantian vision, individuals have the same challenges as always; however, moral cosmopolitanism, suggested for the purpose of perpetual peace,⁹¹ has influenced the majority of the world's states to put moral principle ahead of national sovereignty.⁹² According to this view, law institutions do not change people directly but they can provide a powerful mechanism⁹³ for promoting moral behaviour through specific penalties.

Kantian influence in natural law is evident in the focus on reason as the source of normativity. Kant conceived law as part of morality and argues that practical reason or the 'rational will' is the source of norms.⁹⁴ In other words, practical reason is the ability and the intelligence inherent in human reason to distinguish between wrong and right in every case.⁹⁵ Kant's moral philosophy 'verifies the consciousness of the obligation to act morally' and insists that 'freedom (a rational idea) is real'.⁹⁶ Therefore, the starting points of Kant's approach are freedom and rationality, as morality is based on reason.

Kant formulates the moral law as a 'categorical imperative', implying that the moral law is 'categorical', or that it applies to all situations. It is also 'imperative', which means it is absolutely authoritative.⁹⁷ From this point of view, a 'categorical imperative' operates as the foundational principle of morality.⁹⁸ Categorical imperatives are our moral duties and Kant maintained that 'because we are only contingently rational, all practical rules always appear to us as commands or imperatives, telling us how we should or should not act in order to act rationally.'⁹⁹ Categorical imperatives may count

⁹⁰ Pojman, L. P. (2005). "Kant's Perpetual Peace and Cosmopolitanism." Journal of Social Philosophy **36**(1): 62-71. p. 62.

⁹¹ *Ibid.*,

⁹² Franceschet, A. (2008). "Four Cosmopolitan Projects: the International Criminal Court in Context." from www.allacademic.com/meta/p251105_index.html [accessed on 10th September 2011]

⁹³ Pojman, *Op. cit.*, p. 65.

⁹⁴ Wacks, *Op. cit.*, p. 86.

⁹⁵ Iqbal, *Op. cit.*,

⁹⁶ Ross, A. (2009). "What is the 'Force' of Moral Law in Kant's Practical Philosophy?" Parallax **15**(2): 27-40. p. 27.

⁹⁷ Iqbal, *Op. cit.*,

⁹⁸ Hooker, B. (2002). "Kant's Normative Ethics " Richmond Journal of Philosophy **1**(1): 17-22. p. 17.

⁹⁹ Sullivan, B. R. J. (1989). Immanuel Kant's moral theory. Cambridge, Cambridge University Press, p. 49.

as duties, or rule out wrongs. In a sense, moral responsibilities require us to consider our desire as irrelevant to what we should do.¹⁰⁰ As Crisp has noted, according to Kant's *Groundwork of the Metaphysics of Morals*, 'moral worth attaches to an action only to the extent that it is motivated by respect for the moral law.'¹⁰¹

From the Kantian point of view, it is arguable that there is a need for the Court to be derived from an analysis of a prior idea of reason. What has to be decided upon are the conditions under which human beings will accept the authority of the rule of law. According to cosmopolitanism, it is the moral obligation of national authorities to pursue the interests of its citizens.¹⁰² As civilisation has developed, emphasis has been placed on the motives and intentions of action rather than the mere fact of what was actually done.¹⁰³ Habermas has argued that the first step on the road from international law towards a cosmopolitan world was undertaken in the Nuremburg-Tokyo tribunals after World War II.¹⁰⁴ The transition from international to cosmopolitan law is based upon the rights of the world citizen and from this point of view the ICC is the first international body which can be said to be performing cosmopolitan law.

1.1 The Categorical imperative; rational origin of morality:

The categorical imperative refers to moral rules, which must be followed universally, and this includes treating all rational beings equally. According to Kant, morality involves 'answering to the call of duty'.¹⁰⁵ In this sense, a command is appropriate for every person at every time in every circumstance.¹⁰⁶

Therefore, for an action to be moral it should be in accordance with the three formulations of the categorical imperative, including:

- 1- Formula of Universal law: 'Act only on that maxim through which you can at the same time will that it should become a universal law [of nature].'

¹⁰⁰ *Ibid.*,

¹⁰¹ Crisp, R. (2002). "Aristotle's Ethics " *Richmond Journal of Philosophy* 1(1): 11-16. p. 14.

¹⁰² Rosenthal, J. H. (2009). "Patriotism and Cosmopolitanism." From www.carnegiecouncil.org/resources/transcripts/0193.html [accessed on 10th September 2011]

¹⁰³ *Ibid.*, p. 13.

¹⁰⁴ Habermas, J. (1997). Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight, in Bohman & Lutz-Bachmann (ed). *Perpetual Peace- Essays on Kant's Cosmopolitan Idea*. Cambridge, MIT Press. p. 127.

¹⁰⁵ Acton, H. B. (1970). *New Studies in Ethics: Kant's Moral Philosophy*. London, Macmillan St. Martin's Press, p. 11.

¹⁰⁶ Alfano, M. (2008). "Kant's Categorical Imperative ". from alfanos.org/pdfs/04_issues_philo_fall08/02_Kant.pdf [accessed on 10th September 2011]

- 2- Formula of Humanity: 'Act in such a way that you always treat humanity whether in your own person, or that of any other, never simply as a means, but always at the same time as an end.'
- 3- Formula of Autonomy: 'Every rational being must so act as if he were through his maxims always a law making member of the universal kingdom of ends.'¹⁰⁷

As Paton has asserted, the categorical imperative may have some secret self-interest. However, it cannot be established by an appeal to experience since experience cannot explain what ought to be.¹⁰⁸ Moreover, according to Kant's doctrine of the universality of moral law, the principle of moral action must be impersonal, objective, and impartial as between one person and another.¹⁰⁹ In the Kantian view, an ideal moral community can be called the 'kingdom of ends' or 'virtual commonwealth'. In essence, the moral community is composed of individuals, each of whom must be considered an end and never merely as a means in the calculations of others.¹¹⁰ In sum, these first and third formulations illustrate the need for moral principles to be universalisable. The second formulation points to the radical distinction to be made between things and persons, and emphasizes the necessity of respect for persons.

Kant argues that penal law is an aspect of the categorical imperative and the criminal must be punished¹¹¹ according to Kantian deontological ethics on punishment based on a retributivist foundation.¹¹² Retributive justice refers to re-establishing the social and moral balance which existed before the crime was committed. In this regard, Kant believes that punishment is an application of the categorical imperative and it would be immoral not to punish.¹¹³ Furthermore, he states that any 'deviation from the principle of retribution had to be regarded as a public violation of justice.'¹¹⁴ Villa-Vicencio has suggested that given the impact of social and cultural factors on the behaviour of

¹⁰⁷ Acton, *Op. cit.*, p. 21.

¹⁰⁸ Paton, H. J. (1947). *The Categorical Imperative: A Study in Kant's Moral Philosophy*. London, Hutchinson & Company. p. 127.

¹⁰⁹ *Ibid.*, p. 135.

¹¹⁰ Mahoney, J. (2007). *The Challenge of Human Rights: Origin, Development, and Significance*. Oxford, Blackwell Publishing, p. 179.

¹¹¹ Merle, J.-C. (2000). "A Kantian Critique of Kant's Theory of Punishment." *Law and Philosophy* 19: 311-338. p. 318.

¹¹² *Ibid.*, p. 312.

¹¹³ Kilchling, M. (2008). "Restorative Justice- A Victim Oriented Approach ". from www.etc-graz.at/cms/fileadmin/user_upload/humsec/SAC_08_PPP/PPP_Michael_Kilchling_I.pdf [accessed on 10th September 2011]

¹¹⁴ *Ibid.*,

people, 'the affirmation of personal autonomy still stresses the need for all members of society to take responsibility for their actions.'¹¹⁵

The universal principle of justice conforms to the principle of 'universalizability that Kant laid down as the first formulation of the categorical imperative.'¹¹⁶ In essence, the universal principle of justice from Kant's viewpoint is concerned with explaining 'how the practical requirements in moral laws could be legitimately enforced through the application of external coercion.'¹¹⁷ Kant introduced cosmopolitan law in one of his most famous writings, 'Perpetual Peace. A Philosophical Project.'¹¹⁸ and asserted that 'a violation of right on one place of the earth is felt in all'¹¹⁹, concluding that cosmopolitan law must form a 'supplement' to the 'unwritten code' of both state law and international law if the 'public rights of human beings' are to be secured.¹²⁰ According to Archibugi, 'cosmopolitan law an innovation, allow[ing] the international community to monitor the internal affairs of its members'.¹²¹ There are various interpretations of the concept of cosmopolitan law. However, some scholars -such as Martin Wright and Hedley Bull - have explored the nature of Kant's cosmopolitanism and have argued that it represents a desire to create a society of individuals who are independent from states.¹²² They have argued that 'cosmopolitan law is another channel of non-violent interference since the normative system of the natural law tradition authorised either rebellion or for other states to have recourse to violence against state authority if the latter violated natural rights'.¹²³ Cosmopolitan ethics will be analyzed later in this chapter.

¹¹⁵ Villa-Vicencio, C. (1999-2000). "The Reek of Cruelty and the Quest for Healing - Where Retributive and Restorative Justice Meet." *Journal of Law & Religion* **14** (1). P. 127.

¹¹⁶ Covell, C. (1998). *Kant and the Law of Peace*. London, Macmillan Press, p. 49.

¹¹⁷ *Ibid.*,

¹¹⁸ *Ibid.*,

¹¹⁹ Tinnevelt, R. and T. Mertens (2009). "The World State: A Forbidding Nightmare of Tyranny? Habermas on the Institutional Implications of Moral Cosmopolitanism." *German Law Journal* **10**(1): 63-80, p. 63.

¹²⁰ Dyzenhaus, D., Ed. (2004). *The Unity of Public Law*. Oxford, Hart Publishing, p. 431.

¹²¹ Archibugi, *Op, cit.*,

¹²² *Ibid.*,

¹²³ *Ibid.*,

1.2 The origins of complementarity

It is important to consider the philosophical aspect of the notion of complementarity as this idea is ‘extremely complex and the Court is now faced with pressing questions regarding its interpretation.’¹²⁴ Complementarity means ‘a complementary relationship or situation’ or ‘a state or system that involves complementary components.’ The foundation of complementarity in the philosophy of science is attributed to the Danish physicist Niels Bohr; however, the notion may apply in other fields of science such as sociology, biology and psychology.¹²⁵ Bohr has argued that the relationship of concepts such as love and justice, thoughts and sentiments are complementary.¹²⁶ These terms are related to ‘our inner experiences which are equally essential’; however, they are mutually exclusive in the sense that ‘even our warmest feelings completely lose their nature when we try to express them by way of clear logical reasoning.’¹²⁷ Moreover, Bohr believed that ‘we must be clear to ourselves that the use of the notion of justice in its extreme consequence, excludes love, to which we are called upon in relation to our parents, brothers and sisters, and friends.’¹²⁸

Kaiser has suggested that there are possible Kantian aspects to complementarity. There are some philosophical similarities between Bohr’s complementarity - particularly his critical interest in the construction of knowledge - and Kant’s epistemology.¹²⁹ In fact, Bohr’s complementarity contains some Kantian features. For instance, ‘Bohr’s complementarity shares Kant’s actual mechanism for guaranteeing the objective reality of our judgement.’¹³⁰ Kant believes that knowledge is divided into two sources, positing sensibility and understanding as the foundation of metaphysics. In other words, ‘without sensibility no object would be given to us, without understanding no object would be thought.’¹³¹ That is to say that Kant dealt with the problem of the relationship between the ‘objects [which are possible experience] and our representations of them.’ He found a solution in the possibility for *a priori* knowledge.

¹²⁴ El-Zeid, *Op. cit.*, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice, p. 1.

¹²⁵ *Ibid.*,

¹²⁶ *Ibid.*, p. 3.

¹²⁷ *Ibid.*, p. 4.

¹²⁸ *Ibid.*,

¹²⁹ Kaiser, D. (1992). "More Roots of Complementarity: Kantian Aspects and Influences." Studies in History and Philosophy of Science 23(2): 213-239. p. 213.

¹³⁰ *Ibid.*, p. 214.

¹³¹ *Ibid.*, p. 215.

He writes, ‘we can know *a priori* of things only what we ourselves put into them.’¹³² For Kant, sensibility and understanding formulate concepts of objects in judgements and the judgements are governed by *a priori* knowledge (rules) pertaining to objects of possible experience. Kaiser has argued that the mechanism of linking knowledge to the domain of possible experience provides an indication of a Kantian aspect to Bohr’s complementarity. Although Bohr rejected Kant’s *a priorism*, like Kant he advocated a two-source epistemology,¹³³ ‘a distinction between knowable and unknowable objects in terms of the possibility of experience, and the mechanism of conceptual containment used to guarantee objective reality of judgments.’¹³⁴

In the context of international criminal law, complementarity is perceived as a principle that defines the relationship between domestic courts and the permanent international criminal court. In essence, it provides national courts with primacy to exercise jurisdiction over the core crimes defined under the Rome Statute in achieving the common goal of ending impunity.¹³⁵ A question may arise here as to what the relationship is between the ICC and sovereignty. We may consider whether the authority structure of the ICC - including issues of jurisdiction and the trigger mechanism - is a new form of sovereignty.¹³⁶ Leonard has claimed that supreme authority has been transferred in the modern state from the Church to the nation-state. Therefore, it shows the need to view sovereignty as a social arrangement.¹³⁷ The formation of an international criminal court may be an example of the changing nature of sovereignty, moving from one agent to another based upon the principle of complementarity.¹³⁸ The principle of complementarity defines the relationship that the ICC has with the national authorities and domestic courts of states, which was the main concern of participants in the Preparatory Committee for the Establishment of an International Criminal Court (Preparatory Committee).¹³⁹ Subsequently, the ICC can exercise its authority only if the domestic judicial system is unwilling or unable to pursue the alleged crime in the relevant situation.¹⁴⁰ The main reason for the

¹³² *Ibid.*, p. 217.

¹³³ *Ibid.*, p. 220.

¹³⁴ *Ibid.*, p. 235.

¹³⁵ El Zeidy, *Op, cit.*, p. 4.

¹³⁶ Leonard, *Op, cit.*, p. 88.

¹³⁷ *Ibid.*, p. 93.

¹³⁸ *Ibid.*,

¹³⁹ El Zeidy, *Op, cit*

¹⁴⁰ Article 17 of the Rome Statute

establishment of this type of system is to protect the interests of victims¹⁴¹ and ‘the international community as a whole.’¹⁴² In essence, there has been a change in the nature of state sovereignty, which has become less exclusive. States are no longer the privileged agent, but rather individuals are privileged ‘through the inception of complementary sovereignty’ in the emerging global society.¹⁴³ Therefore, according to Leonard, a new form of sovereignty is emerging. The ICC, based upon the principle of complementarity, provides a situation in which states no longer hold supreme authority concerning the core crimes under international humanitarian law, in those cases where states cannot demonstrate their sovereign authority.¹⁴⁴ In addition, it is one of the few international courts in which individuals rather than states can be party to the proceedings.¹⁴⁵

1.3 The revolutionary concept of sovereignty

The Westphalian state system, that has regulated international conduct since the Peace of Westphalia in 1648, is giving way to new approaches.¹⁴⁶ In fact, as Richard Flak has observed, ‘we are experiencing both the terminal phase of the Westphalian framework and the emergence of a different structure of world order ... as exhibiting the agency of non-[s]tate actors, as to qualify as post-Westphalian.’¹⁴⁷ In other words, there was a move from natural to positive law conceptions, in keeping with notions of sovereign consent, and legal positivism has developed as a reaction to natural law theories. The traditional Westphalian model is incapable of providing contemporary understanding of the field of international law, particularly the ‘legitimacy crisis relating to fundamental reconfigurations of global power.’¹⁴⁸ It is important to note that international law is concerned with the actions of sovereign states, and it does not provide punishment for

¹⁴¹ Kofi Annan’s opening speech at the Rome Conference. www.update.un.org/icc/pressrel/lrom6r1.htm [accessed on 10th September 2011]

¹⁴² Preamble of the Rome Statute

¹⁴³ Leonard, *Op. cit.*, p. 102.

¹⁴⁴ *Ibid.*,

¹⁴⁵ Ku, C. and P. F. Diehl (2003). "International Law as Operating and Normative systems: An Overview." from www.riener.com/uploads/48ecece989ffb.pdf [accessed on 10th September 2011]

¹⁴⁶ Shotwell, C. B. (2001). "International Law and Institutions: A Post-Westphalian Landscape." *The Global Century: Globalization and National Security I & II*: 761-783. p. 761.

¹⁴⁷ Falk, R. (2007). "What Comes after Westphalia: The Democratic Challenge." *Widener Law Review* **13**: 243-253. p. 244.

¹⁴⁸ Cutler, A. C. (2001). "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy." *Review of International Studies* **27**: 133-150. p. 133.

individuals.¹⁴⁹ Therefore, those that carry out 'the act in question' are not personally responsible since they are protected by state sovereignty.¹⁵⁰ In the eighteenth century fundamental questions were raised from the rationalist perspective about the nature of government and its justification.¹⁵¹

Subsequently, there has been a growing disconnect between the theory and the practice of the Westphalian system which does not fit within the Westphalian paradigm of authority.¹⁵² This 'post-Westphalian' revolution is preceded by more cooperative efforts between citizens of different states, and the emergence of new international standards and norms which have challenged the principle of non-interference in sovereign state matters, such as the Rome Statute of the ICC which is a universally binding normative regulation.¹⁵³ In essence, the universality of laws, particularly the application of criminal law beyond state borders; extraterritoriality; and regionalization are challenging traditional notions of sovereignty.¹⁵⁴

Under traditional Westphalian doctrine, the 'boundaries of justice were thought to be coextensive with the legal territorial jurisdiction and economic reach of the sovereign policy',¹⁵⁵ and it was based upon 'principles of equal state sovereignty and the absolute right to internal self-determination without external interference'.¹⁵⁶ From the Kantian point of view, the state cannot always determine what justice is simply by virtue of having power. Kant, as a defender of limited government,¹⁵⁷ was critical of the Westphalian model and the creation of a world state,¹⁵⁸ arguing that a 'permanent universal peace by means of so-called *European balance of power* is a pure illusion', and he furthermore asserted that domestic freedom is not secured through the Westphalian model.¹⁵⁹ Teson has claimed that Kant developed a normative philosophy of international law in such a way that the notion of state sovereignty can be redefined as the sovereignty of state dependent upon the state's domestic legitimacy. Consequently, the principles of international justice must be compatible with the

¹⁴⁹ Tucker, R. W. (2001). "The International Criminal Court Controversy." World Policy Journal 18(2): 71-81. p. 73.

¹⁵⁰ *Ibid.*, p.72.

¹⁵¹ Acton, *Op, cit.*, p. 46.

¹⁵² Cutler, *Op, cit.*,

¹⁵³ Shotwell, *Op, cit.*, p. 762.

¹⁵⁴ *Ibid.*,

¹⁵⁵ *Ibid.*, p. 772.

¹⁵⁶ Brown, G. W. (2005). "State Sovereignty, Federation and Kantian Cosmopolitanism." European Journal of International Relations 11(4): 495-522. p. 498.

¹⁵⁷ Covell, *Op, cit.*, p. 11.

¹⁵⁸ Brown, *Op, cit.*, p. 496.

¹⁵⁹ *Ibid.*, p. 498.

principles of internal justice based upon the Kantian categorical imperative, which is not based upon national interest or rights of governments.¹⁶⁰ However, Franck has argued that justice and legitimacy are conceptually separate. While domestic systems attempt to promote justice, international systems only seek order and compliance. For instance, that a rule is legitimate does not mean that it is just; conversely, many just rules may not be legitimate. Furthermore, justice applies to individuals, while international law addresses states and government.¹⁶¹ However, the Kantian theory of international law rejects this and attempts to unify a theory of justice and make legitimacy dependent on justice.¹⁶²

As a result, classic international legal theory is incapable of serving as the normative framework as it promotes states and not individuals, governments and not persons, order and not rights, compliance and not justice. Instead, a liberal theory of international law 'commits itself to normative individualism, to the promise that the primary normative unit is the individual, not the state.'¹⁶³ As mentioned earlier, Kantian international ethics follow from the categorical imperative and freedom is the first tenet of international ethics.¹⁶⁴ The state is a moral-political entity created by autonomous persons rather than a mere piece of territory. Kant emphasises the individual rather than the state, noting that '... no one had a greater right to any region of the earth than anyone else.'¹⁶⁵

¹⁶⁰ Teson, *Op, cit.*, p. 54.

¹⁶¹ Franck, T. M. (1990). The Power of Legitimacy among Nations. Oxford, Oxford University Press. p. 208.

¹⁶² Teson, *Op, cit.*, p. 98.

¹⁶³ *Ibid.*, p. 54.

¹⁶⁴ *Ibid.*, p. 62.

¹⁶⁵ *Ibid.*, p. 72.

1.4 Cosmopolitan ethics

Although there may be various readings and interpretations of cosmopolitan law, Brown has observed that Kantian cosmopolitan law is ‘an attempt to create additional institutions for the expression of individual autonomy under the growing interdependence of globalisation’.¹⁶⁶ In essence, the protection of individual rights of liberty is one of the fundamental rights for any international legal order.¹⁶⁷ It is also broadly accepted that Kant sought to create a level of cosmopolitan law that would oblige both states and individuals to the ‘hospitable treatment’ of all human beings, regardless of their citizenship or national origin (nationality and locality).¹⁶⁸ Moreover, according to Teson, the normative value of the individual is not to be violated by another state.¹⁶⁹ Therefore, Kantian cosmopolitan law provides the well-judged atmosphere necessary to regulate global interactions in line with reason and the requirement of a civil condition of global public right.¹⁷⁰ As Ku has argued, international law can be considered as a normative system taking ‘on a principally legislative character by mandating particular values and directing specific changes in State behaviour’,¹⁷¹ in such a way that respect for states is derived from respect for persons. In fact, ‘the reason for respecting state stemmed from concerns about individual freedom, not from holistic claims about the state as a moral person.’¹⁷² Furthermore, a lasting international peace is not possible if individual freedom is not secured within every state’s border.¹⁷³ Therefore, justice makes sense only among individuals, not among states which exercise ‘tyrannical power’.¹⁷⁴ This would be the result of ‘a slow-going evolutionary process’ for the purpose of the transformation of all kinds of power into one generally accepted, or at least acceptable, legal order.¹⁷⁵

Kantian cosmopolitan philosophy provides a normative ethical global order, without the existence of a world government, for the purpose of achieving perpetual world

¹⁶⁶ Brown, *Op, cit.*, p. 510.

¹⁶⁷ Lienemann, W. (2007). "The Ethics of Peace and Justice in International Order " Studies in Christian Ethics 20(1): 77-87. p. 87.

¹⁶⁸ Brown, *Op, cit.*,

¹⁶⁹ Teson, *Op, cit.*,

¹⁷⁰ Brown, *Op, cit.*,

¹⁷¹ Ku, *Op, cit.*,

¹⁷² Teson, *Op, cit.*,

¹⁷³ *Ibid.*, p. 74.

¹⁷⁴ *Ibid.*, p. 95.

¹⁷⁵ Lienemann, *Op, cit.*, p. 83.

peace.¹⁷⁶ In this sense, Kant believed in creating a society of world citizenry independent from states. Therefore, it is important to examine the relationship between the rights of states and the concepts of cosmopolitan law.¹⁷⁷ Autonomy as a limited sovereignty is important for Kant's moral vision¹⁷⁸ and Kantian cosmopolitanism advocates 'a new level of cosmopolitan law which holds supremacy over the idea of absolute state sovereignty', while Kant also believes 'states are primary violators' of human freedom. Such freedom must be universally respected in the same way that a sovereign state should be protected under international law.¹⁷⁹ There should therefore be a global community under a commonly accepted international right, holding states accountable to this notion of global society and eliminating the injustices often committed by them.¹⁸⁰

It should be noted that a judicial system of public right can be divided into domestic law, international law, and cosmopolitan law.¹⁸¹ Kant believed that every judicial constitution should follow these three dimensions of rights.¹⁸² Domestic law relates to rights and duties that exist between citizens and their government; international law places emphasis on the necessary rightful condition which should exist between the various governments as representatives of entities; finally, cosmopolitan law focuses on the rightful condition which should exist between all humans and all states regardless of national origin or state citizenship.¹⁸³

From the Kantian point of view, international law is connected with domestic justice¹⁸⁴ and he focused on domestic justice as a precondition for establishing a good civil condition of public right. In other words, there is a primacy of domestic law in Kant's 'global vision' to provide the foundations for a movement toward cosmopolitan justice based on the categorical imperative.¹⁸⁵ According to Kant, perpetual peace is in contradiction with the principle of sovereignty and the independence of states.¹⁸⁶ Kant maintains that perpetual peace and the idea of international rights can only be secured

¹⁷⁶ Brown, *Op, cit.*,

¹⁷⁷ *Ibid.*,

¹⁷⁸ Pojman, *Op, cit.*, p. 67.

¹⁷⁹ Brown, *Op, cit.*, p. 497.

¹⁸⁰ *Ibid.*, p. 500.

¹⁸¹ *Ibid.*, p. 502.

¹⁸² Lienemann, *Op, cit.*, p. 80.

¹⁸³ Brown, *Op, cit.*,

¹⁸⁴ Teson, *Op, cit.*,

¹⁸⁵ Brown, *Op, cit.*, p.506

¹⁸⁶ Zimmern, A. (1934). "International Law and Social Consciousness " British Institute of International and Comparative Law **20**: 25-44. p. 36.

through a consistent commitment to universal law. Brown has argued that this is a variation of Kant's categorical imperative and that the Kantian theory of justice and his metaphysics of morals 'focuses on domestic justice as the necessary first principle for a cosmopolitan order.'¹⁸⁷ National borders have become more flexible and international crime is demanding an international legal system able to prosecute criminals. Kant's cosmopolitanism lays the philosophical foundation for moral world order and, on Kantian grounds, the best way to realize perpetual peace under international law is through a republican form of world government. The Kantian vision of institutionalism is that 'sound, moral cosmopolitans should become institutional cosmopolitans and commit themselves to end the Westphalian nation-state and bring into being a democratic world government dedicated to peace, justice, and well-being for all people everywhere.'¹⁸⁸

Furthermore, according to the Kantian theory of international law, there is a primacy of respect for individual autonomy and international justice, which must focus on the rights of individuals.¹⁸⁹ The ICC is one of the few international courts in which individuals rather than states may be party to the proceedings.¹⁹⁰ In this point of view (the Kantian vision), the reason to promote universal law is based upon creating those 'conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.'¹⁹¹ Teson has claimed that Kant is seen as 'the pioneering advocate of an international organization capable of securing a lasting peace.'¹⁹² Covell, meanwhile, has argued that although Kant did not advocate 'anything like a permanent international court for the application of the laws of nations',¹⁹³ there is no incompatibility between the establishment of independent procedures for adjudication of disputes and the need for a world sovereign to mediate such disputes.¹⁹⁴ On the other hand, Martinez has claimed that although some scholars have made progress to identify different aspects of the international judicial process, the work of these scholars is generally more descriptive than normative.¹⁹⁵ In this sense, the

¹⁸⁷ Brown, *Op, cit.*, p. 501.

¹⁸⁸ Pojman, *Op, cit.*, p. 70.

¹⁸⁹ Teson, *Op, cit.*, p.55.

¹⁹⁰ Ku, *Op, cit.*,

¹⁹¹ Brown, *Op, cit.*, p. 502.

¹⁹² Teson, *Op, cit.*,

¹⁹³ Covell, *Op, cit.*, p. 138.

¹⁹⁴ Brown, *Op, cit.*,

¹⁹⁵ Martinez, J. S. (2003). "Towards an International Judicial System " *Stanford Law Review* **56**: 429-529. p. 433.

emergence of an international judicial system is important in considering whether to promote respect for individual rights or to fulfil the interests of powerful states.¹⁹⁶ Also, the matter becomes more difficult when an international court considers increasing its effectiveness. Martinez has stated that nations grant jurisdiction to international courts in order to remove ‘certain disputes from the realm of politics and shift them to the realm of law.’¹⁹⁷ More importantly, the fact that ‘politicians may secretly hope that the mechanism they have created won’t work very well is not something that courts can base their decisions upon’. However, an international court aims to resolve disputes as effectively and apolitically as possible.¹⁹⁸

Franceschet has argued that the ICC has been formed in accordance with cosmopolitan moral standards. In other words, cosmopolitan principles and ethical justification are satisfied by the creation of the ICC, which has been a departure from the traditional model of nation-state.¹⁹⁹ The ICC is rooted in the notion of cosmopolitan control while creating a supranational judicial body in ways that suggest the need for a response to failures of sovereignty at the state level.²⁰⁰ In fact, cosmopolitan morality has led to important reforms in international law with regard to liberal ideological standards. The essential point here is that sovereignty gives all states freedom to choose whether and when they will obey international law and morality. Therefore, cosmopolitan law is the project of eliminating disorder and the violence against individual rights which originates from the states system.²⁰¹

In the cosmopolitan community vision, human beings are members of particular sovereign states; however, they are also members of the universal community of humankind.²⁰² Since the end of World War II there has been an impressive expansion of human rights and democracy to societies that had been excluded from the benefits of freedom.²⁰³ Also, since the Nuremberg Trials, there was strong interest among states to create a permanent international criminal court based upon individual accountability. However, it was not possible until the immediate political context changed after the Cold War.²⁰⁴ Franceschet has claimed that the way the Cold War ended created a high

¹⁹⁶ *Ibid.*, p. 448.

¹⁹⁷ *Ibid.*, p. 469.

¹⁹⁸ *Ibid.*, p. 470.

¹⁹⁹ Franceschet, *Op, cit.*,

²⁰⁰ *Ibid.*,

²⁰¹ *Ibid.*,

²⁰² *Ibid.*,

²⁰³ Teson, *Op, cit.*,

²⁰⁴ Franceschet, *Op, cit.*,

degree of normative consensus on the need to strengthen and extend the enforcement of universal human rights, particularly given the reality of crimes against humanity and genocide in the former Yugoslavia and Rwanda, and on the need for the creation of *ad hoc* Tribunals by the UN Security Council to bring to justice those who had committed serious crimes in those states.²⁰⁵

It is important to note that international law based upon the Westphalian model displaced 'just war' doctrine in providing guidelines for permissible uses of international force, and was tied to the consent of sovereign states rather than direct religious authority. That is to say, international law became an autonomous source of authority with respect to the use of force as can be seen after World War II, particularly in the Nuremberg Trials.²⁰⁶ However, international law has lost much of its legitimacy as there have been revolutionary changes in the nature of conflicts and the doctrine of territorial sovereignty since the end of the Cold War.²⁰⁷ In essence, the challenges to international law were developments of a normative character, such as global ethics and the 'changing balance of considerations within the United Nations between upholding sovereign rights and protecting people victimized by human rights abuses.'²⁰⁸

In particular, moral imperatives associated with a human rights culture have emerged since the failure of the United Nations to prevent ethnic cleansing in Bosnia and the 1994 Genocide in Rwanda.²⁰⁹ Bickerton has argued that normative power was designed to respond to civilian power and the demand of the nation-state and national interests. He claims that the post-Cold War period gave the European Union (the EU) more responsibilities since it has been given more cultural identity. In other words, the EU chose to be Kantian while 'the United States is absolutely Hobbesian.'²¹⁰ Normative power comes from different sources of legitimacy; cosmopolitan law is one of the sources that give us an understanding of norms that have a universal content.²¹¹ In essence, in terms of legitimacy, the more action can be justified in terms of humanity as a whole, the more it will be perceived as legitimate.²¹²

²⁰⁵ *Ibid.*,

²⁰⁶ Falk, R. (2004). "Legality to Legitimacy: The Revival of the Just War Framework." *Harvard International Review* 26(1): 40-45. p. 40.

²⁰⁷ *Ibid.*, 42.

²⁰⁸ *Ibid.*,

²⁰⁹ *Ibid.*,

²¹⁰ Bickerton, C. J. (2007). "Legitimacy through norms: the political limits of Europe's normative power." from www.unc.edu/euce/eusa2007/papers/bickerton-c-01a.pdf [accessed on 10th September 2011]

²¹¹ *Ibid.*,

²¹² *Ibid.*,

Therefore, the ICC as an international legal forum was established with competence over the most serious crimes, those that affect the whole of mankind,²¹³ and it operates based upon the principle of complementarity, giving the ICC authority only when states are deemed unwilling or unable to exercise the responsibilities of primacy of national criminal jurisdiction in good faith.²¹⁴ In addition, Steven C. Roach has argued that although the ICC's legitimacy derives in large part from its legal function and authority, the Court will also be a political actor, with significant discretion in choosing where and when to enforce international peace and security.²¹⁵ Furthermore, the ICC promotes a culture of human rights within states and reinforces the notion that the legitimacy of the state depends on whether it implements a system of rights, rather than claims to absolute sovereignty.²¹⁶

In terms of how moral law is enforced it is important to note that while the civil law directly and substantively regulates behaviour, the maxims of the moral law 'do not directly obligate action but permit action indirectly through reference to the categorical imperative'.²¹⁷ In essence, moral law is distinguished by the quality of the force it holds over action. This 'force is felt directly in moral conscience' out of respect for the moral law and requires a 'historico-cultural dimension of moral formation'.²¹⁸ The main goal of international criminal justice is not the implementation of the rules, norms, and provisions of the system, but to achieve the essence of these rules in a balanced scale of justice with the same standard of weights and measures.²¹⁹ For instance, the Darfur crisis has raised the question as to whether the international community can respond effectively to humanitarian emergencies, and the ICC leads the international community in mounting a response to serious violations of international crimes.²²⁰ According to the procedural dimension of the ICC's legitimacy, the ICC's judiciary capacity should eliminate undue delays and ensure that states meet the high evidential standards for

²¹³ "On the Legitimacy of the International Criminal Court." *Wall Street Journal* from www.globalpolicy.org/component/content/article/164/28412.html [accessed on 10th September 2011]

²¹⁴ Jensen, R. "Complementing Complementarity: The Principle of Complementarity in The Rome Statute of The International Criminal Court ". from www.isrcl.org/Papers/Jensen.pdf [accessed on 10th September 2011]

²¹⁵ Roach, S. C. (2006). *Politicising the International Criminal Court: The Convergence of Politics, Ethics, and Law*. Maryland, Rowman & Littlefield, p. 6.

²¹⁶ Franceschet, *Op, cit.*,

²¹⁷ Ross, *Op, cit.*, p. 29.

²¹⁸ *Ibid.*, p. 33.

²¹⁹ Malekian, F. (2005). "Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal." *Cornel International Law Journal* **38**: 673-723. p. 675.

²²⁰ Roach, S. C. (2005). "Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and UN Security Council." *International Studies Perspectives* **6**: 431-446. p. 432.

investigating and prosecuting those responsible for serious crimes. In addition, ‘the ICC’s legal neutrality depends on the prosecutor’s ability to exercise his or her discretionary power in a consistent manner’, particularly in politically sensitive cases.²²¹

However, it is important to consider why states have established legalised international institutions ‘when their autonomy would be less constrained by avoiding such legalisation?’²²² What national interest might be derived from joining the ICC? And more importantly, why would a state want to take the risk that its nationals, particularly those acting in an official capacity, will be tried before an international tribunal? ²²³ Megret has observed that a state ‘behaves spontaneously in ways designed to maximize the global common good’ rather than due to the moral imperatives of the times.²²⁴ However, he has also asserted that national interest is shaped by certain normative structures. Therefore, according to the principle of complementarity, it is inevitable that ‘joining the ICC for at least some of the less ‘virtuous’ states involves a substantially more significant normative effort than most brands of realism would allow’, since the ICC ‘would herald the rise of an international society which bears almost no relation to the one that we have known since Westphalia.’²²⁵

Stigen has argued that states might have different motives for joining the ICC, creating the potential for different categories of states.²²⁶ Four categories can be considered in understanding why a state may choose to join the ICC: the realist, functionalist, constructivist and rationalist. He particularly observes that although some states expect to gain increased domestic and international stability and security, mostly states join the ICC ‘as a promoter of shared values and norms’ and because states believe that the ICC can promote their own individual interests.²²⁷

According to the complementarity regime of the ICC, the Rome Statute has implications for state sovereignty in its aim to reduce the failure of states in bringing the perpetrators of crimes to justice.²²⁸ It has been assumed that the ICC as an international institution was established because it promoted the interest of dominant powers. This, in essence,

²²¹ *Ibid.*, p. 434.

²²² Stigen, J. Why do states join the ICC?

²²³ Megret, F. (2006). Why would states want to join the ICC? A theoretical exploration based on the legal nature of complementarity. Complementary Views on Complementarity. J. K. Kleffner and G. Kor. The Hague TMC Asser Press.

²²⁴ *Ibid.*, p. 3.

²²⁵ *Ibid.*, p. 4.

²²⁶ Stigen, *Op, cit.*,

²²⁷ *Ibid.*,

²²⁸ *Ibid.*,

is the realist model for explaining why states join the ICC. But given that powerful states will have a greater interest than others in maintaining international stability, the effective enforcement of international criminal law does not necessarily promote the interests of dominant powers. The number of international crimes will be reduced as a result of the ICC's activity but it will generate an additional need for international military backing. For instance, the United States, United Kingdom, and France are all experiencing considerable domestic criticism as a result of costly interventions in areas of violence, but the need for deploying troops is not likely to be reduced with the introduction of the ICC.²²⁹

From the functionalist point of view, states create international institutions because the institutions will promote public goods efficiently with reduced transaction costs. That is to say that, in the context of the ICC, 'the world community has alternative back-up mechanisms for bringing major criminals to justice' when national systems fail to do so.²³⁰ However, Stigen has argued that the application of functionalist theory has weaknesses in the context of the ICC. Historically, states have done very little to combat impunity for international crimes, criminal justice being viewed as a morally just but politically unrealistic response to gross human rights violations. Moreover, the functionalist theory also fails to notice the fact that the main effect of the Rome Statute, due to the complementarity principle, is not so much coordinated international efforts as an increased number of genuine national investigations and prosecutions.²³¹

The constructivist model asserts that the ICC represents shared norms. According to this approach, ideas are constructed through interaction among individuals, groups, and states. Stigen has claimed that the number of states party to the Rome Statute supports this model and illustrates that 'the most important factor for the ICC's success so far is probably an idealistic international civil society's efficient lobbying *vis-à-vis* governmental decision-makers, including massive NGO campaigns'.²³² In this model, states perceive the risk that their citizens will be brought before the ICC as insignificant. They believe the ICC will not make any real difference to them since the Rome Statute appears attractive to 'well-functioning democracies with credible judiciaries'.²³³ These states with military personnel are frequently and directly involved in international

²²⁹ *Ibid.*, p. 4.

²³⁰ *Ibid.*,

²³¹ *Ibid.*, p. 6.

²³² *Ibid.*, p. 6.

²³³ *Ibid.*,

peacekeeping operations. However, the complementarity principle gives them an opportunity to pre-empt ICC interference. For instance, prior to the United Kingdom's ratification, the Secretary of State, Robin Cook, noted that the complementarity principle was an 'important safeguard for British citizens. It means that in all circumstances Britain will be able to pursue any bona fide allegation of an offence by United Kingdom citizens through our domestic courts, rather than allowing proceedings to take their course through the International Criminal Court'.²³⁴ Therefore, in the view of constructivists, many states expect never to be affected by the ICC's activity.

The final model is the rationalist. From this perspective, states are seen as rational actors pursuing their individual self-interests. States join an international tribunal in order to 'constrain other governments in their international behaviour [as well as] domestic actors, including their own government' through a process of legalisation'.²³⁵ From the rationalist point of view it is suggested that, after centuries of war and violence, states have finally 'woken up to the realization that untrammelled sovereignty is simply either a source of unmitigated evil or not in their best interest.'²³⁶ States suffer from the fact that international crimes are not suppressed and they cannot rely on other states to repress international crimes consistently. Therefore, the ICC, based on complementarity, which makes a presumption in favour of national jurisdiction, was created to ensure the delivery of a global public good and bring an end to impunity for international crimes.²³⁷

This section has sought to explore how important Kant's theory of retributive justice and the categorical imperative are in justifying the complementarity regime of the ICC, as well as to explore the reach of the wider cosmopolitan community inside the nation state for prosecuting the most serious crimes and the achievement of perpetual peace. From the Kantian point of view, individuals have become subjects of international dealings in their own right, since international cosmopolitan legal order is now increasingly focused on the rights and obligations of members of the international community rather than national interests and the mutual relations of states.²³⁸

As a moral being, each individual has a duty to understand and obey the principles that unite him or her with other humans. As mentioned earlier, Kant's moral theory is

²³⁴ *Ibid.*, 7.

²³⁵ Goldstein, J., M. Kahler, et al. (2000). "Introduction: Legalization and World Politics." *International Organization* 54(3): 385-399. p. 397.

²³⁶ Megret, *Op. cit.*, p. 13.

²³⁷ *Ibid.*, p. 14.

²³⁸ Greenwalt, *Op. cit.*,

summarised by the categorical imperative,²³⁹ which are our moral duties and responsibilities to act rationally and to treat all rational beings equally.²⁴⁰ Rationality advocates common authority as moral obligation.²⁴¹ In this vision, things happen for a reason, and there is some kind of will behind every single incident in the world and practical reason is directed at solving practical problems. One of these problems is to give an analysis on how to achieve perpetual peace.²⁴² As the Preamble of the Rome Statute affirms, ‘the most serious crimes of concern to the international community as a whole must not go unpunished’.

In this context, Kant’s retributive justice refers to re-establishing the social and moral balance that existed before the crime was committed. In fact, punishment is regarded as an application of the categorical imperative and it would be immoral not to punish.²⁴³ The universal principle of justice from Kant’s viewpoint is concerned with explaining ‘how the practical requirements in moral laws could be legitimately enforced through the application of external coercion.’²⁴⁴ In this sense, cosmopolitan law allows the international community to monitor the internal affairs of its members,²⁴⁵ and demonstrates ‘an aspiration to create a society of individuals independent from states.’²⁴⁶ In addition, the Kantian vision of institutionalism is that ‘sound, moral cosmopolitans should become institutional cosmopolitans and commit themselves to end the Westphalian nation-state and bring into being a democratic world government dedicated to peace, justice, and well-being for all people everywhere.’²⁴⁷

Consequently, according to the Kantian model of international community, an international criminal court is the first international body that can be said to be performing cosmopolitan law.²⁴⁸ The ICC is rooted in the notion of cosmopolitan law, to administer justice impartially over heinous crimes against humanity, and on behalf of the international community as a whole²⁴⁹ when the competent state authorities are

²³⁹ Vaughan-Williams, N. (2007). "Beyond a Cosmopolitan Ideal: the Politics of Singularity." from huss.exeter.ac.uk/politics/research/readingroom/IP%20Article%20NVW.pdf [accessed on 10th September 2011]

²⁴⁰ Osmundsen, *Op, cit.*,

²⁴¹ *Ibid.*,

²⁴² *Ibid.*,

²⁴³ Kilchling, *Op, cit.*,

²⁴⁴ Covell, *Op, cit.*,

²⁴⁵ Archibugi, *Op, cit.*,

²⁴⁶ *Ibid.*,

²⁴⁷ Pojman, *Op, cit.*,

²⁴⁸ Osmundsen, *Op, cit.*, p. 82.

²⁴⁹ *Ibid.*,

‘unwilling or unable’²⁵⁰ to exercise the responsibilities of primacy of national criminal jurisdiction in good faith.²⁵¹ In effect, in order to have a response to failures of sovereignty at the state level,²⁵² the complementarity regime of the ICC is based less on state sovereignty and more oriented towards the protection of all citizens of the world.²⁵³ On the other hand, having said that an international court aims to resolve disputes as effectively and apolitically as possible,²⁵⁴ states want to take the risk of joining the ICC for a variety of motives. According to the rationalist model, states suffer from the fact that international crimes are not dealt with and find that they cannot rely on other states to tackle international crimes consistently.²⁵⁵

2. The classical Islamic approach; Islamic jurisprudence

Islamic law, or *Shari’a*, as a universal religion, is based on the revealed book of Islam (Qur’an) which recognises no boundaries for its kingdom.²⁵⁶ According to the Islamic philosophy of law, all human beings are subject to divine law and every individual must have the respect of other individuals because of the spiritual dignity of human beings.²⁵⁷ Islam is a distinct cultural system in which the collective, not individual, lies at the centre of its world view. Islam makes no distinction between the individual and the state as an overall political structure. In fact, the individual is considered a member of the *umma* (community)²⁵⁸ and Islamic law is obligatory for Muslims regardless of the territory they reside in.²⁵⁹ According to Islamic theory, God is the sovereign of the community of believers, and the ultimate ruler and legislator.²⁶⁰ Thus, law plays a greater role than it does in western societies.²⁶¹ *Shari’a* governs the life of every Muslim

²⁵⁰ Article 17 of the Rome Statute

²⁵¹ Jensen, *Op. cit.*,

²⁵² Franceschet, *Op. cit.*,

²⁵³ Glasius, M. (2006). The International Criminal Court: a global civil society achievement. New York, Routledge, p. 1.

²⁵⁴ Martinez, *Op. cit.*,

²⁵⁵ Megret, *Op. cit.*, p. 14.

²⁵⁶ Malekian, F. (1994). The Concept of Islamic International Criminal Law: A Comparative Study. London, Graham & Trotman, p. 37.

²⁵⁷ *Ibid.*, p. 7.

²⁵⁸ Tibi, *Op. cit.*,

²⁵⁹ Malekian, *Op. cit.*,

²⁶⁰ Khadduri, M. (1988). The Islamic Conception of Justice. Baltimore and London, The John Hopkins University Press, p. 3.

²⁶¹ Brand, J. (1988). "Reviewed work: The Islamic Conception of Justice by Majid Khadduri." The American Journal of International Law 82(2): 430-433. p. 432.

in every way, which is unknown to the West.²⁶² Communities of believers constitute the Islamic *ummah*, which is a manifestation of society's belief in unity. In this sense, the unity of God in their belief, and the unity of these believers in their practice can play an active political role in domestic as well as international affairs. In other words, from the Islamic viewpoint, religion and politics are not separate arenas; law and politics are considered part of religion.²⁶³ In fact, Islamic law regulates the rules of conduct for all nations regardless of the theological attitudes of the relevant nations,²⁶⁴ since the idea of 'peace is the dominant idea in Islam.'²⁶⁵ Islamic law encourages activities that work against anarchy and violence by 'criminalizing individuals, groups, and government authorities involved in anti-peace action.'²⁶⁶ Since the divine legislator does not rule directly over believers, a new form of government has been established based on divine law and justice, and led by a representative who derives his authority not directly from God but from God's law.²⁶⁷ It is worth mentioning that there are important questions about the legitimacy and qualifications of the ruler since their primary task is to put God's law and justice into practice. Since the Prophet, the first ruler, died without providing a rule of succession, the procedural question of the choice of person who has a legitimate claim to succeed the Prophet in accordance with the standard of political justice (justice based upon the will of the sovereign), has become crucial.²⁶⁸ By contrast, the gradual decline of the Church's political power in Europe contributed to the shift in the source of legitimacy from the supremacy of religious authority to the people, and became the main factor behind the formation of nation-states.²⁶⁹ In fact, the secular concept of the nation-state runs counter to the Islamic ideal of *ummah*, since the notion of *ummah* supersedes national boundaries.²⁷⁰ Interestingly, it is 'suggested that the European Enlightenment itself was a product of Arab influence through the Iberian peninsula'²⁷¹ and that Islamic international law developed with the purpose of creating

²⁶² Vogler, R. (2005). *A World View of Criminal Justice*. Aldershot, Ashgate Publishing, p. 118.

²⁶³ Hooker, V. M. and A. Saikal, Eds. (2004). *Islamic perspectives on the new millennium*. Pasir Panjang, Institution for Southeast Asian Studies (ISEAS), p. 151.

²⁶⁴ Malekian, *Op, cit.*, p. 1.

²⁶⁵ *Ibid.*, p. 2.

²⁶⁶ El-Ayouty, Y. (1999). "International Terrorism Under the Law." *ILSA Journal of International & Comparative Law* 5: 485-499. p. 490.

²⁶⁷ Khadduri, *Op, cit.*, p. 4.

²⁶⁸ *Ibid.*, p. 5.

²⁶⁹ Hooker, *Op, cit.*, p. 152.

²⁷⁰ *Ibid.*,

²⁷¹ Vogler, *Op, cit.*

acceptable international relations between the various nations of the world.²⁷² However, although the Islamic Enlightenment occurred much earlier than the eighteenth-century Enlightenment in Europe, due to historical factors, it could not continue.²⁷³

Although the frameworks for Western international criminal justice and Islamic criminal justice come from two different traditions, basic legal principles from each system should be recognised during the application of international criminal justice so that through equality, reciprocity, and mutual understanding, an international justice can be achieved that cannot be ignored by any criminal party.²⁷⁴ Exclusion of the Islamic legal tradition from consideration by the Rome Statute is a matter of concern. It is concerning simply because the better understanding of justice and equality between nations around the world paves the way to achieving appropriate human rights principles, something that concerns the international community as a whole.²⁷⁵ In this regard, Richard Vogler observes that 'the international tribunals are intended to be truly global', but that 'the practice of the international tribunals increasingly gives the impression that defendants from the developing world are being dragged unwillingly before alien, western courts.'²⁷⁶ Malekian has argued that recognizing one concept of law over another 'diminishes the value of international criminal justice and creates contradictions in the application of an impartial equal jurisdiction and basic philosophy of culture attitude.'²⁷⁷ Moreover, it is important to note here that recent evaluations of international criminal tribunals suggest that, as Delmas-Marty has pointed out, 'harmonization is a progressive, evolutionary process which should also involve a descending integration from international law to domestic law and lead to a more pluralist conception of international criminal law.'²⁷⁸

²⁷² Malekian, *Op, cit.*, p. 1.

²⁷³ Leezenberg, M. (2007). "Interview Soroush: Enlightenment & Philosophy in Islam." from www.dr.soroush.com/PDF/Enlightenment%20and%20Philosophy%20in%20Islam.pdf [accessed on 10th September 2011]

²⁷⁴ Malekian, F. (2009). "The Homogeneity of International Criminal Court with Islamic Jurisprudence." *International Criminal Law Review* 9(4): 595-621. p. 596.

²⁷⁵ *Ibid.*, p. 595.

²⁷⁶ Vogler, R.K. (2011). Making International Criminal Procedure Work: from Theory to Practice, in HENHAM, R. & FINDLAY, M. (eds) *Exploring the Boundaries of International Criminal Justice*. Aldershot, Ashgate, p.115

²⁷⁷ Malekian, *Op, cit.*,

²⁷⁸ Vogler, *Op, cit.*,

2.1 Reluctance of Islamic states to participate in the ratification of the Rome Statute:

In the past fifty years, international law has been changed dramatically. On the other hand, *Shari'a* is over fourteen centuries old and seems cannot be changed,²⁷⁹ as it is based on divine inspiration, and is 'often [a]contradictory body of opinions [without] a uniform, unequivocal doctrine of criminal laws.'²⁸⁰ Therefore, an important question arises here as to whether the ICC's jurisdiction is compatible with Islamic law. Islamic criminal law and international criminal law share many overlapping functions for the suitable prevention and prohibition of international criminal violations, including the prohibition of torture, slavery, and war crimes.²⁸¹ The question that arises is how the absence of specific elements of crimes in the penal codes of domestic law in Muslim states relates to the repressive use of *Shari'a* by these Islamic states. Even in those cases where *Shari'a* has been codified, a state may progress further in Islamic rule by making use of 'its monopoly on the use of force' against political and civil rights in the name of God.²⁸² The state's monopoly on the use of violence remains problematic, since normative pressures can now, more than ever, influence states.²⁸³

Islamic states have played a positive role in the establishment of the International Criminal Court;²⁸⁴ however, there were many important conflicts between Islamic ethics and the ICC provisions, which need further adaptation to the ICC Statute.²⁸⁵ It is worth mentioning that seven countries voted against the Rome Statute in 1998 as they were opposed to the formation of the ICC. Four of them were countries 'with predominantly Muslim populations purporting to apply at least some measures of Islamic law', including Libya, Qatar, Iraq, and Yemen.²⁸⁶

As *Shari'a* has not provided a comprehensive system of codes, it is important to consider how Islamic law relates to the ICC provisions.²⁸⁷ This raises the question of whether international criminal law is compatible with a broader application of *Shari'a*

²⁷⁹ Nassar, *Op, cit.*,

²⁸⁰ Peters, R. (2005). Crime and punishment in Islamic law: Theory and Practice from the Sixteen to the Twenty-first Century. Cambridge, Cambridge University Press. p. 2.

²⁸¹ Malekian, *Op, cit.*, The Concept of Islamic International Criminal Law: A Comparative Study, p. 3.

²⁸² Roach, Politicising the International Criminal Court: The Convergence of Politics, Ethics, and Law, *Op, cit.*, p. 139.

²⁸³ *Ibid.*, p. 138.

²⁸⁴ *Ibid.*, p. 139

²⁸⁵ Roach, S. C. (2005). "Arab States and the Role of Islam in the International Criminal Court." Political Studies **53**: 143-161. p.157.

²⁸⁶ Nassar, *Op, cit.*,

²⁸⁷ Roach, Political Studies, *Op, cit.*,

in Islamic states.²⁸⁸ For instance, suicide is a crime under Islamic law and can be punished by Islamic courts.²⁸⁹ This conflict reflects the important role of Islam in many Muslim countries since they officially recognize Islamic values as a source of legislation,²⁹⁰ meaning that the national decision-making process cannot be separated from Islam.²⁹¹ However, the lack of an independent judiciary to provide the necessary oversight of the government's actions and practice is one of the central problems of undeveloped criminal law systems in these countries. As Bassiouni has argued, Islamic states have failed to adopt a 'progressive codification of Islamic criminal justice which could adapt it to a contemporary framework which would keep faith with the past, while setting the foundations for the future.'²⁹²

However, many Arab states are deeply concerned that secular provisions of the Rome Statute would allow the ICC to extend its jurisdiction over matters that are of national concern. For instance, corruption and a lack of accountability continue to persist in Arab Islamic countries, even in the more liberal Arab states in which the judges of *Shari'a* appeals courts must actively balance *Shari'a* against the protection of the basic political liberties of Muslim citizens.²⁹³

The abuse of the state's monopoly on the use of force reveals the need to adapt *Shari'a* and criminal legal systems to international law, or rather to the Rome Statute.²⁹⁴ That is to say that a flexible application of *Shari'a* to civil society can facilitate the adaptation of Islam to international law.²⁹⁵ For instance, although 13 members of the Arab League have signed the Rome Statute, there are currently only four Arab states which have ratified the Statute; Jordan, Tunisia, Comoros and Djibouti.²⁹⁶ On the other hand, in Asia, Afghanistan voted in favour of the Statute and has ratified it but Indonesia, as the largest Muslim population in the world, abstained from voting and has not signed the Rome Statute.²⁹⁷

²⁸⁸ Nassar, *Op, cit.*,

²⁸⁹ El-Ayouti, *Op, cit.*,

²⁹⁰ Roach, Politicising the International Criminal Court: The Convergence of Politics, Ethics, and Law, *Op, cit.*, p.140.

²⁹¹ *Ibid.*, p. 150.

²⁹² *Ibid.*, p. 151.

²⁹³ *Ibid.*, p. 144.

²⁹⁴ *Ibid.*, p.143.

²⁹⁵ *Ibid.*,

²⁹⁶ McGoldrick, D., P. J. Rowe, et al., Eds. (2004). The permanent international criminal court: Legal and Policy Issues. Oxford, Hart Publishing, p. 397.

²⁹⁷ *Ibid.*, p. 398.

Another concern of Arab countries towards the ICC as an international criminal justice institution is based upon the concept of sovereignty. Since most Arab states were subjected to colonialism, they are deeply concerned with regard to any external interference in their domestic affairs.²⁹⁸ The relationship between international criminal tribunals and states is a complex one, with the complementarity regime of the Rome Statute being designed to support sovereignty.²⁹⁹ However, it is argued that states with 'well-developed criminal justice systems that have the ability and the capacity to investigate and prosecute ICC crimes would benefit more from this.'³⁰⁰ In other words, the criminal justice systems in the less-developed countries will be judged to be unable to effectively hold proceedings. Thus, the ICC will not protect their sovereignty, and 'their system will be assessed by judges from those same Western-based countries.'³⁰¹

An-Naim has suggested that developing *Shari'a* will require states leaders and Islamic clerical authorities to reinterpret the non-constitutive nature of *Shari'a*. In other words, *Shari'a* cannot in itself provide the essential source of constitutional changes to bring Islam into line with the modern evolution of international law. Under *Shari'a*, *Qur'an* and *Sunnah* are the only sources from which to develop constitutional safeguards against human rights abuses but given the ambiguities of contemporary *Shari'a*, Islamic states face a challenge in incorporating all the ICC's legal standards into their domestic criminal systems.³⁰²

However, the tension between Islamic states and the ICC could be resolved by a mutual, ongoing practice of appealing to the interests of all states parties.³⁰³ In fact, the system of international criminal law relies on a jurisdiction provided by its different constituent national criminal jurisdictions, whereas 'Islamic international criminal law relies on its own provisions'³⁰⁴, and is bound by 'outdated rules of fixed punishments for all crimes.'³⁰⁵ The basic jurisdiction in Islamic international criminal law is based on

²⁹⁸ Maget, *Op, cit.*,

²⁹⁹ *Ibid.*,

³⁰⁰ www.parliament.the-stationery-office.com/pa/cm200001/cmstand/d/st010503/pm/10503s04.htm [accessed on 10th September 2011]

³⁰¹ Maget, *Op, cit.*,

³⁰² *Ibid.*,

³⁰³ Roach, *Politicising the International Criminal Court: The Convergence of Politics, Ethics, and Law*, *Op, cit.*, p.154.

³⁰⁴ Malekian, the Concept of Islamic International Criminal Law, *Op, cit.*, p. 44.

³⁰⁵ Wiechman, D. J., J. D. Kendall, et al. "Islamic Law: Myths and Realities." from muslim-canada.org/Islam_myths.htm [accessed on 10th september 2011]

its original source (*Qu'ran* and *Sunnah*), but this does not prevent 'the adaptation of the law to its other sources and even to the modern system of international criminal law.'³⁰⁶

Nevertheless, it must be noted that the method, degree, and level of punishment in Islamic international criminal law may not be the same as in the system of Western international criminal law.³⁰⁷ For instance, capital punishment is part of Islamic law as a mandatory penalty under *Shari'a*. However, the diversity of practice would suggest there is little consensus even among Muslims as to the scope of capital punishment. In other words, although some Islamic states attempted during the negotiation process of the Rome Statute to assert that there was some principle at stake, Islamic law in no way mandates capital punishment for the crimes falling within the jurisdiction of the International Criminal Court, namely genocide, crimes against humanity, and war crimes.³⁰⁸ For instance, as Schabas has noted, two of the crimes for which Islamic law mandates the death penalty - adultery and apostasy - cannot by any effort of interpretation be deemed to be the 'most serious crimes' for which the death penalty may be imposed in accordance with Article 6(2) of the International Covenant on Civil and Political Rights.³⁰⁹

It is interesting to mention here that the creation of the International Islamic Court of Justice (IICJ) has been proposed by the Organization of the Islamic Conference (OIC), for the purpose of peacefully settling the disputes arising among member states.³¹⁰ The potential establishment of an Islamic Court, based on Islamic law as the primary applicable law, may raise a question as to what would happen in the case of a conflict of jurisdiction raised by a non-Islamic country under the same dispute. Moreover, it will probably have potential consequences for the political and diplomatic balance in the Arab region.³¹¹ Having said that, the ICC was established to adjudicate genocide, crimes against humanity, and war crimes; it does not provide *Shari'a* law to include all people in its world judiciary. Since the ICC issued an arrest warrant against the Sudanese President, the creation of an Arab and Islamic criminal court has been proposed by Egyptian activists and members of political parties in order to prosecute the crimes committed by the world powers in Iraq, Afghanistan, and Palestinian Occupied

³⁰⁶ Malekian, the Concept of Islamic International Criminal Law, *Op. cit.*, p. 43.

³⁰⁷ *Ibid.*,

³⁰⁸ Schabas, W. "Islam and the Death Penalty." from <http://pewforum.org/deathpenalty/resources/reader/15.php> [accessed on 10th September 2011]

³⁰⁹ *Ibid.*,

³¹⁰ Lombardini, M. (2001). "The International Islamic Court of Justice: Towards an International Islamic Legal System?" *Leiden Journal of International Law* **14**: 665-680. p. 666.

³¹¹ *Ibid.*,

Territories.³¹² From the viewpoint of most Muslim countries, the Western world hegemony over the ICC operation does not serve their nations' interests as 'they may want to impose their *Shari'a* law concepts' instead of using Western concepts of law.³¹³ But what if the Islamic countries were to start their own version of the ICC? They could then arrest and prosecute all those who say anything negative towards Islam. They would not hesitate to issue arrest warrants against people for insulting Islamic law.³¹⁴ It has been claimed that the result of such efforts would be that each group would end up with its own ICC, one for Russia and China, one for the Islamic world and one for the Western world, each sharing their own values, background and concept of justice.³¹⁵ It is important to ask here what compromises would be made in such a case? In essence, setting up an international judicial system has been desirable due to the international community's wish to protect the people of the world from core crimes such as those which are now happening in Darfur. Giving up most of the values in the process is not the answer.³¹⁶

2.2 Substantive law in the Islamic legal tradition

Islam as a comprehensive way of life encompasses a complete moral system that is an important aspect of its universal standards. Muslim defenders claim that the world-wide application of *Shari'a* would result in universal freedom and justice.³¹⁷ In an Islamic context, *Shari'a* includes both ethics and law. However, it does not allow behaviour norms based on individual conscience.³¹⁸ From an Islamic perspective, the purpose of human life is to worship God by leading this worldly life in harmony with the Divine Will, and thereby achieving peace in this world and everlasting success in the life of the hereafter.³¹⁹ In other words, its objective is complete justice, mercy, well-being and wisdom.³²⁰

³¹² Elmore, J. W. (2009). "The Evil of the ICC." from www.faithfreedom.org/content/evil-icc-international-criminal-court [accessed on 10th September 2011]

³¹³ *Ibid.*,

³¹⁴ www.faithfreedom.org/content/evil-icc-international-criminal-court [accessed on 10th September 2011]

³¹⁵ Elmore, *Op. cit.*,

³¹⁶ *Ibid.*,

³¹⁷ Schirmacher, C. (2008). "Basic features of Islamic criminal law." from www.islaminstitut.de/View-article.89+M5c143dc26d2.0.html [accessed on 10th September 2011]

³¹⁸ Suseelan, *Op. cit.*,

³¹⁹ www.whyislam.org/SelfDevelopment/MoralityEthicsinIslam/tabid/124/Default.aspx [accessed on 10th September 2011]

³²⁰ Siddiqui, *Op. cit.*,

In classical Islamic theory, the *Qur'an* and *Sunnah* (sayings and practice of the Prophet Muhammad) are the basis for the Islamic Divine Law. The *Sunnah* basically attempts to find a solution to any problem from the vantage point of the Prophet Muhammad's life, his sayings and his actions.³²¹ *Sunnah* is the second source of Islamic law and constitutes a practical interpretation of it. It also consists of *hadith*, which means the statements of Prophet and the manner of his life.³²² Therefore, the *Qur'an* and *Sunnah* are the two main sources for Islamic legal theory and provide the subject matter of law.³²³ For Muslims, the moral directives of the *Qur'an* and *hadith* are the expression of ethics in operation. In essence, Muslims believe that only knowledge of the *Qur'an* and *hadith* can help individual Muslims solve the conflicts between social and moral norms that create ethical dilemmas. Therefore, Islamic law reflects the will of *Allah* (God) rather than the will of the moral majority or the will of a human lawmaker.³²⁴

Islamic law originated in the legal precedents of Muhammad's early Muslim community on the Arabian Peninsula in the 7th Century AD, and had its jurisprudence shaped by specific circumstances and therefore limited to individual cases.³²⁵ Thereafter, the Muslims continued their expansion across the Arabian Peninsula and into Syria, Mesopotamia (present day Iraq), Persia, and westward into Egypt and the rest of North Africa.³²⁶ It is interesting to note here that law existed apart from religion under the first four *Caliph*, who followed the Prophet and were continuing to spread the moral teachings of the *Qur'an*. The law was generally administered through existing, pre-Islamic institutions of foreign character, such as Persian (to the east) and Byzantine (to the west) the two great empires that dominated the Middle East before Islam.³²⁷

The *Qur'an* contains a variety of lawmaking provisions and legal prescriptions and proscriptions which are interspersed throughout its chapters and verses, some dealing with specific questions of substantive law, others with questions of criminal procedure, and still others establishing the basis for interpretation. Therefore, *Qur'an* and *Sunnah*

³²¹ Sonny, A. d. (2005). "Morality in the Modern World: Islam." from www.itscotland.org.uk/Images/MoralityIslamv2_tcm4-299190.doc [accessed on 10th September 2011]

³²² Malekian, Op, cit., *The Concept of Islamic International Criminal Law: A Comparative Study*, p. 6.

³²³ Hallaq, W. B. (1997). *A history of Islamic legal theories: an introduction to Sunni uṣūl al-fiqh*. Cambridge, Cambridge University Press, p. 1.

³²⁴ *Ibid.*,

³²⁵ Schirrmacher, *Op, cit.*,

³²⁶ Roberson, C. and D. K.Das (2008). *An Introduction to Comparative Legal Models of Criminal Justice*. Boca Raton, Taylor & Francis Group, p. 6.

³²⁷ Lippman, M., S. McConville, et al. (1988). *Islamic Criminal Law and Procedure. An Introduction*. New York, Praeger, p. 22.

define the procedural and substantive elements of Arab states' constitutions,³²⁸ whilst the rules for interpreting the *Qur'an* itself are subject to the science of interpretation (*ilm usul al-fiqh*).³²⁹ In other words, the *Qur'an* and *Sunnah* do not give explicit guidance on all issues. When guidance is not clearly given in the *Qur'an*, there are several other sources of law. For example, guidance can be sought from *fiqh*, which means 'understanding' and is the science of jurisprudence: the science of human intelligence, debate and discussion.³³⁰

Islamic law contains the rules by which the Islamic system of criminal justice is to be applied.³³¹ However, *Qur'anic* provisions do not provide a complete code of law and procedure of general application;³³² they cover 'only a small part, or outlines some basic principles of norms and values.'³³³ Out of a total of 6237 verses only 190 verses or 3% of the total can be said to contain legal provisions. Most of these deal with family law and inheritance.³³⁴ As such, the *Qur'an* does not set forth a complete system of criminal justice, and criminal proceedings are only referred to for a select number of offences. It does, however, contain the elements necessary for the construction by believers of a system of justice capable of being respectful to the needs of the society at a given time and place. Therefore, Islamic jurisprudence recognizes a number of sources of law that permit the development of a comprehensive system of criminal justice.³³⁵ However, significant differences exist among Muslim scholars as to whether or not Islam in general, and *Shari'a* in particular, are dynamic or static.³³⁶ *Shari'a* is essentially a policy-oriented legal system, which requires dynamic evolution and evolving application to remain strong. For example, nothing in *Shari'a* would prohibit the development of a criminal code, a code of criminal procedure, a code of corrections, or an international criminal court, provided that these different codes embody the basic rules of the *Shari'a*. Furthermore, it is clear that the *Shari'a* does not provide certain rules which can and should be embodied in a codified system in order to ensure the integrity of the legal process itself and its proper application, and in order to guarantee

³²⁸ Roach, Politicising the International Criminal Court: The Convergence of Politics, Ethics, and Law, *Op. cit.*, p. 104.

³²⁹ Stowasser, B. F., Ed. (1987). The Islamic impulse. London, Taylor & Francis, p. 247.

³³⁰ Soudy, *Op. cit.*,

³³¹ Stowasser, *Op. cit.*,

³³² Vogler, *Op. cit.*, p. 106.

³³³ Siddiqui, *Op. cit.*,

³³⁴ Badr, G. M. (1977). " Islamic Law: Its Relation to other Legal System. " The American Journal of Comparative Law 26: 187-198. p. 187.

³³⁵ Stowasser, *Op. cit.*, 247.

³³⁶ *Ibid.*, p. 248.

the basic human rights of the accused as required in the Islamic criminal justice system.³³⁷ Consequently, modern jurisprudence in Muslim countries tends to be a composite of *Quranic* commandments, elements of Islamic traditions, customary law, vestiges of pre-Islamic Persian or Roman codes, and elements of European legal provisions left over from the colonial period.³³⁸

2.3 Procedural law in the Islamic legal tradition

It is important at this point to consider how consistent Islamic conceptions of crime and procedure are with the law and practice of the ICC. Islam is a universal religion that invites humanity into the unity of God.³³⁹ The universality of Islam is an undeniable fact and it carries a divine message, as a Qur'anic doctrine of Apostleship,³⁴⁰ which is not bound by the constraints of time and space and is addressed to human beings wherever they are. This universal character of the Islamic message makes all humans equal in terms of duty and legal capacity, as well as in terms of rights and duties.³⁴¹ However, Khadduri has argued that Islamic procedure lacks uniformity and consistency mainly because Islam's process is 'partly judicial and partly administrative in character.'³⁴²

Islamic criminal law recognizes three categories of crime, including *hudud*, *ta'zir*, and *qisas*. These classes of crime are usually distinguished substantially on the basis of rules of evidence and penalties inflicted: capital crimes, crimes of retaliation and discretionary crimes. The most serious cases, denoted capital (*hadd*) crimes, comprise those classed by the *Qur'an* or tradition as capital offences and for which they set down a fixed penalty. Since Islam regards such crimes as committed against God and not a human being, a charge may no longer be dropped once it has been brought; nor is an amicable out of court settlement permitted until punishment has been inflicted on the guilty party.³⁴³ *Hadd* crimes are set by God and lead to mandatory penalties. *Ta'zir* crimes are forbidden behaviour or acts that endanger public order or state security,³⁴⁴ and imply the correction or rehabilitation of the perpetrators. *Ta'zir* crimes have a

³³⁷ *Ibid.*, p. 249.

³³⁸ Schirrmacher, *Op, cit.*,

³³⁹ Hooker, *Op, cit.*, p. 151.

³⁴⁰ www.masud.co.uk/ISLAM/ahm/british.htm [accessed on 10th September 2011]

³⁴¹ Dayf, S. "The Universality of Islam."

www.isesco.org.ma/english/publications/The%20Universality%20of%20Islam/p1.php [accessed on 10th September 2011]

³⁴² Khadduri, *Op, cit.*, p. 150.

³⁴³ Schirrmacher, *Op, cit.*,

³⁴⁴ Peters, *Op, cit.*, p. 7.

discretionary nature and punishment is left to the judge. *Ta'zir* offences include bribery, immodest clothing, immoral behaviour, and public drunkenness, etc. Since these offences are not explicit in Islamic law, the punishment is left to the discretion of the judge as to the range of punishments set out in the penal code, and different countries have different punishments for these crimes.³⁴⁵

The third category is *qisas*, or retribution, which is concerned with crimes against the person such as homicide, infliction of wounds, and battery. Punishment by retribution is set by law.³⁴⁶ *Qisas* crimes include those crimes which cause physical harm or death to another; such as murder, manslaughter, battery, mutilation to person, and damage to property. A further category is that of *diyat*. This is not a crime, but a separate punishment referring to a form of compensation, or blood money, which is to be paid to the victim or the victim's family as reparation for an injury or murder. This category is for those who choose to forgo their right of retribution under the *qisas* punishment.³⁴⁷

How do these categories of crime relate to international core crimes? The Rome Statute has jurisdiction over the most serious crimes of concern to the international community as a whole: genocide, crimes against humanity and war crimes.³⁴⁸ Malekian, in relation to the three categories of crime in the ICC Statute, has claimed that Islamic international criminal law has many provisions dealing with these three categories.³⁴⁹ For instance, the concept of genocide exists in Islamic jurisprudence and implies 'strict prohibition of acts that are conducted in order to kill, in whole or in part, the population of a nation or city.'³⁵⁰ Although the principle of Islamic law is the protection of human beings, the concept of crimes against humanity has different conditions for its recognition when compared with international criminal law. In particular, according to Islamic law, an act recognised as a crime against humanity does not necessarily need to be widespread or systematic because Islamic law places its emphasis on human value. That is to say that the penal system in Islamic law and the Rome Statute 'are not identical and can create problems concerning the mono-cultural view of these definitions.'³⁵¹

³⁴⁵ Karadsheh, *Op, cit.*,

³⁴⁶ www.oxfordislamicstudies.com/article/opr/t236/e0170 [accessed on 10th September 2011]

³⁴⁷ Karadsheh, *Op, cit.*,

³⁴⁸ Article 5 of the Rome Statute

³⁴⁹ Malekian, *International Criminal Law Review, Op, cit.*, p. 599.

³⁵⁰ *Ibid.*,

³⁵¹ *Ibid.*, p. 601.

According to Article 21 of the Rome Statute, the ICC may apply the national laws of states which normally exercise jurisdiction over crime, provided that those principles are not inconsistent with the Rome Statute and with international law and internationally recognized norms and standards.³⁵² However, the Rome Statute does not provide any definition concerning the scope of ‘internationally recognized human rights’ as a source of law. Furthermore, international criminal proceedings are ‘widely fragmented as a result of [an] unprecedented development of international or mixed criminal tribunals which follow very different approaches as far as criminal procedural law is concerned.’³⁵³ In addition, the Court does not define what is to be understood by the general principle of law derived by the Court from the national laws of the legal systems of the world.³⁵⁴

2.4 Criminal proceedings under *Shari’a*

Criminal proceeding in Islamic law is acting on behalf of society in a contest between a defendant and the government.³⁵⁵ Punishment in Islamic thought is morally justified because of its deep root in scripture and divine laws.³⁵⁶ The *Shari’a* presumes that any person is innocent until proven guilty in a court of law, and entitles every person accused of anything to a fair trial under the *Shari’a* or his or her own traditional law.³⁵⁷ Vogler has observed that in Islamic criminal justice, ‘by way of contrast to western criminal law, the nature of the offence determines the procedure to be adopted and the evidence required, as well as the punishment.’³⁵⁸ In other words, in common law systems, offences are classified by the type of harm arising from the crime.³⁵⁹ Whereas, according to Islamic law, the definition of crimes, the means of establishing proof and the appropriate punishments, are all closely linked.³⁶⁰ Furthermore, Islamic law does not conform to the notion of law as in common law and civil law systems.³⁶¹

Classical Islamic law was very progressive for its time, as it came with a message trying to convey the importance of meeting certain standards of legal protection for

³⁵² Article 21 (1) (c) of the Rome Statute

³⁵³ Malekian, *Op, cit.*, p. 268.

³⁵⁴ *Ibid.*, p. 300.

³⁵⁵ Roberson, *Op, cit.*, p. 151.

³⁵⁶ Sondy, *Op, cit.*,

³⁵⁷ Stowasser, *Op, cit.*, p. 234.

³⁵⁸ Vogler, *Op, cit.*, p. 109.

³⁵⁹ Lippman, *Op, cit.*, p. 38.

³⁶⁰ Roberson, *Op, cit.*, p. 151.

³⁶¹ Peters, *Op, cit.*, p. 1.

individual rights.³⁶² Mayer states that classical Islamic law, a thousand or more years ago, did not grant a right to appoint a lawyer (*wakil*),³⁶³ whereas Roberson has argued that '*Shari'a* generally entitles individuals and legal entities to a *wakil* (representative), who may be a lawyer.'³⁶⁴ Mayer has claimed that according to scholars of Islamic law, the scheme of Islamic criminal justice comports with contemporary standards of enlightened criminal justice, and classical Islamic law is still capable of evolving, according to its own principles and methodology.³⁶⁵ Due process in Islamic criminal law is based upon *Shari'a* although specific procedural safeguards are not stipulated in either the *Qur'an* or the *Sunnah*.³⁶⁶ However, due process rights in the *Shari'a* consist of the presumption of innocence, the prohibition of pre-trial detention, the right of silence, the right of defence, the prohibition of torture, and the prosecution burden of proof.³⁶⁷ According to traditional Islamic criminal law, there is no jury system and there is no prosecutor. Judges conduct the investigation, the examination and issue the verdict.³⁶⁸

The application of *Shari'a* within criminal procedure in Muslim countries began during a limited period of time in the seventh century CE. However, the comprehensive application of Islamic law was restricted, particularly in the late nineteenth century, when they borrowed new codes derived from European ones.³⁶⁹ In fact, during the nineteenth century, the application of Islamic criminal law has seen important changes due to the emergence of Western hegemony in that century.³⁷⁰ In most parts of the Islamic world, it was replaced by Western-type criminal codes. In some countries this happened immediately after the establishment of colonial rule. Elsewhere it was a 'gradual process.'³⁷¹ As previously stated, *Shari'a* does not provide for a particular framework for criminal procedures and judicial process, rather it focuses on the guiding principles and objectives without attempting to address the details.³⁷² In this sense, it has been written into different aspects of *Shari'a* and criminal law. However, studies

³⁶² Badr, G. M. and A. E. Mayer (1984). "Islamic Criminal Justice." The American Journal of Comparative Law **32**(1): 167-169. p. 168.

³⁶³ *Ibid.*, p. 167.

³⁶⁴ Roberson, *Op, cit.*, p. 158.

³⁶⁵ Badr and Mayer, *Op, cit.*,

³⁶⁶ Lippman, *Op, cit.*, p. 59.

³⁶⁷ Vogler, *Op, cit.*, p. 114.

³⁶⁸ Roberson, *Op, cit.*, p. 162.

³⁶⁹ Haleem, M. A., A. O. Sherif, et al., Eds. (2003). Criminal Justice in Islam: Judicial Procedure in Shari'a, New York, I.B. Tauris, p. 4.

³⁷⁰ Roberson, *Op, cit.*, p. 3.

³⁷¹ *Ibid.*, p. 2.

³⁷² Haleem, *Op, cit.*, p. 12.

have not yet succeeded in a comprehensive analysis of the procedural rules of *Shari'a* in order to identify those rules within Western codes which are compatible with Islamic law.³⁷³

All of the above points indicate quite clearly that, although there has been a tendency in some Muslim countries to adopt Western legislation, this trend has not resulted in a noticeable change to the systems of government in these countries,³⁷⁴ and that furthermore, procedural rules of the ICC are incompatible with *Shari'a*.³⁷⁵ That is to say, the Islamic world view conflicts with the provisions of the Rome Statute.³⁷⁶ The state and religion are inseparable in Islamic countries, meaning that the national decision-making process cannot be separated from Islam.³⁷⁷

2.5 Sovereignty:

From the Islamic point of view, 'the course of justice' is the application of the judicial system, which is established by the state for civil and criminal offences. In other words, the monopoly of force and the means of enforcement are placed in the hands of the state.³⁷⁸ Sovereignty is another concern of Islamic states with regard to the complementarity regime of the ICC,³⁷⁹ although this principle gives primacy to national jurisdictions to prosecute crimes falling within the scope of the Rome Statute.³⁸⁰ In considering the importance of sovereignty in Islamic states, Roach has identified four types of Islamic state sovereignty, including supreme sovereignty, monarchical, republican, and democratic. In a sense, the existence of a fundamental bond between *Shari'a* and state rule characterizes these different forms of sovereignty.³⁸¹

A monarchical form of sovereignty consists of hereditary rule and the submission of the people to 'the king/sultan/sheikh in exchange for social public order and beneficence.'³⁸² In Saudi Arabia, as an example of this type of sovereignty, *Shari'a* remains inflexible and 'the criminal system allows the government to detain individuals

³⁷³ *Ibid.*,

³⁷⁴ *Ibid.*, p. 11.

³⁷⁵ Elmore, *Op, cit.*,

³⁷⁶ Roach, Politicising the International Criminal Court: The Convergence of Politics, Ethics, and Law, *Op, cit.*, p.149.

³⁷⁷ *Ibid.*, p. 150.

³⁷⁸ El-Ayouti, *Op, cit.*,

³⁷⁹ Maget, *Op, cit.*,

³⁸⁰ Article 17 of the Rome Statute

³⁸¹ Roach, *Op, cit.*, p. 142.

³⁸² *Ibid.*, p. 141.

without any judicial body to provide oversight of detention.³⁸³ Saudi Arabia has applied Islamic criminal law in its traditional form since it was founded in 1927 and is administrated by the Saudi Ministry of Justice.³⁸⁴ An-Naim has argued that in Saudi Arabia, ‘certain ideological elites make decisions in the name of the people, who continue to be victims of human rights violations. ...that position is also taken in the name of religion and culture, but it is self-appointed guardians of religions and culture.’³⁸⁵

Republican sovereignty consists of political pluralism or non-elected state political parties. In other words, the sovereign adopts *Shari’a* as the principal source of legislation; for instance, Yemen is not defined by a union, the prince, or the people, but rather it is ‘compromised of decision-making bodies of non-elected political parties’.³⁸⁶ Democratic sovereignty is the third type of Muslim state sovereignty, which lies in the people’s democratic will; examples can be seen in Egypt, Jordan, Lebanon, Tunisia. The distinctive feature of this type of sovereignty is the separation of governmental powers to protect individual political and civil rights. However, one may observe particular deviations from the democratic norms of human rights protection in this type of sovereignty.³⁸⁷

The last form of sovereignty, according to Roach, is supreme sovereignty wherein the supreme authority of God is recognized in the constitution and state sovereignty is subordinated to God’s will.³⁸⁸ It is arguable that this type of sovereignty is similar to the pre-Westphalian period. In that time, the sovereign authority that ‘held the claim to rule was God and his word, and no other agent’s claim to rule superseded it.’³⁸⁹ An example of this is Sudan, one of the most extreme versions of an Arab Islamic state,³⁹⁰ whose constitution recognizes the supreme authority of ‘God over both sovereignty and the state.’³⁹¹ In this type of sovereignty, the state rejects any recognition of secular norms or forms of law.³⁹² Subsequently, a conflict between *Shari’a* and the protection of individual rights arises since there is a lack of state accountability to the people. In fact,

³⁸³ Roach, *Op, cit.*, p. 152.

³⁸⁴ Roberson, *Op, cit.*, p. 158.

³⁸⁵ www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59451 [accessed on 10th September 2011]

³⁸⁶ Roach, *Op, cit.*, p. 141.

³⁸⁷ *Ibid.*, p.142.

³⁸⁸ *Ibid.*, p. 141.

³⁸⁹ Leonard, *Op, cit.*,

³⁹⁰ Roach, *Op, cit.*,

³⁹¹ Article 4 of the Constitution of the Republic of Sudan

³⁹² Roach, *Op, cit.*, p. 142.

‘the constitutional provision on the supreme authority of God over state and sovereignty reflected the Sudanese government’s ability to justify virtually any form of brutal repression.’³⁹³ This has happened in the Darfur region of Sudan, where the Sudanese government have supported Janjaweed militias and has conducted unlawful attacks against civilians.³⁹⁴ Furthermore, in the case of Sudan there may be problems with applying and enacting ICC provisions in cases involving nationals of non-state parties.³⁹⁵

Iran, a non Arab Islamic country, is another example of this form of sovereignty in which Islamic law is the principal source of legislation. In other words, God’s will is placed above the sovereignty of the people, and the highest clerical rulers are in charge of enforcing the laws and rules in conjunction with God’s will – in Iran’s case, the Supreme leader and Council of Guardians.³⁹⁶ It is also important to note that, according to Iran’s Islamic Punishment Act 1991, the judge can rule in *hudud* offences based on his knowledge in criminal cases related to both crimes against God and people.³⁹⁷ In 1979, with the overthrow of the Shah and the establishment of the Islamic republic, all laws and regulations were newly reformulated based on Islamic rules, and all previous laws based upon French-model Criminal Procedure Code abolished.³⁹⁸ The new system reflects inquisitorial procedures³⁹⁹ and it is argued that it suffers from over-criminalisation, with three decades of experience illustrating that it does not work.⁴⁰⁰ In this regard, Bassiouni has argued that the revolutionaries’ application of Islamic criminal justice is contrary to the basic doctrine of Islam.⁴⁰¹ He notes that, ‘although certain laws that were promulgated may be in conformity with a certain interpretation of Islam, the manner in which these laws have been applied, as well as ways in which other processes have been carried out, are without question contrary to the spirit and letter of Islamic criminal justice clearly embodied in the *Shari’a*.’⁴⁰² He also claims that the demand for the establishment of Islamic criminal justice in various Muslim societies is not because their current system is unfair or inadequate. Rather, the demand stands as

³⁹³ *Ibid.*, p. 150.

³⁹⁴ www.hrw.org/en/news/2004/04/22/sudan-government-and-militias-conspire-darfur-killings

³⁹⁵ Roach, *Op, cit.*, p. 155.

³⁹⁶ *Ibid.*, p. 142.

³⁹⁷ Roberson, *Op, cit.*, p. 157.

³⁹⁸ Vogler, *Op, cit.*, p. 123.

³⁹⁹ *Ibid.*, p. 124.

⁴⁰⁰ *Ibid.*,

⁴⁰¹ Stowasser, *Op, cit.*, p. 246.

⁴⁰² *Ibid.*, p. 246.

a symbol of a greater issue - that of radical socio-political and economic transformation.⁴⁰³

Iran is considered to be one of the leading Islamic systems for criminal law and procedure. The Judges are primarily religious clerics interpreting 'God's will.'⁴⁰⁴ The Islamic system of Iran may also reflect similar value systems in other Muslim countries of the world, particularly in the Middle East; countries such as Saudi Arabia, Syria, Iraq, Kuwait, Bahrain, Qatar, Libya, and Egypt.⁴⁰⁵ It should be noted that it is impossible to understand the present legal development in the Islamic countries of the Middle East without a correct appreciation of the past history of legal theory, of positive law, and of legal practice in Islam.⁴⁰⁶

Review of the Rome Statute with an eye towards different criminal justice systems reveals support and dispute from Muslim countries, for instance Iran.⁴⁰⁷ Comparing the Iranian criminal justice system with the Rome Statute reveals several apparent conflicts that may cause a reluctance to adopt the ICC Statute. Abtahi has argued that the conflict between some provisions of the Rome Statute and the principles of *Shari'a* (the *Shi'i* twelve *Ja'fari* school) may arise if the Statute is ratified.⁴⁰⁸ During the UN Diplomatic Conference on the Establishment of the Statue, Iran had an active presence at various stages of the elaboration of the Statute. However, it has an 'ambivalent position' on the ICC.⁴⁰⁹ In terms of the complementarity regime of the ICC, although Iran supported this principle, some Iranian scholars claimed that application of the complementarity principle in the case of Iran could possibly raise problems. They argued that 'there is no correspondence between its judiciary and international standards, without further elaborating on this issue.'⁴¹⁰ In addition, the Iranian delegation in the seventh session of the ICC Assembly of State Parties (ASP) stated that, according to the principle of complementarity, 'the main responsibility remains on the shoulder of the national criminal jurisdictions' and that therefore, 'the need for boosting the domestic judicial capacities is a crucial element for realizing the purpose of the Rome Statute.'⁴¹¹ The

⁴⁰³ *Ibid.*, p. 247.

⁴⁰⁴ Karadsheh, *Op, cit.*,

⁴⁰⁵ *Ibid.*,

⁴⁰⁶ Khadduri, *Op, cit.*, p. 28.

⁴⁰⁷ *Ibid.*,

⁴⁰⁸ Abtahi, H. (2005). "The Islamic Republic of Iran and the ICC." Journal of International Criminal Justice 3: 635-648. p. 637.

⁴⁰⁹ *Ibid.*, p.640.

⁴¹⁰ *Ibid.*, p. 643.

⁴¹¹ www.iccnw.org/documents/ASP7_Statement_Iran_eng.pdf [accessed on 10th September 2011]

other concern raised by Iran is the lack of Muslim judges in the Court. In fact, this may create two types of problems. On the one hand, non-Muslim judges may not be familiar with *Shari'a* principles and therefore justice may not be carried out as it should be. On the other hand, article 36 (8) (a) of the Rome Statute does not provide for the religious background of the judges which may raise a theological issue in the case where a Muslim is judged by non-Muslim judges.⁴¹²

It has become increasingly important that countries agree that the ICC provides an interesting alternative to the traditional manner of determining the appropriate jurisdiction for trying international criminal offences as, previously, countries would rarely allow external authorities to exercise jurisdiction over their own citizens. However, the ICC jurisdiction raises the issue of whether Islamic law is compatible with the contemporary rules of international jurisdiction.⁴¹³ Although the ICC itself is not based on universal jurisdiction, the contention of universal jurisdiction is that 'all states have an interest in punishing crimes that are of international concern',⁴¹⁴ which can be seen in the Preamble to the Rome Statute - to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community.⁴¹⁵ However, substitute the law of man for the law of God, and the exclusion of Islamic law's exclusive jurisdiction becomes a common concern for Muslim countries joining the ICC.⁴¹⁶ Therefore, it is important to determine whether Muslim countries accept a duty for a state to either prosecute or extradite and whether this can be reconciled with Islamic law.⁴¹⁷

Malekian has claimed that 'Islamic law permits a hybrid jurisdiction' and that the legal nature of the ICC is a combination of domestic and international criminal rules. Therefore, as long as the Court maintains its objectivity to implement its Statute, its provisions may not violate the provisions of Islamic law.⁴¹⁸ He does not address the complexity of different criminal procedure systems to demonstrate whether Islamic procedure is compatible with the Rome Statute, particularly the admissibility assessment of a situation or a case based upon the complementarity principle. However, he observes that 'a significant principle of Islamic law is the unchanging nature of

⁴¹² *Ibid.*,

⁴¹³ Nassar, *Op, cit.*,

⁴¹⁴ Inazumi, M. (2005). Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law. Utrecht, Intersentia, p. 66.

⁴¹⁵ Preamble of the Rome Statute

⁴¹⁶ Nassar, *Op, cit.*, p. 591.

⁴¹⁷ *Ibid.*,

⁴¹⁸ Malekian, International Criminal Law Review, *Op, cit.*,

Shair'a', and that 'penalties cannot be modified by subsequent laws'.⁴¹⁹ Therefore, 'procedures which are supposedly polar opposites, or antimonies existing in a dialectical relationship with each other, cannot be amalgamated.'⁴²⁰

Substantive and procedural features of the ICC emerged from negotiations between states in the Rome Conference. The ICC negotiators from common law and civil law states pushed for rules and procedures that were based on their legal backgrounds, forging a compromise between common law and civil law principles rather than Islamic law or mixed law states.⁴²¹ In fact, the differences between Islamic law and Western legal systems constituted a large obstacle at the Rome Conference. Islamic law was largely neglected in the ICC negotiations since Islamic states constituted the smallest group amongst the negotiators by comparison with civil law and common law states.⁴²² Furthermore, Wippman has argued that Islamic states 'feared that the ICC would be used as a tool of Western interests and that their nationals and government officials might some day be subject to ICC investigation and prosecution.'⁴²³

Importantly, unlike Western legal systems, there is no division between state-level decision-making and the Islamic religion in Islamic law. This indicates that judges operating in Islamic domestic legal systems use *Shari'a* to 'determine what criminal penalties to impose on Muslims accused of violating *Shari'a* codes.'⁴²⁴ However, as Islam makes no distinction between religion and law, this creates inherent tension in the application of secular international humanitarian human rights in countries where Islamic law is applicable.⁴²⁵ The ICC would have the power to subject citizens of an Islamic state to secular international law, which gives the ICC jurisdictional power that goes directly against the Islamic faith.⁴²⁶

As such, Islamic criminal law is fundamentally different from Western legal traditions and international criminal law. In this sense, Islamic law, with its strict adherence to *Shari'a*, remains unique and different from Western legal traditions. These differences

⁴¹⁹ *Ibid.*,

⁴²⁰ Vogler, *Exploring the Boundaries of International Criminal Justice*, *Op. cit.*,

⁴²¹ Powell, E. J. and S. Mitchell (2008). "The Creation and Expansion of the International Criminal Court: A Legal Explanation." ir.uiowa.edu/cgi/viewcontent.cgi?article=1002&context=polisci_pubs [accessed on 10th September 2011].

⁴²² *Ibid.*,

⁴²³ Powell, *Op. cit.*,

⁴²⁴ Roach, *Political Studies*, *Op. cit.*, p. 153.

⁴²⁵ Steiner, K. (2006). "Reframing Human Rights: Secular and Religious Sources of Human Rights." www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/archive/Kerstin_Steiner_III.pdf [accessed on 10th September 2011]

⁴²⁶ Powell, *Op. cit.*,

minimized the impact of the Islamic legal tradition on the structure and procedures of the ICC.⁴²⁷ That is to say, the rules and procedures of the ICC constitute a hybrid of the civil and common systems whilst Islamic law is simply absent from the structure of the ICC. As Powell has argued, this fact creates a significant bias in favour of both civil and common law states. In fact, signature and ratification of the Rome Statute does not benefit Islamic law states in the same way that it does civil and common law States.⁴²⁸

Conclusion:

This chapter has addressed an interesting and important question in the creation of the ICC and its complementarity regime. Based upon what authority does the Court have legitimacy to interfere in a sovereign state to prosecute, arrest and punish offenders for the purpose of ‘put[ting] an end to impunity for the perpetrators of’ international crimes’?⁴²⁹ Two different normative approaches have been applied in the analysis of the ideological roots of the ICC. The purpose of this chapter has been to demonstrate the normative foundations of legitimacy of the ICC based on Kantian philosophy and the Islamic legal tradition. From the point of view of Kantian morality, the ICC is acting in the name of and on behalf of humanity: those who commit serious crimes which deeply shock the conscience of humanity are of concern to the international community as a whole. As Cassese observes, the establishment of the ICC is a revolutionary step in this context of an emerging vision of the international community.

Like Kantian cosmopolitanism, *Shari’a* is a doctrine of universality but its principles are divinely inspired. In spite of the importance of Islamic universalism, significant numbers of conflicts are currently taking place in Arab states and have resulted in the deaths and displacement of thousands of innocent civilians, which seems to require that ‘voice of reason accurately conveys to the West the thoughts and concerns of the Arab people.’⁴³⁰ However, as this chapter has considered, there is an inherent tension for the application of a secular international legal system in countries where Islamic law is applicable. Given that the rules and procedures of the ICC were formulated on the basis of Western legal systems, and that as such the Rome Statute does not include any Islamic provisions, the application of the Court has been particularly challenged in

⁴²⁷ *Ibid.*,

⁴²⁸ *Ibid.*,

⁴²⁹ Preamble of the Rome Statute

⁴³⁰ Maget, *Op. cit.*,

Muslim countries. Although the ICC has been mostly hailed as a success, Islamic states still regard its operation with scepticism as Islamic legal tradition is unjustifiably neglected among the legal systems by the ICC which has relied purely upon Western inspiration.⁴³¹

Therefore, cultural adaptation will reflect the willingness of states to reconcile their national customs with international law, allowing Islamic states to resolve the tensions between secular and Islamic law.⁴³² The Islamic states need to interpret the spirit and words of the *Qu'ran* and *Sunna* with a view to formulating a comprehensive system of specific codes (*Shari'a*),⁴³³ since the Rome Statute provisions will conflict with Islam where cases arise, and these cases will sometimes involve serious international crimes.⁴³⁴ In fact, it is imperative that Islamic societies touched by those processes feel a sense of buy-in or participation that is meaningful for them,⁴³⁵ so that the ICC no longer resembles an imperialist Western court. The next chapter will examine the ICC Prosecutorial policy in order to explore whether or not the Prosecutor has taken into account the importance of operating a code of prosecutorial ethics and cultural sensitivity towards different situations.

⁴³¹ Badar, *Op, cit.*, p. 411.

⁴³² Roach, *Political Studies, Op, cit.*,

⁴³³ *Ibid.*, p.152.

⁴³⁴ Roach, *Politicising the International Criminal Court: The Convergence of Politics, Ethics, and Law, Op, cit.*, p.154.

⁴³⁵ Kelly, M. J. 'Islam and International Criminal Law: A Brief (In)Compatibility Study', (2010) *Pace International Law Review Online Companion*, available at digitalcommons.pace.edu/pilonline/8.

Chapter Three: ICC Prosecutorial Policy on Complementarity

Introduction:

The concept of broad prosecutorial discretion is based on the body of law under which the prosecutor decides to file a warrant of arrest, and to trigger a system of charging, dismissals, and guilty pleas.¹ Over the years, courts in many legal systems have reinforced the independent role of the prosecutor by enhancing the degree of discretion that the prosecutor possesses.² The role and functions of the prosecutor have been the subject of debate and reform in many democratic countries.³ It is because prosecutors are the main ‘gatekeepers’ of the criminal justice system that their decisions have such a great impact on the public interest.⁴ Moreover, the jurisprudence of various courts and tribunals as well as national courts in recent decades has demonstrated the important role of the prosecutor in the administration of justice.⁵

Prosecutors have traditionally been reluctant to explain their decisions to the press, while the public, through the media, expect more information about the decision in order to enhance prosecutorial accountability.⁶ In the prosecution process it is important to consider the fact that the decision to prosecute and the decision to charge ‘should not be made by improper influence, political, or otherwise’⁷ and prosecutors ‘shall perform their duties fairly, consistently and expeditiously, and respect and

¹ History of the Public Prosecutor- The Independence of the [Prosecutor](http://law.jrank.org/pages/1861/Prosecution-History-Public-Prosecutor-independence-public-prosecutor.html), law.jrank.org/pages/1861/Prosecution-History-Public-Prosecutor-independence-public-prosecutor.html [accessed on 10th September 2011]

² Nsereko, D. D. N. (2005). "Prosecutorial Discretion before National Courts and International Tribunals." *Journal of International Criminal Justice* 3(1): 124-144. p. 126.

³ Federico, G. D. (2001). "The Independence and Accountability of the Public Prosecutor in search of a difficult equilibrium. The cases of England, France and Italy." from www.irsig.cnr.it/testi/pubbl_online/indip_account_dif.pdf.

⁴ Second chances in the criminal justice system: alternatives to incarceration and re-entry strategies, Published by American Bar Association, available at: http://books.google.co.uk/books?id=cCrnqfguyK0C&dq=prosecutor+are+the+main+gatekeepers+of+criminal+justice&source=gbp_summary_s&cad=0

⁵ Office of the High Commissioner for Human Rights, Guidelines for the Role of Prosecutors, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, www.unhchr.ch/html/menu3/b/h_comp45.htm [accessed on 10th September 2011]

⁶ *Ibid.*,

⁷ *Ibid.*,

protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.’⁸

The degree of discretion that prosecutors possess in international tribunals varies depending on the nature of their mandates.⁹ In the context of the ICC, in accordance with the principle of complementarity, prosecutorial discretion is broader than in the other international tribunals. The criteria upon which the Prosecutor’s discretion is exercised are complex,¹⁰ and the methodologies for assessing those criteria are vague; particularly in the selection of situations, assessment of preliminary investigation and charging decisions.¹¹ Therefore, some important issues arise here relating to the selection of situations and cases for investigation and prosecution in the context of international crimes.

The issue of an independent Prosecutor with powers to initiate investigations and prosecutions was one of the most controversial issues at the Rome Conference and a number of states, such as the United States, the Russian Federation, China and others, were opposed to the idea of a Prosecutor with such powers. The Draft Statute prepared by the International Law Commission (ILC) in 1994 did not provide an independent Prosecutor. According to the Rome Statute, situations are identified on the basis of three triggering mechanisms, including Security Council referral,¹² state referral,¹³ and prosecutorial initiative.¹⁴ Therefore, it is arguable that the power of the Prosecutor to initiate an investigation in general, and to assess the preliminary investigation in particular, has become critical.

The purpose of this chapter is to examine prosecutorial discretion in the context of the ICC in order to assess the prosecutorial decision-making process with regard to the complementarity regime. As previously mentioned in the last chapter, the Prosecutor has an ethical duty, on behalf of the international community, to bring criminals to justice. A Kantian model of criminal justice can accommodate the ambivalence about retributive ideas of individual justice in criminal law. This model of thinking is a basis for the relationship between society on the one hand and the responsible individual on the other. In fact, this spreads the ideas of universal responsibility and moral

⁸ *Ibid.*,

⁹ Nsereko, *Op. cit.*,

¹⁰ Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, December 8, 1997, at 7-8.

¹¹ Stahn, *Op. cit.*, p. 185.

¹² Article 13 of the Rome Statute.

¹³ *Ibid.*, Article 14.

¹⁴ *Ibid.*, Article 15.

accountability across a social space, between an individual and a community. Therefore, the ICC Prosecutor should act in an ethical rather than a purely expedient way in selecting situations and cases; otherwise, they will miss something crucial to ethics, by neglecting the concept of moral duty, and a good will. In order to execute this ethical obligation, he or she should exercise discretion with the sensitivity necessary to serve the goal of achieving justice. The chapter has been organized into three sections and will emphasize the importance of code of prosecutorial ethics. The first will summarize developments in prosecutorial discretion in the light of negotiations in the *travaux préparatoires* of the Rome Statute. In addition, some important questions will be considered in relation to the role of the Prosecutor. The second section will analyze the practice of the Prosecutor power within the ICC structure. It will further highlight the exercise of prosecutorial discretion in the preliminary phase of proceedings and it will establish the scene for the last section. This will evaluate the decision-making process by focusing on sufficient guidelines and policy, and whether there is consistency and transparency in the prosecutorial decisions. It will also consider a control mechanism available to challenge the power of the Prosecutor in order to determine whether or not there is sufficient judicial supervision of the Prosecutor.

1. The scope of prosecutorial discretion at the ICC:

The prosecutor has a moral obligation to bring criminal charges and is responsible for the effectiveness of the criminal justice system.¹⁵ Moreover, the prosecutor enjoys significant influence over individual cases. He or she also has broad discretion to direct criminal investigations and determine which individuals to charge with crimes as a result, as well as to decide which situations will be rejected as inappropriate for the Court.¹⁶ Prosecutorial discretion entails both risks and benefits. Therefore, this policy-making role can provide important efficiency benefits in order to maintain a functioning criminal justice system.¹⁷ In the context of the ICC, a number of important issues may arise in relation to the prosecution system; for instance, the role of ethics and culture in prosecutorial decision-making process, the discretion of the prosecutor and political interference in prosecutorial policy. Moreover, in considering the importance of the

¹⁵ Danner, *The American Journal of International Law*, *Op. cit.*, p. 512.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 518.

independence and accountability of the Prosecutor of the ICC, it is clearly necessary to consider the minimum standards of independence which the Prosecutor should enjoy, and to what extent the Prosecutor should be subject to the minimum standards of accountability.¹⁸ Thus, my emphasis will be on the existing model of the Prosecutor which has been granted broad discretion by the Rome Statute.

1.1 Developments of prosecutorial discretion in the *travaux preparatoires* of the Rome Statute:

Considering the concerns of state sovereignty, the principle of complementarity was given fundamental importance in the negotiation of the Statute in the Preparatory Committee and during the Diplomatic Conference.¹⁹ In particular, the role of the ICC Prosecutor, a key aspect of an effective criminal court, and the extent to which he or she should enjoy the power to trigger the jurisdiction of the Court were considered at the *Ad Hoc* and Preparatory Committees for the establishment of the ICC.²⁰ In fact, the power of the Prosecutor to initiate an investigation based upon his or her own authority had been the particular focus of criticism.²¹ There were different debates over the prosecutor's power. The ILC draft in 1994 indicated that investigations would generally be initiated based upon referral by a state party or the UN Security Council. This draft did not allow the Prosecutor to initiate a case, mainly out of fear that an independent prosecutor would lead to politically motivated decisions.²² However, the Preparatory Committee discussed the question of whether to authorize the Prosecutor to initiate an investigation and select cases based on information and communications received from different sources, including non-state entities such as individuals, and NGOs.²³ In effect, the Preparatory Committee discussed granting power to the Prosecutor which would

¹⁸ Arbour, L., K. Ambos, et al., Eds. (2000). The Prosecutor of a Permanent International Criminal Court: International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR), the Max-Planck Institute. p. 109.

¹⁹ *Ibid.*, p. 143.

²⁰ Gurmendi, S. F. d. (1998). "The Role of the International Prosecutor", in Roy S. Lee (ed), *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results*, The Hague, Kluwer Law International, p. 176.

²¹ Brown, B. S. (1999). "U.S. Objections to the Statute of the International Criminal Court: A Brief Response." *International Law and Politics* 31: 856-891. p. 881.

²² Draft Statute for an International Criminal Court, articles 21 and 23 (1994), untreaty.un.org/ilc/texts/instrument

²³ Diplomatic Conference of Plenipotentiaries on the Establishment of International Criminal Court, June 15 - July 17, 1998, Draft Statute of the Preparatory Committee on the Establishment of an International Criminal Court, art. 11, 12, U.N. Doc. A/Conf.183/2/Add.1 (1998)

enhance the effectiveness of the Court.²⁴ The rationale for enhanced prosecutorial authority was that prosecutorial independence seems an essential requirement of a legitimate criminal court.²⁵ The option of having an independent Prosecutor was supported by representatives of NGOs, who argued that historically states have been reluctant to use existing procedures for invoking human rights mechanisms.²⁶ In addition, history demonstrated that governments have committed many international crimes against their citizens and granted immunities or amnesties to those responsible.²⁷ It was also thought that states might be unwilling to initiate proceedings against other states because of the 'political and diplomatic ramifications involved.'²⁸ Therefore, different proposals regarding prosecutorial independence were considered at the Rome Conference and received critical support from 'like-minded' states, which played an important role in the development of the Rome Statute.²⁹ In the same way, NGOs such as Amnesty International argued that because the Court is 'a judicial body...its Prosecutor must have independence to decide whether to investigate or prosecute.'³⁰

It is important here to take into consideration the objections to the Court of the United States, a permanent member of the Security Council. In fact, the States did not oppose the idea of an international criminal court in the negotiation;³¹ indeed, its delegation had a significant role in drafting the Rome Statute.³² However, amongst its objections to the Rome Statute, the lack of adequate checks and balances on the powers of the Prosecutor and judges is an important one.³³ The United States was concerned that the ICC would become 'a focal point for rhetorical assertions about criminality even in cases in which the ICC clearly lacks jurisdiction.'³⁴ They further claimed that the Prosecutor as an independent organ of the Court is not accountable to 'any representative body' or the

²⁴ Press Release, L/2778, Preparatory Committee on International Criminal Court Discusses Power to be Given Prosecutor, 4 April 1996. www.iccnw.org/documents/ProsecutorPower4Apr96.pdf [accessed on 10th September 2011]

²⁵ Greenawalt, *International Law and Politics*, *Op. cit.*, p. 591.

²⁶ Danner, *The American Journal of International Law*, *Op. cit.*, p. 533.

²⁷ Danner, *Stanford Law Review*, *Op. cit.*, p.1641.

²⁸ The International Criminal Court Monitor, Issue 1, July-August 1996, www.igc.apc.org/icc

²⁹ Schabas, W. (2004). *An Introduction to the International Criminal Court*. Cambridge, Cambridge University Press. p. 19.

³⁰ Amnesty International, *The International Criminal Court: Making the Right Choices – Part 1*, pp. 108-109 (Jan. 1997), [web.amnesty.org/library/pdf/IOR400011997ENGLISH/\\$File/IOR4000197.pdf](http://web.amnesty.org/library/pdf/IOR400011997ENGLISH/$File/IOR4000197.pdf)

³¹ Danner, *Stanford Law Review*, *Op. cit.*, p. 1663.

³² Foltz, A. C. (2005). "United States Opposition to the International Criminal Court: Debunking the Apparent Contradiction ". from Research Report, www.afresearch.org/skins/RIMS/home.aspx

³³ Arieff, A., R. Margesson, et al. (2008). "International Criminal Court Cases in Africa: Status and Policy Issues." from www.fas.org/sgp/crs/row/RL34665.pdf [accessed on 10th September 2011].

³⁴ Goldsmith, J. (2003). "The Self-Defeating International Criminal Court." *The University of Chicago Law Review* 70: 89-95. p. 94.

Security Council.³⁵ At the United Nations Plenipotentiaries Conference on the Establishment of an International Criminal Court, the United States Ambassador to the United Nations declared that a permanent international criminal court must be part of the international order, and that the Security Council is a vital part of this order. From the U.S. point of view, the Security Council must play an important role in the Court's triggering mechanisms.³⁶ In addition, it was argued that granting power to the Prosecutor to initiate investigation and seek an indictment 'against anyone in any place, will weaken rather than strengthen the Court since prosecutorial decisions will be regarded as political.'³⁷ Thus, the United States claimed that the Security Council should control the prosecutorial discretion of the Prosecutor,³⁸ running contrary to Article 16 of the Rome Statute, under which the Security Council could only defer the prosecution for a renewable twelve months.³⁹ Given that the Prosecutor has significant discretion in determining which situations and which individuals should be investigated and prosecuted by the ICC, the United States argued that the Prosecutor is unaccountable due to the independence of the ICC from the permanent members of the Security Council.⁴⁰

Some delegations proposed a plan for enhancing the accountability of the Prosecutor, under which the Prosecutor would be required to file an annual report to the Security Council. However, the majority of state delegations at the meeting ultimately voted against the plan, claiming that the information revealed by the Prosecutor would compromise the confidentiality of the Prosecutor's investigation.⁴¹ It was also argued in the *ad hoc* Committee that UN Security Council referral 'would reduce the credibility and moral authority of the Court, excessively limit its role, [and] introduce an inappropriate political influence over the functioning of the institution.'⁴²

Arab delegations supported the prosecutor's right to initiate investigation independently. However, they objected to the UN Security Council's ability to refer a situation given that permanent members of the Security Council could block efforts to

³⁵ Foltz, *Op. cit.*,

³⁶ Statement of the USA Ambassador in the Rome Conference, June 17, 1998, www.amicc.org/usinfo/administration_clinton.html [accessed on 10th September 2011]

³⁷ *Ibid.*,

³⁸ Danner, *Stanford Law Review*, *Op. cit.*,

³⁹ Foltz, *Op. cit.*,

⁴⁰ Danner, *Stanford Law Review*, *Op. cit.*, p. 1636.

⁴¹ Roach, *Politicizing the International Criminal Court: the Convergence of Politics, Ethics, and Law*, *Op. cit.*, p. 53.

⁴² U.N. General Assembly Report, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, para. 121, U.N. Doc. A/50/22 (Sept. 6, 1995).

investigate their own actions.⁴³ As a result, in the final version of the Rome Statute, to avoid making the Court formally 'subordinate to political institutions,' the Prosecutor was granted an investigatory role in situations identified by states, the Security Council and on his or her own motion. The Security Council was given only a limited ability to restrict the Prosecutor's discretion,⁴⁴ although no limitation – given the territorial and nationality preconditions to the jurisdiction of the Court - applies in relation to UN Security Council referrals.⁴⁵

Therefore, the Prosecutor enjoys broad discretion in the initiation and conduct of criminal proceedings, such as the selection of the concrete situations and cases for investigation or prosecution.⁴⁶ According to the Rome Statute, the ICC Prosecution is a separate organ of the Court⁴⁷ and 'shall be headed by the Prosecutor.'⁴⁸ Depending on whether there is any obligation for the ICC Prosecutor to bring proceedings, it is for the Prosecutor to determine if there is sufficient basis for a prosecution and whether he or she can initiate an investigation. However, the case must pass the admissibility test under the principle of complementarity according to Article 17 of the Rome Statute.⁴⁹

2. Analysis of the practice of prosecutorial discretion at the ICC

2.1 Preliminary examination under the Rome Statute:

There are three kinds of triggering mechanisms pursuant to the Rome Statute. The UN Security Council, acting under Chapter VII of the UN Charter, as well as a state party, may refer a situation to the Prosecutor, or the Prosecutor may initiate an investigation independently, *proprio motu*, with the authorization of the Pre-Trial Chamber.⁵⁰ The Prosecution has the key role and is the only organ of the Court in preliminary investigation able to obtain the necessary information and examine national courts to make sure that they investigate and prosecute crimes committed within the situation of crisis that is the subject of the triggering procedure.⁵¹ The Rome Statute, in general,

⁴³ Bruno, G. (2011). " A decade of reasons why Arab countries distrust the ICC. " from www.thenational.ae/featured-content/home/middle-national-conversation/a-decade-of-reasons-why-arab-countries-distrust-the-icc [accessed on 10th September 2011]

⁴⁴ Danner, *The American Journal of International Law*, *Op, cit.*, p. 514.

⁴⁵ Article 13 of the Rome Statute.

⁴⁶ Arbour, *Op, cit.*, p. 210.

⁴⁷ Article 34 of the Rome Statute.

⁴⁸ *Ibid.*, Article 42 (2).

⁴⁹ Arbour, *Op, cit.*, p. 142.

⁵⁰ Olasolo, H. (2005). *The Triggering Procedure of the International Criminal Court*. Martinus, Nijhoff. p. 65.

⁵¹ Olasolo, H. (2003). "Issues regarding the general powers of the ICC Prosecutor, www.icc-cpi.int

grants the Prosecutor the authority to exercise discretion in selecting and prioritizing investigations.⁵² Article 53 of the Rome Statute, along with the complementarity regime based on Article 17, set out some obligations for initiating an investigation and for the admissibility of a case.⁵³ As such, no external entity can direct the Prosecutor to charge cases against particular individuals.⁵⁴

Yet, as Knoop has claimed, ‘no definition of reasonable basis is provided’ and it is the Prosecutor, therefore, who is empowered to determine whether this reasonable basis exists.⁵⁵ However, the Prosecutor does have the power to conduct his or her preliminary inquiry. The main purpose of this is to gather sufficient information to determine the existence of ‘a reasonable basis to believe’ that crimes within the jurisdiction of the Court have been committed in the situation concerned. For instance, ‘seek[ing] 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 ‘receiv[ing] written or oral testimony at the seat of the Court,’ are the sort of preliminary investigative steps, based upon *proprio motu* power, which are formulated in Article 15 of the Rome Statute. However, a situation which is referred by the Security Council or state party presupposes that they have undertaken a previous investigation before formally communicating with the Prosecutor.⁵⁶

An important point which arises here is that the preliminary inquiry may be carried out confidentially without giving notice to the state concerned, while the initiation of an investigation must always be communicated by the Prosecutor to ‘all state parties’ and any states concerned who are not party to the Rome Statute.⁵⁷ However, there is an important distinction between the preliminary inquiry and the investigation. In the preliminary phase, ‘the Prosecutor shall establish the personal, territorial and temporal parameters that define the referred situation within which those specific facts take place.’⁵⁸ On the other hand, in the investigation phase, and in accordance with Article 54 (1) (a), the Prosecutor has to ‘establish the truth.’ In doing so, he or she has to ‘extend the investigation to cover all facts and evidence relevant to an assessment of

⁵² Danner, *The American Journal of International Law*, *Op. cit.*, p. 519.

⁵³ Articles 17 and 53 of the Rome Statute.

⁵⁴ Danner, *The American Journal of International Law*, *Op. cit.*, p. 520.

⁵⁵ Knoop, *Criminal Law Forum*, *Op. cit.*, p. 375.

⁵⁶ Olasolo, H. (2003). "The Prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body? ." *International Criminal Law Review* 3: 87-150. p. 134.

⁵⁷ *Ibid.*, p. 92.

⁵⁸ *Ibid.*, p. 107.

whether there is criminal responsibility under this Statute,’ and must cover incriminating and exonerating circumstances equally.⁵⁹

It is also important to note here that the situation as the subject of investigation is contained in the Rome Statute Article 13 (a) (b), Article 14 (1), Article 15 (5) (6), Article 18 (1), and Article 19 (3), and objectivity is defined by ‘personal, territorial and temporal parameters as opposed to a case composed of specific facts allegedly committed by identified suspects.’⁶⁰ In other words, the Prosecutor is bound to investigate and prosecute the crimes committed by all the different parties within the situation.⁶¹ Moreover, the Prosecutor’s determination as to whether there is a ‘reasonable basis to proceed’ with an investigation must be made in relation to the whole situation referred by the state party, and not only with regard to specific acts which took place within it.⁶² It is important to emphasize here that the nature of the authority to interpret and define the situation is important. In this regard, a senior ICC officer has claimed that there is no authority to interpret what constitutes a ‘situation’. For example,

In the records of the Uganda situation it mentioned that the government referred the situation concerning the Lord’s Resistance Army (LRA) to the Prosecutor as well as the situation in Northern Uganda.⁶³

In relation to the assessment of the differences between the admissibility test of a situation and that of a case, a senior ICC officer suggested that:

‘The admissibility test of a case is easier than the admissibility test of a situation. In terms of a case, the same individual and the same conduct should be considered. However, in the admissibility test at the situation level before the opening of an investigation, it is difficult to determine what the state is doing and what is sufficient to consider whether the state is acting or not. This is complicated and there are no established criteria.’⁶⁴

In relation to the assessment of a situation, he also emphasizes that:

‘The performance of the state in relation to crimes within the jurisdiction of the Court is important, and it is difficult to find out whether any prosecution and investigation has been done in respect of certain crimes.

⁵⁹ The Rome Statute, Article 54 (1)(a)

⁶⁰ Olasolo, *Op. cit.*, p. 58.

⁶¹ *Ibid.*,

⁶² *Ibid.*, p. 99.

⁶³ Interview with senior ICC officer D

⁶⁴ Interview with senior ICC officer B

In doing so, the difficulty is when the state is taking partial action to investigate certain crimes but not others, and when they are prosecuting a group of certain individuals but not others. The point is there should be some standards to do an admissibility test at this stage.’⁶⁵

He suggests three criteria to consider whether the state is active or inactive.

‘In the situation, three main criteria should be considered; 1- those groups that may be involved in the criminality that has taken place; 2- the high level individuals in those groups; and 3- not every high level individual but those who was involved in promoting that criminality.’

‘The next question is whether the State is unwilling or unable to carry out those investigations and prosecutions.’⁶⁶

As discussed earlier in this section, there are a set of considerations in the Rome Statute regarding investigation and prosecution which govern the discretion of the Prosecutor in determining whether or not to proceed with a case.⁶⁷ However, the experience of the *ad hoc* tribunals demonstrated that international prosecutions cannot pursue all crimes within a particular conflict, which is the main challenge faced by the Prosecutor, and this may cause a discriminatory result and inequality in treatment. It is a problematic issue and the Rome Statute is silent about which potential accused should be pursued by the Prosecutor.⁶⁸ Danner has claimed that even the review of the Prosecutor’s decision by the Pre-Trial Chamber will not solve this problem, given that the Chamber can assess ‘only the lawfulness and not the wisdom of the Prosecutor’s decision to investigate.’⁶⁹ When an investigation has been initiated, the Prosecutor will be able to ‘control the way in which an investigation is conducted’⁷⁰ and the investigators are accountable to him or her.⁷¹ Under Article 53 (2) of the Rome Statute, the Prosecutor has discretion not to proceed where ‘there is not a sufficient basis for a prosecution.’⁷² If the Prosecutor decides there is a reasonable basis to proceed with an investigation, based upon Article 18(1) of Rome Statute, he or she must notify all states parties to the Rome Statute and those states that would otherwise exercise jurisdiction

⁶⁵ *Ibid.*,

⁶⁶ *Ibid.*,

⁶⁷ Article 53 (1) of the Rome Statute

⁶⁸ Danner, *The American Journal of International Law*, *Op. cit.*, p. 521.

⁶⁹ *Ibid.*, p. 520.

⁷⁰ Arbour, *Op. cit.*, p. 143.

⁷¹ *Ibid.*, p. 146.

⁷² Article 53 (2) of the Rome Statute

over the crimes.⁷³ Subsequently, if one of these states informs the Court that ‘it is investigating or has investigated its nationals within its jurisdiction, the Prosecutor shall defer to the state’s investigation of those persons.’⁷⁴ However, it is questionable how far the prosecution submissions can be under seal or confidential regarding such complex admissibility procedures.

Regarding the Prosecutor’s discretion over the decision to charge, it is worth mentioning here that Article 16 (4) of the Rome Statute provides that the Prosecutor ‘may amend or withdraw any charges’ before the hearing to confirm charges on which the Prosecutor intends to seek trial.⁷⁵ However, ‘after commencement of the trial, the Prosecutor may, [only] with the permission of the Trial Chamber, withdraw the charges.’⁷⁶

2.2 Prosecutorial discretion in the initiation of an investigation:

Applying the complementarity principle raises several legal and political concerns, notably the difficulty of proving the unwillingness of states to investigate and prosecute. In particular, Article 17 (2) contains the conditions and rules of procedure concerning the Court’s powers. It stipulates, *inter alia*, that the ICC can intervene when national courts: 1- shield the defendant from investigation and prosecution; 2- there is an undue delay in initiating an investigation and prosecution; 3- there exists bias against the defendant. The purpose of these rules is to ‘create an incentive for states, and to encourage them to develop and then apply their national criminal justice system as a way of avoiding the exercise of jurisdiction by the ICC.’⁷⁷

The ICC may exercise its jurisdiction only when the national courts are inactive or are ‘unable’ or ‘unwilling’ to conduct investigations and prosecutions. Under Article 17 of the Rome Statute, the ICC must decide whether the national jurisdiction is willing and able to take up the case.⁷⁸ The Prosecutor is the principal agency responsible for safeguarding the complementarity regime during the ‘triggering and criminal

⁷³ Danner, *The American Journal of International Law*, *Op. cit.*, p. 517.

⁷⁴ Rome Statute, Article 18(2)

⁷⁵ Arbour, *Op. cit.*, p. 154.

⁷⁶ Article 64 (9) of the Rome Statute

⁷⁷ Roach, *Politicizing the International Criminal Court: the Convergence of Politics, Ethics, and Law*, *Op. cit.*, p. 41.

⁷⁸ Boller, T. J. (2003). "The International Criminal Court: Better than Nuremberg?" *Indiana International & Comparative Law Review* **14**(1): 279-314. p. 292.

procedures.’⁷⁹ Triggering procedures within the ICC criminal justice system are necessary for the initiation of any criminal procedure.⁸⁰ Therefore, as Olasolo has observed, the triggering procedure is precisely the mechanism through which the Prosecutor exercises its power to decide whether or not it is going to apply its investigative and prosecutorial powers over the crimes committed in a given situation of crisis.⁸¹ In effect, analysis of national courts investigations and prosecutions are viewed in terms of triggering procedures.⁸²

The Prosecutor on his or her own motion may initiate an investigation with regard to an alleged crime committed within a situation of crisis. By doing so, the Prosecutor opens a criminal procedure which is subject to a case, which is composed of specific facts that allegedly amount to one or more crimes within the jurisdiction of the Court. It is important to note that during the investigation stage the Prosecutor is the only party in charge of the proceedings until the issuance of a warrant of arrest based on Article 58 of the Rome Statute.⁸³ Even after the issuance of a warrant of arrest, the Prosecutor has the key role in the application of the complementarity regime. Under Article 19 (3) of the Rome Statute, the Prosecutor may seek an admissibility ruling. Moreover, Article 18 indicates that the Prosecutor has the power to defer an investigation of a case on the grounds that a domestic jurisdiction is investigating or prosecuting the specific crime.⁸⁴ Furthermore, Article 19 (11) grants the Prosecutor supervisory functions to request information on the proceedings from the state concerned.⁸⁵ The Prosecutor, in determining whether to conduct a preliminary examination or investigation, will have to consider whether guidelines cover the factors in Article 53 (1) (a) to (c) and Article 17, which apply to any state or Security Council referrals. It may be that the most serious challenge facing the Prosecutor is in determining which crimes to select for a preliminary examination and investigation based on referral by the Security Council, pursuant to Article 13 (b), or by a state party, pursuant to Articles 13 (a) and 14.⁸⁶

⁷⁹ Olasolo, H. (2003). “Issues regarding the general powers of the ICC Prosecutor” Contribution to an expert consultation process on general issues relevant to the ICC Office of the Prosecutor , www.icc-cpi.int

⁸⁰ *Ibid.*,

⁸¹ *Ibid.*,

⁸² *Ibid.*,

⁸³ *Ibid.*,

⁸⁴ Article 18 (2) of the Rome Statute

⁸⁵ *Ibid.*, Article 19 (11)

⁸⁶ Hall, C. K. (2003) “Suggestions concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations”, Contribution to an expert consultation process on general issues relevant to the ICC Office of the Prosecutor. www.icc-cpi.int

The determination of criteria in deciding whether to initiate an investigation relies largely on subjective decision-making by the Prosecutor. According to Article 53 (1) of the Rome Statute,⁸⁷ the Prosecutor must make a subjective assumption to define what is 'reasonable' in determining whether the case is admissible under Article 17, and whether or not there are 'substantial reasons' for believing that an investigation would not serve the interests of justice. It should be mentioned here that a relevant circumstance in one situation may not be relevant in another, and it is up to the Prosecutor to make this determination.⁸⁸ In considering the admissibility of the case, the Rome Statute sets out some criteria but does not indicate how to evaluate them.⁸⁹ In determining whether there is a 'reasonable basis to proceed', Article 53 declares that the Prosecutor must consider whether '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,' and whether 'the case is or would be admissible under article 17.'⁹⁰ Article 17 itself allows for considerable prosecutorial discretion. Subparagraphs (2) and (3) of Article 17 provide some criteria in order to determine 'unwillingness' and 'inability',⁹¹ but McDonald and Haveman have claimed that these criteria still leave room for a large degree of prosecutorial discretion. For instance, under Article 17 (2) (b), the determination of 'unjustified delay' and '[bringing] the person concerned to

⁸⁷ Article 53 (1) of the Rome Statute lays down the criteria which the prosecutor *shall* consider in deciding to initiate an investigation: (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.

⁸⁸ McDonald, A. and R. Haveman (2003). "Prosecutorial Discretion - Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC", Expert consultation process on general issues relevant to the ICC Office of the Prosecutor." from www.icc-cpi.int/otp/consultations.php.

⁸⁹ Goldstone, R. J. and N. Fritz (2000). "In the Interests of Justice and Independent Referral: The ICC Prosecutor's Unprecedented Powers." *Leiden Journal of International Law* 13(3): 655-667. p. 662.

⁹⁰ Article 53 (1) (a) (b) of the Rome Statute

⁹¹ Article 17 (2) of the Rome Statute declares that: In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised 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.

Article 17 (3) stipulates that: 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.

justice' is vague. Questions arise as to what constitutes an 'unjustified delay' and to what extent it can be determined by the Prosecutor. Does '[bringing] the person concerned to justice,' mean the indictment or arrest of a suspect, or the commencement of trial? Which standards should apply for this provision? Also, the context of the crime is relevant here. For example, are the standards in armed conflict the same as those in peacetime, when criminal justice systems function fully?⁹²

Determination of the relationship between the unwillingness and the inability of states is the other important issue for the Prosecutor. What might appear as unwillingness may be *de facto* inability.⁹³ Consequently, the role of the Court in determining these criteria based upon the principle of complementarity is significant,⁹⁴ since the ICC has a mechanism for evaluating national judicial systems.⁹⁵ There has been considerable debate as to whether the ICC's role is one of assisting states that are unable or encouraging states that are unwilling to proceed with the prosecution and investigation in a particular case. However, many states 'may wish not to pursue a particular investigation and prosecution because of ... political interests.'⁹⁶ As such, the Court may be used as an instrument in a national political conflict and will become politicised. Therefore, the Prosecutor should implement standards in a consistent way to determine whether states can prosecute at the national level, whether they are therefore unable or unwilling and whether the case should come under the ICC's jurisdiction.⁹⁷

Prof. Bassiouni, in relation to the self-referral of a situation to the ICC Prosecutor for political reasons, observes that:

'There are a range of reasons for a state to refer a situation to the Court, some of which could be part of a non-political category of facts. However, it might be a situation where the government are willing to proceed but because of a lack of control and for political reasons may request the Court to pursue the situation. For instance, in Uganda the government didn't want to risk more problems with the Lord's Army so referred the situation to the ICC Prosecutor.'⁹⁸

⁹² McDonald and Haveman, *Op, cit.*,

⁹³ *Ibid.*,

⁹⁴ *Ibid.*,

⁹⁵ Brown, B. (1998). "Primacy or Complementarity: Reconsidering the Jurisdiction of National Courts and International Criminal Tribunals." Yale Journal of International Law 23(2): 383-436. p. 425.

⁹⁶ *Ibid.*, 424.

⁹⁷ *Ibid.*,

⁹⁸ Interview with Prof. Cherif Bassiouni, 2nd September 2008, The Hague.

Wouters has also suggested that self-referral can endanger the legitimacy of the Court, since it allows for the prosecution of rebel groups only.⁹⁹ For instance, the Ugandan government referred the situation for the purpose of investigation and prosecution of the leadership of the LRA. However, some of the conduct of the Ugandan military could equally be the subject of criminal investigations and proceedings by the Prosecutor.¹⁰⁰ Chapter seven will discuss self-referral issues in detail, in relation to the DRC situation as one of the state referrals to the Prosecutor.

2.3 The exercise of prosecutorial discretion within the ICC structure:

The issue of prosecutorial discretion and when and how it can and should be exercised is one of the deepest and most difficult questions facing the Court.¹⁰¹ It is important to consider the principles according to which the Prosecutor should perform his or her moral obligation in multi-cultural world. In practice, national courts may be in a better position to initiate proceedings; otherwise, the Prosecutor must intervene and prosecute cases based on code of prosecutorial ethics. In this sense, 'the Prosecutor's unique brand of discretion' is a new issue for international criminal justice and the question of prosecutorial discretion at the ICC has been criticized in the early years of its work.¹⁰² A key concern relates to the extent to which the Prosecutor should develop his or her own prosecutorial guidelines and whether or not the Judges should direct the Prosecutor through their judicial interpretation of the Rome Statute.¹⁰³ In fact, the Prosecutor must consider a range of policy and strategy matters in executing his or her ethical duty which will have an impact on the framework of international criminal justice. These include normative requirements and guidelines for admissibility assessment, the selection of cases for preliminary examination or investigation, and the criteria for determining whether states are unwilling or genuinely unable to investigate or prosecute crimes.¹⁰⁴

Given that the prosecution of everyone responsible for international crimes is not possible, selective prosecution is accepted in all legal systems and is consistent with

⁹⁹ Jacobs, D. and N. Arajari (2008). "The International Criminal Court." the Law and Practice of International Courts and Tribunals 7: 115-160. p. 128.

¹⁰⁰ Wouters, J. (2008). "The OTP: Accountability and independence." International Criminal Law Review 8: 273-318. p. 289.

¹⁰¹ Greenawalt, *Op. cit.*, p. 600.

¹⁰² Stahn, *Op. cit.*, p. 185.

¹⁰³ McDonald, A. & Haveman, R. *Op. cit.*,

¹⁰⁴ Hall, *Op. cit.*,

general principles of law.¹⁰⁵ The Prosecutor must also consider the development of guidelines for prosecution and policy with respect to requests by the UN Security Council or the state referral of a situation.¹⁰⁶ In addition, it is important to take into account to what extent the Prosecutor should limit investigations and indictments to situations that fit the standard contexts associated with international criminal prosecution.¹⁰⁷ As mentioned earlier, making decisions over whether to investigate or to prosecute is one of the prosecutorial discretion issues. The timing of indictments is the other relevant discretionary issue. This is because the nature of the ICC allows the Court to issue indictments during an ongoing conflict. However, the question arises as to whether the Prosecutor should investigate and bring charges in situations where the conflict is still on-going. Arguably, an investigation into an ongoing conflict makes the political consequences of that investigation more sensitive. This is particularly pertinent as all of the ICC's ongoing investigations, notably in the Darfur region of the Sudan and the DRC, are taking place in the midst of ongoing conflict. Thus, a question may be raised here as to what effect the prosecutorial process may have on efforts to end violent conflicts and achieve peace.¹⁰⁸ The Rome Statute is silent about the time limit of charging within which the Prosecutor can make a decision to initiate an investigation into an ongoing conflict. This issue may raise another question about the operation of the complementarity regime in terms of the extent to which the Prosecutor can seek indictments at times of conflict, especially when states are highly unlikely to be both willing and able to pursue prosecutions.¹⁰⁹

It should be noted that the political role of the Prosecutor plays an important part in the administration of international criminal justice. Knowledge of the legal framework and the operational dynamics of the military and political structures of the concerned situation are crucial to determining the individual responsibility of the accused and to establish the chains of command. Thus, knowledge for this purpose should not be based only upon secondary sources, particularly when there is a parallel mechanism of decision-making based upon individuals in their personal capacity and their official

¹⁰⁵ Bassiouni, C. M., Ed. (2002). Post-Conflict Justice. International and Comparative Criminal Law Series, Martinus Nijhoff. p. 79.

¹⁰⁶ Hall, *Op, cit.*,

¹⁰⁷ Greenawalt, *Op, cit.*, p. 634.

¹⁰⁸ *Ibid.*, p. 641.

¹⁰⁹ *Ibid.*,

position in the chain of command.¹¹⁰ As has been mentioned already, the issue of who to prosecute is one of the most important considerations in prosecutorial decision-making. The international criminal Prosecutor must also consider how far they should focus on higher level accused and/or low ranking perpetrators (the logic of targeting so-called big fish versus small fish).¹¹¹ Article 1 of the Rome Statute declares that the Court 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.'¹¹² However, selected cases in current situations at the ICC have met this criterion in different ways. For instance, in the DRC situation, the first case selected concerned recruiting child soldiers. In contrast, in the situation of Darfur it was announced that the preference will be for 'big fish' in investigating crimes.¹¹³ Therefore, the question that arises here is why the prosecutor is seeking Al-Bashir's arrest for genocide, the most serious crime with which he can be charged and the most difficult to prove.¹¹⁴

The other key question is whether the Prosecutor should worry about the risks of destabilizing delicate political situations through the publicizing of investigations or the bringing of charges. The Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), Louis Arbour, was faced with this question when she decided to indict Slobodan Milosevic in 1999.¹¹⁵ Although many observers criticized her decision, the ICTY Prosecutor maintained that she had decided independently to indict Milosevic from the fear of granting him amnesty by the North Atlantic Treaty Organization (NATO).¹¹⁶ These criticisms and reactions to the Milosevic indictment indicate the importance of guidelines when the Prosecutor is exercising his or her discretion in controversial cases. Similarly, the ICC Prosecutor encountered this issue in relation to the Darfur situation when the request for the issue of a warrant of arrest against the president of the Sudan, Al-Bashir, was announced in July 2008. The case of

¹¹⁰ Cayley, A. T. (2005). Senior Trial Attorney's Advice on Darfur Case Strategy Internal Memorandum of Law, the Hague, p. 9.

¹¹¹ Takemura, H. (2007). "Big fish and small fish debate- An Examination of the Prosecutorial Discretion." International Criminal Law Review 17: 677-685. p. 678.

¹¹² Article 1 of the Rome Statute

¹¹³ Statement of the Prosecutor of the International Criminal Court, Mr. *Luis Moreno-Ocampo* to the United Nations Security Council Pursuant to UNSCR 1593 (2005) (14 December 2006) 2.

¹¹⁴ Rozenberg, J. (2008). "Why the world's most powerful prosecutor should resign: Part 3." from www.telegraph.co.uk/news/newstopics/lawreports/joshuarozenberg/2700862/Why-the-worlds-most-powerful-prosecutor-should-resign-Part-3.html [accessed on 10th September 2011]

¹¹⁵ Chesterman, S. (2001). "No Justice Without Peace? International Criminal Law and the Decision to Prosecute ". from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117222.

¹¹⁶ Sisk, R. (1999). "A Rush to Indict Slob: Prosecutor Feared U.S. Would Let Him off Hook." Daily News, from www.nydailynews.com/archives/news/1999/05/28/1999-05-28_a_rush_to_indict_slobo_prose.html [accessed on 10th September 2011].

President Al-Bashir of Sudan is distinguishable from other national leaders who have been indicted by international courts such as Charles Taylor and Slobodan Milosevic, 'on the basis that these prosecutions *occurred after* a transition to democracy in the context of a new national arrangement, and thus have little bearing on the Sudanese case.'¹¹⁷ Greenwalt has argued that Prosecutorial authority and its inconsistency with governing principles of case strategy for the prosecution at an early stage of the criminal justice process will challenge the legitimacy of prosecutorial discretion and complicate the work of the ICC.¹¹⁸

The fourth report of the Prosecutor to the United Nations Security Council declared that the Prosecutor 'is required to focus on the most serious incidents and the individuals with the greatest responsibility for those incidents.'¹¹⁹ However, regarding the selection of the first suspect in the DRC situation before the ICC, one of the interviewees observed that:

'Tomas Daylo Lubanga was the only person [for] whom the Prosecutor had sufficient evidence, although he charged only for child soldiers despite the fact that he was in jail because of different crimes.'¹²⁰

According to the normative basis of the complementarity regime of the Court, the Prosecutor should consider law, evidence as well as moral obligations to fulfil his or her ethical and legal duty and not simply to win a case. In the DRC situation, the *Lubanga case* seemed to be relatively simple; however it is entering its final phase after six years of proceedings. The legitimacy and accountability of the Prosecutor has been further criticized by commentators such as Rozenberg, who has claimed that 'the move against Al-Bashir is intended to show that the ICC is willing to pursue difficult cases of high-ranking officials and to regain some of the legitimacy that the Court has lost in Uganda and the Democratic Republic of Congo.'¹²¹

In the Darfur situation, Prof. Bassiouni observed in relation to charging the head of state:

'We cannot presume that a national legal system is going to be considered unwilling, simply because it was the judgement of the

¹¹⁷ Public Document, ICC-02/05, 11 January 2009, Application on behalf of Citizens' Organisations of The Sudan in relation to the Prosecutor's Applications for Arrest Warrants of 14 July 2008 and 20 November 2008. para.12.

¹¹⁸ Greenwalt, *Op, cit.*, p. 662.

¹¹⁹ The Fourth Report of the Prosecutor of the ICC to the United Nations Security Council pursuant to the United Nations Security Council Resolution 1593 (14 December 2006)

¹²⁰ Interview with Senior ICC officer A.

¹²¹ Rozenberg, *Op, cit.*,

Prosecutor to decide to indict [the] head of state. I think this was a big jump.’¹²²

Cayley, in relation to the prosecution of crimes committed in the Darfur region in the Sudan, has observed that the governing principles of the case strategy for this situation should be set ‘to target those most responsible for the crimes, to concentrate the investigation on senior military and political figures and then local level, to concentrate the investigation on a very limited number of criminal episodes, to cover all facts and evidence for the purpose of the establishment of the truth and to investigate incriminating and exonerating circumstances equally.’¹²³ In the Pre-Trial phase, the Prosecutor must apply a consistent set of criteria to every case. Moreover, the Prosecutor will have to decide how many charges to bring and for what kinds of crime, and the reasons behind those choices. The decision as to whether or not to have a formal policy in this respect is an important one. This significantly affects the complexity, length, and character of the individual cases heard by the Court.¹²⁴

It is therefore of critical importance that the Prosecutor should give long and careful thought to the issue of prosecutorial discretion and how it should be exercised, especially in the initiation of an investigation.¹²⁵ Precise understanding of the Prosecutor’s discretion and its limits requires a review of the procedure by which a case makes its way through the Court.¹²⁶ As such, internal prosecutorial policy can moderate the risk of politicized prosecution.¹²⁷

3. The prosecutorial decision-making process in relation to the complementarity regime

With regard to a challenge to a state’s assertion of inadmissibility, the prosecutorial decision-making process carries political implications in prosecution policy and practice. This section explores the important character of the prosecutor in the process of justice and the extent to which a prosecution policy and pattern operate in the decision-making process. Although the Rome Statute empowers the Prosecutor to prosecute international crimes, it does not provide sufficient guidance to enable him or

¹²² Interview with Prof. Cherif Bassiouni, 2nd September 2008, The Hague.

¹²³ Cayley, *Op, cit.*,

¹²⁴ Danner, *the American Journal of International Law*, *Op, cit.*, p. 537.

¹²⁵ McDonald, A. and R. Haveman, *Op, cit.*,

¹²⁶ Danner, *Op, cit.*, *the American Journal of International Law*, p. 516.

¹²⁷ Greenwalt, *Op, cit*, p. 588.

her to select situations and cases. In addition, Roach argues that the use of pragmatic ethics in the ICC shows how experience and intelligence play an important role in governing the consequences of its actions and its case-by-case selections.¹²⁸

Prof. Bassiouni, in respect of the application of the principle of complementarity, has maintained that:

‘There is no inter-active process between the Prosecutor and national legal systems and national prosecutions to show the movement in terms of inter-relationship and cooperation. The Prosecutor should proceed based on facts.’¹²⁹

In addition, as a senior ICC officer has highlighted, there are different perspectives about the complementarity principle from the viewpoints of the Chambers and the Office of the Prosecutor (OTP).

‘The complementarity principle which is being applied in the Chambers is different from the OTP perspective. OTP have their own perspective about unwillingness or inability criteria in assessing the admissibility of a case. There has been nothing developed in the ICC in terms of unwillingness or inability criteria. However, till now there was no challenge in the sense of bringing the problem about unwillingness and inability to the fore.’¹³⁰

This is explored in further detail in case studies (Chapters 5 and 7).

3.1 Overview of prosecutorial guidelines at the ICC:

The actions of the Prosecutor will inevitably be guided by some code of prosecutorial ethics, even if he or she does not acknowledge them. However, articulating public prosecutorial guidelines will demonstrate that his or her decisions will be taken in a rational and consistent way.¹³¹ Guidelines will set out clear standards and indicate clarifications in particular during the preliminary examination phase, and are important for protecting impartiality and maintaining apolitical prosecutions. Such guidelines can provide factors to be taken into account by the Prosecutor when making his or her discretionary decision.¹³² Guidelines in the context of prosecutorial discretion

¹²⁸ Roach, *Op, cit.*, Politicizing the International Criminal Court: the Convergence of Politics, Ethics, and Law p.10.

¹²⁹ *Ibid.*, p. 101.

¹³⁰ Interview with senior ICC officer C, 10 September 2008, the ICC, The Hague.

¹³¹ Sklansky, D. A. (1999). "Starr, Singleton, and the Prosecutor's Role." The Fordham Urban Law Journal **26**: 509-538. p. 532.

¹³² Danner, he American Journal of International Law , *Op, cit.*, p. 541.

are quite common in national jurisdictions in which the prosecutor has wide discretionary power.¹³³ As Greenwalt has claimed, any framework of prosecutorial guidelines at the ICC faces a tension between the policy priorities of the ICC and those societies which are affected by international crimes.¹³⁴ Given the fact that there is considerable cultural diversity among states and conception of justice, the Prosecutor should be sensitive to cultural and religious differences, and unique needs and circumstances of each society in order to perform his or her function. For instance, there is a prevailing attitude towards the ICC prosecutions among less-developed countries which view the Court as an agent and symptoms of imperialism.¹³⁵

Therefore, prosecutorial guidelines will assist the Prosecutor in establishing the legitimacy and transparency of his or her policies and discretionary decision-making.¹³⁶ In fact, the purpose of the Prosecutorial guidelines - including provisions concerning investigation and charging decisions - is to promote fair and consistent decision-making and to make the prosecutorial process more understandable.¹³⁷ It would also help the Prosecutor negotiate the tension between accountability and independence.¹³⁸ In this sense, it is important whether the content of prosecutorial policy could solve the legitimacy challenges posed by the substantive problems of prosecutorial discretion, and to what extent appropriate guidelines could narrow the Prosecutor's range of options.¹³⁹ For instance, the Secretariats of the International Association of Prosecutors (IAP) and the Coalition for the International Criminal Court (CICC) proposed a Draft Code of Professional Conduct for the Office of the Prosecutors of the International Criminal Court in 2002.¹⁴⁰ This draft code was prepared as a 'potential tool in shaping the Office of the Prosecutor's approach to professional ethics.'¹⁴¹ The draft code of conduct for the Prosecutor mentioned that the Prosecutor 'should be, and appear to be, consistent, objective, impartial, and independent.' Although the draft code of conduct does not

¹³³ Greenwalt, *op. cit.*, p. 656.

¹³⁴ *Ibid.*, p. 658.

¹³⁵ Debating International Justice in Africa, www.fljs.org/uploads/documents/Justice_in_Africa.pdf [accessed on 10th September 2011]

¹³⁶ Danner, *The American Journal of International Law*, *Op. cit.*, p. 552.

¹³⁷ *Ibid.*, p. 541.

¹³⁸ *Ibid.*,

¹³⁹ Hall, C. K. (2004). "The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight against Impunity." *Leiden Journal of International Law* 17(1): 121-139. p. 127.

¹⁴⁰ www.iap.nl.com

¹⁴¹ www.amicc.org/icc_activities.html [accessed on 10th September 2011]

address the guidelines regarding prosecutorial discretion, it does emphasise the importance of ethical prosecutorial behaviour.¹⁴²

The Rome Statute itself does not provide prosecutorial goals in any substantial detail, although its Preamble undertook to put an end to impunity for the perpetrators of ‘serious crimes of concern to the international community as a whole.’¹⁴³ The prosecutorial guidelines can be constituted from a number of different sources, including interrelated guidelines and policies involving the principle of complementarity on the basis both of UN Security Council referral and state referral. For instance, they can be derived from guidelines for selecting cases for preliminary examination or investigation, including cases where it is necessary to determine whether states are unwilling or genuinely unable to investigate or prosecute crimes.¹⁴⁴

Clearly, the perceptions of the Prosecutor’s work and how his or her mandate is executed are very important, particularly in the early phase of the Court’s work. In order to increase transparency and enhance the credibility of the Court as a legal institution, it is necessary to identify the guiding principles underlying the exercise of prosecutorial discretion and to identify criteria which can be applied in each instance in order to determine whether the conditions of Article 53(1) of the Rome Statute have been fulfilled.¹⁴⁵ However, this Article does not provide specific guidance with respect to the way in which the Prosecutor should approach this issue.¹⁴⁶ Article 17(2) specifies two conditions under which the ICC may intervene in the affairs of national judiciary, but determining the unwillingness of states is difficult. It requires subjective judgements of state intent that may lead to conflicting interpretations of the validity of this intent. For example, even if the ICC adequately determines that the national court’s slow investigative proceedings constitute an unnecessary delay in the process, it is possible that national courts or state leaders will contest this interpretation, especially if it upsets their sense of national pride. Thus, the application of the complementarity principle will likely turn on the national government’s inability to investigate or prosecute, since the determination of inability based on the condition of partial or complete state collapse (Article 17 (3)) presents fewer political obstacles.¹⁴⁷

¹⁴² International Association of Prosecutors, the Code of Professional Conduct for Prosecutors of the International Criminal Court, Art. 1(9), www.iap.nl.com

¹⁴³ Preamble of the Rome Statute, paras 4 -5.

¹⁴⁴ Hall, *Op. cit.*, *Leiden Journal of International Law*, p. 126.

¹⁴⁵ McDonald & Haveman, *Op. cit.*,

¹⁴⁶ Danner, *The American Journal of International Law*, *Op. cit.*, p. 521.

¹⁴⁷ Roach, *Op. cit.*, p. 45.

It is also important that the Prosecutor explains any additional factors which are considered in prosecutorial decision-making regarding the inadmissibility of the case. Such a guideline will improve the consistency and coherency of decision-making as well as improving the possible amendment of the guidelines.¹⁴⁸ In fact, the Prosecutor must apply a consistent and publicly articulated standard when deciding which cases to investigate and to prosecute. Publication of the prosecutorial guidelines will ensure that public expectations are realistic. Furthermore, guidelines must take into account a number of other factors concerning the prospects for obtaining sufficient evidence to prove that an individual has committed a crime.¹⁴⁹ The consistency of the prosecutorial guidelines has also been addressed by some NGOs such as FIDH, who propose that workable guidelines in determining which crimes should be subject to preliminary examination and which cases to prosecute, and the consistency of the application of these guidelines, should be considered in the prosecutor's decision-making process.¹⁵⁰

Therefore, since the Rome Statute entered into force on July 1, 2002, the OTP has made efforts to provide a draft policy paper and draft regulations on issues relevant to its policy and initial operation. In this regard, the first public hearing was held in 2003 to address some important issues in this draft such as prosecutorial independence and accountability, and the efficiency of investigations.¹⁵¹ In relation to the scope of the complementarity principle, it was announced that '[n]o clear consensus has yet emerged on the appropriate contours for the complementarity practice of the Office.'¹⁵² It was also observed that there was a need for more detailed standards of impartiality, integrity and effectiveness in the operation of the prosecution based upon the Rome Statute. In the second public hearing of the OTP, which was held in September 2006, the three principles of the prosecutorial strategy were addressed, including positive complementarity, focused investigations and prosecutions, and maximizing the impact.¹⁵³ The positive complementarity approach adopted by the OTP means that it 'encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.'¹⁵⁴ The

¹⁴⁸ Danner, *The American Journal of International Law*, *Op. cit.*, p. 546.

¹⁴⁹ ICTY, Committee established to review the NATO Bombing Campaign, para5.

¹⁵⁰ FIDH Statement, *Op. cit.*,

¹⁵¹ Summary of recommendations received during the first public hearing of the Office of the Prosecutor, convened from 17-18 June 2003 at The Hague. Comments and conclusions of the Office of the Prosecutor. www.icc-cpi.int/library/organs/otp/ph/ph1_conclusions.pdf

¹⁵² *Ibid.*,

¹⁵³ www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor

¹⁵⁴ Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006, www.icc-cpi.int

second principle, that of focused investigations and prosecutions, reflects the policy of the OTP of focusing on the most serious crimes and those responsible for these crimes.¹⁵⁵ The Office also adopted a ‘sequence’ approach, whereby cases inside the situation are selected according to their gravity.¹⁵⁶

However, the OTP policy paper indicates that ‘in some cases the focus of an investigation by the Prosecutor may go wider than high-ranking officers, if investigation of certain type of crimes or those officers lower down the chain of command is necessary for the whole case.’¹⁵⁷ Bassiouni, with regard to government involvement in crimes committed and how responsibility can be proven up the chain command, has stated that:

‘The logic of every proceeding should be considered. For instance, considering the function of the local military and local chief of the police would lead the Prosecutor to build the chain of command responsibility’.¹⁵⁸

Although the Prosecutor announced that they will focus on the most serious incidents and individuals, the assessment of the seriousness of the crimes is critical for impartial prosecutorial decision-making. Otherwise, this could ‘fuel the politicization of the ICC’¹⁵⁹ since ‘the ICC lacks sufficient political safeguards to protect against the abuse of prosecutorial authority’.¹⁶⁰ This prosecutorial strategy has been considered by different entities such as states parties, the organ of the Court, international organizations, NGOs and academia. In this regard, the FIDH, one of the NGOs, in its statement on the prosecutorial strategy, declared that ‘there is a fundamental difference between the strategy that is announced and the implementation of the outlined principles.’¹⁶¹ Therefore, the monitoring of certain situations by the Prosecutor may remain unknown. It is argued that even in those cases where it has been made public that a particular situation is under preliminary analysis, the Prosecutor should adopt a much more proactive role.¹⁶² For instance, the situation of Colombia was made public

¹⁵⁵ *Ibid.*,

¹⁵⁶ *Ibid.*,

¹⁵⁷ Paper on some policy issues before the Office of the Prosecutor, www.icc-cpi.int

¹⁵⁸ Interview with Prof. Cherif Bassiouni, 2nd September 2008, The Hague.

¹⁵⁹ Damaška, M. (2001). "The Shadow Side of Command Responsibility." *American Journal of Comparative Law* 49: 455-496. See also Danner, *Op, cit.*, p. 543.

¹⁶⁰ Greenwalt, *Op, cit.*, p. 587.

¹⁶¹ International Federation of Human Rights (FIDH) Statement on the Prosecutorial Strategy of the OTP, 26 September 2006 available at: www.fidh.org/FIDH-Analysis-of-the-Strategy-of [accessed on 10th September 2011]

¹⁶² FIDH Statement, *Op, cit.*,

by the Prosecutor in March 2005. However, the communication between the Court and Colombia ‘has not been followed up publicly, which has minimized any preventive impact of the ICC.’¹⁶³ With regard to focused investigations and prosecutions, it has been argued that this principle is not representative of the range of criminality. For instance, in the case of *Thomas Lubanga Dyilo*, the recruitment of child soldiers to ‘participate actively in the hostilities are crimes of a very serious nature. However, the charges for which Thomas Lubanga will be tried are neither representative of the crimes committed by the *Union des Patriotes Congolais*, which he has been leading, nor reflective of the victimisation suffered by the communities.’¹⁶⁴

3.2 The lack of consistency and transparency of Prosecutorial decisions

Both the consistency of procedure and the adherence to due process standards are crucial in the fact-finding process.¹⁶⁵ There are many possible criteria that the Prosecutor may use to guide him or her in deciding: (1) whether to initiate an investigation and (2) whether to actually prosecute. The complementarity criterion of inability and unwillingness are mentioned in the ICC Statute.¹⁶⁶ The principle of complementarity seems to provide some answers to the question of which cases to investigate and prosecute where national jurisdictions are unable or unwilling to do so. However, many other factors may be considered when deciding on whether or not an investigation should be started.¹⁶⁷ The primary role of the Prosecutor in the early stages of proceedings is to make a decision as to whether or not the ICC gets involved in different situations. Although in the early stages of proceedings the Prosecutor does not have the power to investigate, he or she can conduct a fact-finding inquiry. As a senior ICC officer asserted:

‘In preliminary examination, the Prosecutor does not exercise any investigation power. The Prosecution conducts a fact-finding inquiry to assess the situation’.¹⁶⁸

The Prosecutor is entrusted with the first screening of investigations at the national level.¹⁶⁹ As such, the criteria under which the Prosecutor must select the situations and

¹⁶³ *Ibid.*,

¹⁶⁴ *Ibid.*,

¹⁶⁵ Fionda, *Op. cit.*, p. 175.

¹⁶⁶ McDonald and Haveman, *Op. cit.*,

¹⁶⁷ *Ibid.*,

¹⁶⁸ Interview with senior ICC officer A, October 2008, the ICC, The Hague.

cases for investigation and prosecution are crucial. The selection criteria were explained by the Prosecution in a Draft Paper in 2006.¹⁷⁰ It was declared that the selection process in the practice of the ICC Prosecution is based upon four guiding principles, including independence, impartiality, objectivity and non-discrimination.¹⁷¹ Among these guiding principles, it seems that the duties of independence and objectivity have an important impact on the selection process. These guiding principles are also highlighted in the Draft Policy Paper on Preliminary Examination of 4th October 2010, which explained the procedures applied by the Prosecution in the conduct of its preliminary examination.¹⁷² Although the manner in which the Prosecution selects cases was not elaborated in this draft policy paper, it declared pursuant to Article 14 (1) of the Rome Statute that ‘the Office of the Prosecutor shall act independently of instructions from any external source.’¹⁷³ It should be noted here that the selection process is independent of the cooperation-seeking process, and is conducted exclusively on the available information and evidence and in accordance with the Statute criteria and the policies of the Prosecutor.¹⁷⁴ However, Rozenberg has claimed that in the selection process there are instructions from the NGOs, in some cases even demanding the publicising of information in relation to the ICC proceedings. There are also prosecutorial problems in respect of NGOs; for instance, the trouble of the ICC in the case of *Lubanga*.¹⁷⁵

The principle of objectivity, which flows from Article 54 (1) of the Rome Statute, means that the Prosecutor will consider ‘incriminating and exonerating circumstances equally, in order to establish the truth.’¹⁷⁶ This has to be applied during the preliminary examination phase of situation selection as well as the investigation stage.¹⁷⁷ It must be stressed here that at the preliminary examination stage, information may be obtained from external sources rather than the Prosecutor’s own evidence-gathering powers and

¹⁶⁹ Olasolo, *International Criminal Law Review*, *Op, cit.*, p. 90.

¹⁷⁰ OTP, Draft Paper, Criteria for selection of situations and cases (2006). which the OTP distributed in July 2006 in the course of a meeting with NGO representatives. www.icc-cpi.int

¹⁷¹ *Ibid.*,

¹⁷² www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies

¹⁷³ Article 42 (1) (2) of the Rome Statute

¹⁷⁴ Stahn, *Op, cit.*, pp. 209-217. The word ‘information’ refers to selection processes for the opening of an investigation under Article 53(1) of the Rome Statute. The word ‘evidence’ is used to refer to cases addressed under Article 53(2)

¹⁷⁵ Rozenberg, J. (2008). "Courting Controversy." www.lawgazette.co.uk/opinion/columnists/courting-controversy [accessed on 10th September 2011].

¹⁷⁶ OTP, Draft Paper, Criteria for selection of situations and cases (2006). which the OTP distributed in July 2006 in the course of a meeting with NGO representatives.

¹⁷⁷ *Ibid.*,

will be assessed in terms of its relevance, credibility, and reliability.¹⁷⁸ Moreover, the selection of cases is ‘an evidence-driven process, also governed by the principle of objectivity.’¹⁷⁹ Gathering sufficient information and evaluating evidence is the other important aspect of prosecutorial decision-making policy. In some cases, sensitive information may be provided to the Prosecutor by different entities. Under those circumstances, acting in secrecy would have an impact on the legitimacy of the ICC.¹⁸⁰ Therefore, the Prosecutor should not rely on this rationale and refuse to circulate prosecutorial guidelines altogether.¹⁸¹ It is argued that this has already caused some troubles, some ‘legal battles’, for the ICC, in particular in the first case arising from the DRC situation.¹⁸² One of the problems in the case of *Thomas Lubanga Dyilo* is related to the wide interpretation of Article 54 (3) (e) of the Statute by the Prosecutor regarding gathering considerable information on a confidential basis. Although the Prosecutor has the power to decide whether to disclose these documents and information, in this case the prosecution approach and the existence of confidentiality agreements with information providers led to complex problems. A single judge in 2006 indicated that this approach would be problematic; the Prosecution reconsidered its approach in May 2008.¹⁸³

3.3 Accountability mechanisms to challenge prosecutorial discretion

As discussed earlier, the Prosecutor preserves a significant amount of discretion in his or her investigatory, screening, charging, and admissibility determinations. Therefore, the importance of the prosecutor’s decision and their application of procedural mechanisms raise some important issues such as prosecutorial accountability for the use of discretion, how the ICC should assert its judicial authority, especially in relation to non-states parties, and how this will affect the struggle for political legitimacy.¹⁸⁴

¹⁷⁸ Draft Policy Paper on Preliminary Examination, 4th October 2010, para.42 www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/

¹⁷⁹ Stahn, *Op.cit.*, p. 215.

¹⁸⁰ Danner, *The American Journal of International Law*, *Op. cit.*, p. 550.

¹⁸¹ Barnett, M. N. and M. Finnemore (1999). "The Politics, Power, and Pathologies of International Organizations." *International Organization* 53(4): 699-732. p. 707.

¹⁸² Ciampi, A. (2008). "The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute." *Journal of International Criminal Justice* 6: 885-897. p. 892.

¹⁸³ Case *The Prosecutor v. Thomas Lubanga Dyilo*, Public document, transcripts ICC-01/04-01/06-T-98-ENG ET WT 18-11-2008

¹⁸⁴ Roach, *Op. cit.*, p. 10.

The notion of accountability includes two functions: answerability and enforcement. There are different kinds of accountability to which the Prosecutor is subject in the context of international institutions. The accountability mechanisms can be formal or informal; ranging from hierarchical budgetary constraints, to internal office policies. Before a domestic judge, different actors such as defendants or victims can challenge prosecutorial discretion.¹⁸⁵ By contrast, international institutions are not generally accountable to any particular state. In many cases, member states have been unable to change the decision taken by international institutions.¹⁸⁶ The Rome Statute grants the Prosecutor independence from state control in the identification and investigation of alleged perpetrators of international crimes. As such, based upon the ICC's institutional structure, the Prosecutor may pose a danger to world order because of inadequate checks on his or her discretion.¹⁸⁷ The most important check on prosecutorial authority would be in relation to *proprio motu* investigation, which needs the authorization of the Pre-Trial Chamber.¹⁸⁸ However, there are no adequate checks on the Prosecutor's discretion to determine how to conduct investigations and prosecutions in the situations which are referred by the Security Council or by the state.¹⁸⁹

In the context of the ICC, formal accountability¹⁹⁰ is exercised by the ICC judiciary and by the state representatives in the Assembly of States Parties (ASP). In other words, accountability is not available in the sense of electoral accountability or in the sense of a mechanism for determining formal legal responsibility or liability.¹⁹¹ The election of the Prosecutor is one of the important decisions made by the ASP. When the Rome Statute came into force on July 1, 2002, the ASP decided to elect the Prosecutor by consensus in February 2003. The nomination period was from September 9 to November 30, 2002.¹⁹² A number of states considered nominating a candidate for this post but by 30 November 2002 a candidate had still not been agreed.¹⁹³ Accordingly, the ASP announced the extension of the deadline for the nomination of the Prosecutor, based

¹⁸⁵ Stahn, *Op. cit.*, p. 248.

¹⁸⁶ Schedler, A., L. Diamond, et al. (1999). The Self-Restraining State: Power and Accountability in New Democracies Lynne Rienner. p. 14.

¹⁸⁷ Danner, The American Journal of International Law, *Op. cit.*, p. 511.

¹⁸⁸ Wouters, *Op. cit.*, p. 283.

¹⁸⁹ Danner, *Op. cit.*, p. 522.

¹⁹⁰ Reinisch, A. (2001). "Securing the Accountability of International Organizations." Global Governance 7(2): 131- 149. p. 140.

¹⁹¹ Danner, *Op. cit.*, p. 525.

¹⁹² untreaty.un.org/cod/icc/elections/prosecutor/prosecutor_nominations.htm [accessed on 10th September 2011]

¹⁹³ fra.controlarms.org/library/Index/ENGIOR400012003?open&of=ENG-2AM [accessed on 10th September 2011]

upon its Resolution ICC-ASP/1/Res.2 on the procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutor. However, no nominations for the Prosecutor were made for the attention of the ASP.¹⁹⁴ Therefore, the President of the Assembly encouraged states to continue ‘to consult informally first on suitable candidate(s) in order to ensure that any nominations for this post command the support of as many interested states as possible.’¹⁹⁵ Subsequently, on March 24, 2003, the President of the Assembly announced that the States Parties to the Rome Statute ‘agreed informally, and on the basis of consensus, to elect at the forthcoming resumed session of the Assembly of States Parties, Mr. Luis Moreno Ocampo, of Argentina, as prosecutor of the International Criminal Court.’ He was officially selected on April 21, 2003 in New York.¹⁹⁶ This informal process was not conducted by the more transparent method as with the ICC’s judiciary. Thus, the lack of transparency of the method by which the Prosecutor was appointed has had a deleterious effect on the independent regime of the prosecution.¹⁹⁷ Therefore, the Prosecutor should make every effort to facilitate a transparent decision-making process in the future.¹⁹⁸

The role of the ASP in assessing the scope of prosecutorial discretion and carrying out judicial review of discretionary prosecutorial decision-making - as formal accountability mechanisms - is an important aspect of the accountability of the Prosecutor’s actions.¹⁹⁹ It was supposed that the ASP would act as a strong check on the Prosecutor.²⁰⁰ However, Danner has claimed that the ASP is not a sufficient mechanism of accountability since the jurisdiction of the Court extends to nationals of non-states parties of the Rome Statute and they do not have a representative in the ASP.²⁰¹ They may only send observers to the ASP.²⁰²

The assertion of the ICC’s jurisdiction over nationals of non-states parties, and the prosecutor’s determination of what situation and which accused, ensure the political sensitivity of the jurisdiction of the Court. An important question may arise as to whether the judicial review should apply at every level of prosecutorial decision-

¹⁹⁴ untreaty.un.org/cod/icc/elections/prosecutor/prosecutor_nominations.htm [accessed on 10th September 2011]

¹⁹⁵ fra.controlarms.org/library/Index/ENGIOR400012003?open&of=ENG-2AM [accessed on 10th September 2011]

¹⁹⁶ www.icc-cpi.int/Menus/ASP/Press+Releases/Press+Releases+2003 [accessed on 10th September 2011]

¹⁹⁷ Danner, *Op. cit.*, *Stanford Law Review*, p. 1660.

¹⁹⁸ *Ibid.*,

¹⁹⁹ *Ibid.*,

²⁰⁰ Danner, *The American Journal of International Law*, *Op. cit.*, p. 524.

²⁰¹ *Ibid.*,

²⁰² Article 112 of the Rome Statute.

making.²⁰³ As mentioned above, formal accountability, including judicial and electoral review by the ASP, is specifically described in the Rome Statute. Apart from that, there is only an informal or pragmatic accountability for the Prosecutor's discretionary decisions.²⁰⁴ Based upon this kind of accountability, the Prosecutor might be accountable to other entities such as NGOs and non-states parties regarding the effectiveness of his or her work. However, 'there is no one controlling the on/off switch to the Office of the Prosecutor.'²⁰⁵ In terms of pragmatic accountability, the complementarity regime contains admissibility provisions and may provide state control over the Prosecutor's decision to pursue particular investigations and prosecutions. However, some states and NGOs might support the Prosecutor in pursuing specific cases. The formal and pragmatic accountability mechanisms of the Rome Statute are not sufficient to guarantee the quality of the Prosecutor's decision-making. The formal accountability mechanisms - provided by the ASP and the judiciary - will not necessarily cause fewer misjudgements. The regime of pragmatic accountability, while more sensitive to individual decisions, is 'dependent on whether or not a state or an NGO that wishes to protest against a prosecutorial decision has some leverage to use against the Prosecutor at that time'.²⁰⁶

In this context, a consideration of the procedural limitations on the ICC Prosecutor is important to understand how the ICC deals with the prospects of an abusive Prosecutor or an imbalance of power that might affect its fairness and legitimacy.²⁰⁷ The Court faces difficult and critical challenges in establishing its credibility. It is vitally important for the Court to provide the balance between the necessary requirements of fairness and the high expectations of victims and the international community²⁰⁸ but the ICC Prosecutor's decisions are only subject to limited control by the Pre-Trial and Appeal Chambers of the Court.²⁰⁹ The recent stay of proceedings in the *Lubanga* case is an illustration of this challenge and the difficulty in finding a balance. On the whole, it is arguable that one noticeable feature in the working of the ICC until now is 'the ongoing struggle between the Prosecutor and the pre-trial chambers for control over

²⁰³ Danner, *The American Journal of International Law*, *Op, cit.*, p. 525.

²⁰⁴ *Ibid.*,

²⁰⁵ *Ibid.*, p. 534.

²⁰⁶ *Ibid.*, p. 536.

²⁰⁷ Roach, *Op, cit.*, p. 54.

²⁰⁸ Jacobs & Arajari, *Op, cit.*, p. 130.

²⁰⁹ Olasolo, Issues regarding the general powers of the ICC Prosecutor, *Op, cit.*,

the pre-trial phase.’²¹⁰ The Pre-Trial Chamber could also be responsible for assessing the information provided by non-state actors. Given the influential role played by NGOs in the ICTY, the NGOs provide a substantial amount of information or eyewitness testimony to the Office of the Prosecutor. But much of this evidence may not meet the strict evidential requirements of the ICC.²¹¹ For instance, the prosecutor’s position in the *Lubanga case*, according to the Court, amounted to ‘a wholesale and serious abuse’ of an exception that allows prosecutors to receive evidence which is not in itself admissible, but which could lead in turn to usable evidence.²¹²

3.4 The scope of judicial supervision of prosecutorial investigation in the respective national systems

The Prosecution is an independent organ of the Court, where the pressures of law and politics come together.²¹³ This independent body of the Court can determine how to conduct investigations and how to present the case before the Court in the different stages of criminal proceedings.²¹⁴ The Prosecutor is also independent from state control, although under the principle of complementarity the Prosecutor does not have primacy over national authorities.²¹⁵ Therefore, the relationship between the Prosecutor and states tends to be complex. There seems to be a tension which arises from the exercise by the Prosecutor of his quasi-judicial role to pursue crimes within the jurisdiction of the Court and to decide high-profile cases.²¹⁶

Prof. Bassiouni believes that:

‘In the course of the process of interaction between national jurisdictions and the Court, there might be an excellent cooperation with national courts, but then they might decide not to cooperate. In the case of the Darfur situation, first they said that we are invoking the complementarity principle. Then, they declared that we are not going further in respect of concrete cases. Thus, the Prosecutor can say that the government is unwilling to proceed and the case is admissible. In effect, the complementarity principle on the process becomes the question of political opportunity to decide what the national authorities

²¹⁰ *Ibid.*,

²¹¹ Roach, *Op, cit.*, p. 53

²¹² Rozenberg, J. (2008). "Courting Controversy." From www.lawgazette.co.uk/opinion/columnists/courting-controversy [accessed on 10th September 2011]

²¹³ McDoland and Haveman, *Op, cit.*,

²¹⁴ Wouters, *Op, cit.*, p. 280.

²¹⁵ Danner, *The American Journal of International Law, Op, cit.*, p. 518.

²¹⁶ Goethals, J., C. Fijnaut, et al. (2000). "Preface." *European Journal of Crime, Criminal Law & Criminal Justice* 8(3): 149-153. p. 151.

want to do. For instance, if they wanted to consider the situation, why did they start to prosecute Kushayb and then release him?’²¹⁷

In national jurisdictions, the role of the prosecutor very often defines the balance between the executive and the judicial powers of the state, and the office is designed to be politically independent of government.²¹⁸ Therefore, the question of prosecutorial independence is extremely sensitive, particularly in cases against powerful individuals.²¹⁹ It is crucial for the Prosecutor to provide a balance between the demands for prosecutorial independence and the legitimacy challenge posed by the substantive difficulties of prosecutorial discretion.²²⁰ The tension between independence and accountability will be much more critical at the international level.

However, the questions of how widespread the phenomenon of political prosecution is and what the remedy is if an intolerable conflict of interest or other deviation from lawful prosecutorial behaviour is uncovered, remain unsolved.²²¹ Morals and normative considerations shape the decisions and judgements that define the application of law, but such considerations also incorporate the influence of NGOs, social movements, and states.²²² Judicial power by extension refers to the capacity to administer and to enforce the rules of procedure and norms of the Rome Statute. The ICC’s judicial power is neither dominant nor strict. Rather, it is flexible insofar as it lacks a centralised enforcement mechanism and it is dependent upon the state’s cooperation. ‘With the increasing importance of NGOs, it becomes all the more important to consider the ICC’s political legitimacy, or how the ICC will justify and rationalise its power in terms of its ability to promote and maintain international peace and security, whether through deterrence or action aimed at stopping the violence caused by the targeted perpetrator.’²²³ Indeed, the political legitimacy of the ICC requires various strategies to address the political overtones of the exercise of the Prosecutor’s discretionary power consistent with its legal standards and rules of fairness.²²⁴ As such, the legal principles and political issues surrounding the application

²¹⁷ Interview with Prof. Bassiouni, 2nd September 2008, The Hague.

²¹⁸ Danner, *Op. cit.*,

²¹⁹ *Ibid.*, p. 550.

²²⁰ Greenawalt, *Op. cit.*,

²²¹ Dasgupta, R. (2008). "Would al-Bashir Get a Fair Trial? Lessons from Guantánamo for the ICC." from www.cslls.ox.ac.uk/documents/Dasgupt.pdf [accessed on 10th September 2011].

²²² Roach, *the International Criminal Court: the Convergence of Politics, Ethics, and Law*, *Op. cit.*, p. 76.

²²³ *Ibid.*, p. 3.

²²⁴ *Ibid.*, p. 4.

of the complementarity principle and the ICC's rules of procedure²²⁵ must be considered. Danner has argued that the prosecutorial role at the ICC may have its own political perspective. Especially in an on-going conflict, it would be under external political pressure to bring perpetrators to justice, particularly in high-profile cases.²²⁶ Clearly, the ICC prosecution of a head of state has political consequences, and the consideration of such political consequences plays a role in the prosecutorial decision-making process.²²⁷ For instance, concerning the Prosecutor's application for the issuance of a warrant of arrest for President Al-Bashir of Sudan, a number of commentators have pointed out that the prosecution of a state's leadership is always a political act, and have suggested that there should be some measures to ensure the independence of the Prosecutor from unjustified political influence. In addition, it is important to focus on the political conduct of the prosecutor as an individual.²²⁸ As has been mentioned earlier, the Prosecutor enjoys broad discretionary powers in his or her investigatory, charging, and admissibility determinations.²²⁹ Therefore, the framework of prosecutorial independence, and in particular the mandatory complementary difference with national proceedings, will impose difficult policy choices on independent prosecutors.²³⁰ In addition, the enforcement of prosecutorial guidelines and the role of judicial review is an important issue in the implementation of prosecution policy.²³¹

The Prosecutor's role has a considerable impact on the credibility and legitimacy of the ICC as a legal institution in general. Therefore, the exercise of prosecutorial discretion should be subject to the judicial review of the Judges of the ICC.²³² In fact, the judicial supervision of prosecutorial investigation in respective national systems is relevant to an examination of the independence of the Prosecutor.²³³ Although the UN has provided guidelines for prosecutors, these are focussed on state rather than international tribunals. As a result, the judicial branch of the ICC, in particular the Pre-

²²⁵ *Ibid.*, p. 10.

²²⁶ Danner, *Op. cit.*,

²²⁷ Harrison, T. (2008, 21 July 2008). "What Does it Mean for the Prosecutor to be a Political Actor?". from www.csls.ox.ac.uk/documents/Harrison.pdf [accessed on 10th September 2011].

²²⁸ *Ibid.*,

²²⁹ Danner, *Op. cit.*,

²³⁰ Greenawalt, *Op. cit.*,

²³¹ Abrams, N. (1971). "Internal Policy: Guiding the Exercise of Prosecutorial Discretion." *UCLA Law Review* 19: 1-58. p. 29.

²³² Ciampi. *Op. cit.*, p. 897.

²³³ Dolin, B. R. (2002). "The International Criminal Court: American Concerns About an International Prosecutor." from www.parl.gc.ca/information/library/PRBpubs/prb0211-e.htm [accessed on 10th September 2011]

Trial Chamber, have the freedom to exercise greater supervisory and review powers.²³⁴ The Rome Statute provides some safeguards against abuses of prosecutorial discretion, including judicial review of the Prosecutor's decision to determine the existence of reasonable basis to proceed, and finally the independence and impartiality of the Prosecutor as a safeguard against potential abuse of prosecutorial discretion.²³⁵ However, this complex judicial review is not 'uniform for all of the Prosecutor's decisions on the merits of an investigation' and depends on different procedures in this respect.²³⁶ Moreover, there are complex Pre-Trial Chamber proceedings provided for in the Rome Statute, which could have a crucial impact on admissibility decisions. In addition, investigatory and charging decisions must be reviewed for conformity with the published prosecutorial guidelines. In particular, the criteria that the Prosecutor will use to evaluate domestic authorities and the seriousness of crimes must be viewed in a preliminary examination. As such, the power to choose to pursue an investigation lies at the heart of the independence of the Prosecutor.²³⁷

The importance of prosecutorial impartiality is the other related issue that must have an influence on the Prosecutor's discretion.²³⁸ This duty is related to the requirements under which the Prosecutor should investigate incriminating and exonerating circumstances equally.²³⁹ On the whole, the good faith or bad faith of the Prosecutor is an important issue which has a bearing on his or her prosecutorial decision-making. For instance, in the status conference in the case concerning *Thomas Lubanga Dyilo*, the defence team objected to the 'prosecution claim that their delays were justified because they were acting in good faith and based on the Rome Statute.'²⁴⁰ However, the defence argued that delay in relation to disclosure of the incriminating evidence was unjustifiable, and to 'bring us to the Prosecution's good or bad faith, especially when the prosecution signed confidentiality agreements, it shows that this approach would lead to serious problems such as delays in the proceedings'.²⁴¹

²³⁴ Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN. Doc. A/CONF.144/28/Rev.1 (1990), p.189.

²³⁵ Olasolo, *International Criminal Law Review*, *Op. cit.*, p. 101.

²³⁶ *Ibid.*, p. 103.

²³⁷ Danner, *Op. cit.*,

²³⁸ *Ibid.*

²³⁹ Rome Statute Article 54 (1) (a)

²⁴⁰ ICC Public Document, Transcript of Status Conference in the Case Concerning *Lubanga*, ICC-01/04-01-06, 18 November 2008, p. 19.

²⁴¹ *Ibid.*,

Conclusion:

The Prosecutor has an important policymaking role in determining what kinds of situations should be adjudicated in the ICC and which accused, among the many potential targets, should face prosecution in the ICC. Crucially, the complementarity regime gives broad discretion to the Prosecutor to justify the need to intervene in the territories of other states. However, it is evident that cultural differences have been and will continue to be an undeniable fact of life for all parties involved with international tribunals. In other words, there is a tension between the wide diversity of cultural traditions and ideologies based on different moral backgrounds, such as African tribal laws, and particularly Islamic beliefs and Western liberal traditions. Therefore, the need for cultural sensitization in relation to differing norms cannot be underestimated. As Almqvist has pointed out ‘without understanding the local culture, i.e. the specific norms regulating the transmission and dissemination of knowledge as well as culture-specific taboos and inhibitions, interrogators and international judges face a serious risk of making erroneous assessments of points of evidence’.²⁴² In this sense, the Prosecutor cannot facilitate the application of the complementarity regime without being aware of cultural differences in ideologies and perceptions of criminal justice. The ICC investigations and prosecutions should consider contextual factors; otherwise it is going to be one of the biggest difficulties to conduct criminal proceedings and the ICC is open to criticism as a ‘reaction to the evils of colonialism’;²⁴³ and this can be used as an excuse to avoid responsibility for human rights violations.²⁴⁴ This issue will be explored more fully in Chapters 3-7.

As mentioned earlier, in Chapter Two, the Court’s moral and sociological legitimacy demands a code of prosecutorial ethics and the Prosecutor is required to exercise his or her power to select situations and cases impartially, without intimidation, and improper interference. In doing so, an understanding of cultural diversity has a great impact on the efficiency and legitimacy of the ICC prosecutions on the one hand, and its influence on the national justice system, and the affected society on the other. This chapter has set up the ICC prosecutorial policy in different phases of proceedings and evaluated the

²⁴² Almqvist, J. (2006). "The Impact of Cultural Diversity on International Criminal Proceedings." *Journal of International Criminal Justice* 4: 745-764. p. 758.

²⁴³ Donnelly, J. (2003). *Universal Human Rights in Theory and Practice*. New York, Cornell University Press. p. 99.

²⁴⁴ *Ibid.*, p. 100.

need for more guidelines and normative standards on prosecutorial conduct in criminal investigations and prosecutions. As far as prosecutorial discretion is concerned, the Prosecutor must be sensitive to cultural diversity since there are many different policies and ideologies governing criminal justice systems in every country; otherwise a clash of legal processes is not avoidable and will have a negative impact on the prosecutorial decision-making process. In this regard, a code of prosecutorial ethics, guidelines, and rules of law and procedures which blends recognized legal traditions, including Islamic law can represent a composite legal process governing international criminal prosecutions.

Taking into account the current developments of the cases at the Court, two different situations will be examined in the following chapters in order to evaluate procedural mechanisms in each situation and the way in which the Prosecutor has reacted to the situation in the Darfur region of the Sudan and the Ituri region of the DRC. It will demonstrate that failure of the Prosecutor to execute his moral duties in an impartial, independent and objective manner has led to complex concerns over the possibility of a fair trial at the ICC. Furthermore, a lack of consistency and transparency in prosecutorial policy and the choices made has invited miscarriages of justice. It can be concluded that investment in accountability will produce a significant return in public trust and confidence. Conversely, the 'erosion of public trust and confidence in the criminal justice system will be the ultimate price to pay for unjustified secrecy.'²⁴⁵

²⁴⁵ Bellemare, D. A. (2004, August 10, 2004). "Public Confidence and Accountability in the Exercise of Prosecutorial Discretion." 18th International Conference, International Society for the Reform of Criminal Law, from www.isrcl.org/Papers/2004/Bellemare.pdf [accessed on 10th September 2011]

Chapter Four: The Situation in the Darfur Region of the Sudan

Introduction:

From the beginning of the current conflict in Darfur in 2002, and in particular throughout 2003 and 2004, various reports about atrocities committed in Darfur and the large number of refugees from Darfur caused grave concern to the international community.¹ The view that states are free to do whatever they like within their own borders has changed in recent times² and the international community has taken initial steps to end impunity for some of the horrific crimes in the region. For instance, the Security Council established the International Commission of Inquiry on Darfur (UNCOI) in September 2004, which submitted its report on widespread and grave crimes in Darfur.³ Following the report of the UNCOI, the United Nations Security Council, acting under Chapter VII of the UN Charter, decided in Resolution 1593 on 31 March 2005 to refer the situation in Darfur since 1 July 2002 to the ICC Prosecutor.⁴ The Security Council referred the Darfur situation to the ICC under Article 13 (b) and based on the assumption that Sudanese courts were unwilling and unable to prosecute the numerous international crimes perpetrated in Darfur since 2003.⁵ The main question to be addressed here, however, is whether the discretion of the Prosecutor was exercised correctly in this situation to bring those responsible to justice for violations of human rights.

In this regard, it seems necessary to analyse Sudanese law and practice to examine whether an independent and impartial justice system exists in accordance with international standards, and whether those most responsible can be brought to justice.⁶ Moreover, it is also important to examine whether, as alleged, a sophisticated system

¹ "Accountability and Justice for International Crimes in Sudan."

www.redress.org/reports/SudanICCGuideEnglish.pdf [accessed on 10th September 2011].

² Hong, M.-L. K. (2008). "A Genocide by Any Other Name: Language, Law, and the Response to Darfur." *Virginia Journal of International Law* 49(1): 235-272. p. 244.

³ "Lack of Conviction: The Special Criminal Court on the Events in Darfur." from www.hrw.org/legacy/backgrounder/ij/sudan0606/sudan0606.pdf [accessed on 10th September 2011]

⁴ International Commission of Jurist, (2007). "The Administration of Justice in Sudan: The Case of Darfur." from http://icj.org/IMG/SUDAN_FINAL_17Sep_2007.pdf [accessed on 10th September 2011].

⁵ United Nations (2004). "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General." from www.un.org/News/dh/sudan/com_inq_darfur.pdf [accessed on 10th September 2011], para 606.

⁶ Redress report, *Op, cit.*,

of immunities and legal and procedural obstacles to justice exist to prevent victims of human rights violations from accessing justice, truth and reparations.⁷ An important question which may be raised here is what were the Khartoum authorities actually doing in Darfur? As early as 2004, Sudan and its judiciary began to take action in response to the crimes committed within its jurisdiction. In particular, the President of Sudan established a National Commission of Inquiry (NCOI) in 2004 to consider the performance of the judiciary and to investigate the Darfur crimes.⁸ The National Commission verified that grave human rights breaches had taken place in all three states of Darfur and that all parties to the conflict had committed them to varying degrees.⁹ However, according to the UNCOI Report, this National Commission, which was under enormous pressure to present a view compatible with the government's position, concluded that while there were incidents of serious abuse, there were not widespread or systematic crimes.¹⁰ In incorporating the Kantian concept of complementarity into a solution for the Darfur crisis, the role of the Sudanese authorities is extremely important, and the Sudanese legal system, as a striking example of legal pluralism provides an appropriate test case for an examination of ICC sensitivity towards local law.

The Sudanese government responded to calls for justice in Darfur by establishing three sets of special courts in Darfur; special courts in 2001, specialized courts in 2003, and new Special Criminal Court on the Events in Darfur (SCCED) in 2005.¹¹ The Sudanese Chief Justice of the Supreme Court announced that 'the Sudanese judiciary is capable and desirous of fully shouldering its responsibility in earnest for doing justice and restoring rights to their owners, free of any partiality, fear or influence, so that no person who has committed an offence may escape punishment, whatever his position or rank.'¹² However, the President of the SCCED stated that 'higher authorities are not interested in these cases [being] presented to the court or for them to even come to the knowledge of the court.'¹³ In accordance with the findings of different international

⁷ ICJ Report, *Op, cit.*,

⁸ Totten, C. and N. Tyler (2008). "Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and related Issues in the International Criminal Court." *The Journal of Criminal Law & Criminology* **98**(3): 1069-1118. p. 1095.

⁹ National Commission of Inquiry on Darfur, Confidential source, para 19.

¹⁰ UNCOI report, paras. 459-462

¹¹ HRW report, Lack of Conviction: The Special Criminal Court on the Events in Darfur. *Op, cit.*,

¹² United Nations Security Council, S/2005/403- 22 June 2005- Letter dated 18 June 2005 from the Chargé d'affaires a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council

¹³ Rubin, E. "If not Peace, then Justice," *New York Times Magazine*, April 2, 2006, p. 48

and national bodies, Sudanese special courts may be able to try some of the low-level criminals involved in the Darfur crimes while the ICC focuses its efforts on the leaders of the human rights violations.¹⁴ The impartiality and independence of the Sudanese special courts are important criteria in order to determine whether the Sudanese criminal legal system is adequate to respond to the levels of criminal conduct which have taken place in Darfur.¹⁵ The Government of Sudan declined to act at first but then reacted to the ICC by creating the domestic tribunal. But perhaps 'inaction followed by hasty action may lend credence to the claim that the Sudanese court was only established to shield the accused from liability for their alleged crimes.'¹⁶ Therefore, in order to prosecute the Darfur crimes, certain procedural measures seem necessary to ensure both uniformity and fairness in the application of the law.¹⁷ Having said that, the procedural laws to be applied by the Court are far from clear, and the hybrid of Sudanese statutes, *Shari'a*, law by decree and references to international law could affect the transparency of the Court's work.¹⁸ In fact, although the international community has universally recognised international core crimes, diversity of culture still plays an important role in international investigations and prosecutions. It is crucial to consider, for instance, cultural factors that affect witness testimony, the question of applying international crimes in the national context of each situation, and the role of culture in sentencing.

In order to address the adequacy of the Sudanese criminal justice system in relation to the Darfur situation, and in the context of the complementarity regime of the ICC, the admissibility criteria stipulated in Article 17 of the Rome Statute should be examined. In discussing this issue, this chapter is organized into five sections. The first section will look at the contextual history of Sudan's crisis in Darfur. It aims to examine the causes of the current Darfur conflict. In particular, the violations of international humanitarian law by all parties to the conflict will be considered. The second section will grapple with the development of Sudanese criminal justice. It will explore how the Islamization process affected the Sudanese Penal Code. There will also be consideration of the, consequences of the political dimension of the Sudanese criminal justice system, in order to address the fairness of the domestic courts. The

¹⁴ ICJ Report, The Administration of Justice in Sudan: The Case of Darfur, *Op. cit.*,

¹⁵ *Ibid.*,

¹⁶ Hewett, D. Y. (2006). "Sudan's Courts and Complementarity in the Face of Darfur." The Yale Journal of International Law 31: 276-280. p. 278.

¹⁷ Totten, *Op. cit.*, p. 1100.

¹⁸ HRW report, Lack of Conviction: The Special Criminal Court on the Events in Darfur, *Op. cit.*,

fourth section will focus on Sudan's failure to engage with its international obligations regarding international crimes under the Rome Statute. In particular, the operation of the criminal justice system in Darfur will be examined. Finally, an overall evaluation of whether Sudan's criminal procedure is inadequate, in terms of Article 17 of the Rome Statute, will be attempted.

Contextual history of Sudan's crisis in Darfur:

In order to understand the legal system of Sudan and the root causes of the crisis in Darfur, it is important to examine briefly the history of Sudan and the origins of the complex conflict there.¹⁹ In Sudan, the largest country in Africa, 597 tribes speak more than 400 languages and dialectics, and practise a variety of religious traditions within each of the major groupings: Islam, indigenous African beliefs and Christianity.²⁰ There are nineteen major ethnic groups and 597 subgroups. In 2000, semi-official figures indicated religious affiliations as 70 percent Sunni Muslim, 25 percent indigenous beliefs, and 5 percent Christian.²¹

Sudan's history is full of conflict, repression and serious crimes. The Sudanese case, as one of the world's tragic examples of human rights abuses, is a difficult one to comprehend due to its Afro-Arab nature, the country acting as a bridge between the African continent and the Middle East. In this sense, the geographic context and Sudan's racial, ethnic and cultural composition have all been sources of tension.²² The fight to exist and for space to live and the struggle for resources such as land and water, necessary to survive, inevitably leads to conflict and violence.²³ In this context, various ethnic and cultural differences, racial tensions, and differential access to natural and financial resources all play significant roles.²⁴ As Le Billon has argued, resources can motivate 'secessions in resource-rich regions. The fear of secession can also lead to severe repression by the central government. Southern Sudan with its conflict over oil, grazing land and cattle, is an example of how resource control can

¹⁹ Gravelle, K. B. (1998). "Islamic Law in Sudan: A Comparative Analysis." ILSA Journal of International & Comparative Law 5(1): 1-22.

²⁰ Bechtold, P. K. (1990) "More Turbulence in Sudan: A New Politics This Time?" 4: 579- 595. p. 580.

²¹ Glickman, H. (2000). "Ethnic Conflicts: Islamism in Sudan's Civil War." Orbis: A Journal of World Affairs 44(2): 267-281. p. 269.

²² Babiker, M. A. (2007). Application of International Humanitarian and Human Rights Law to the Armed Conflicts of the Sudan. Oxford, Intersentia, p. 2.

²³ *Ibid.*, page xi.

²⁴ Glickman, *Op. cit.*,

play into secessionist agendas.’²⁵ It is also important to note here that broad generalizations tend to ignore the heterogeneity of the different sides and the fact that both the government militias and rebel forces fight among themselves, sometimes ‘switching allegiances with bewildering alacrity.’²⁶

On one level, the civil war that has afflicted the country almost continuously since independence in 1956 can be seen as a conflict between the Arab Muslim north and the black African, and predominantly Christian or animist, south. At a more detailed level, other features of the conflict emerge. Alan Phillips, the director of Minority Rights Group International, wrote in 1995 that attempts to portray the conflict in North-South or Arab-African terms disguise ‘the complexities of a war fought by multi-ethnic groups where religious differences colour struggle over access to land or political power.’²⁷ That said, Iraq, Iran, Libya and Saudi Arabia have in fact been aiding the Sudanese government, while Ethiopia, Chad, Uganda, and the United States Central Intelligence Agency (CIA) programme have aided southern Sudanese rebels.²⁸ Therefore, there has been a growing crisis of state and society in the Sudan, with civil war fuelled by the growing number of refugees, major economic difficulties, and political instability.²⁹ The tragedy of Sudan is that all of these factors, prompting violent interethnic conflict in Sudanese society, have reached a highly destructive level; the economy has collapsed and neither civilian party politics nor military revolutionary programmes have been able to overcome the instability in the country.³⁰ For more than three decades, conflict has continued between north and south.³¹ In 1972, the Addis Ababa Accord was signed, ending 17 years of the first civil war, but the agreement broke down in 1983 and the civil war over autonomy was renewed. Subsequently, on January 2005, the Comprehensive Peace Agreement (CPA) was signed, not only to put an end to the southern problem but also to address the problems of national governance in Sudan.³² Finally, South Sudan was officially independent on July 15th 2011 as the 193rd member of the United Nations.

²⁵ LeBillon, P. (2001). "The Political Ecology of War: Natural Resources and Armed Conflicts." Political Geography 20: 561-584. p. 574.

²⁶ Glickman, *Op, cit.*, p. 270.

²⁷ Youngs, T. (2004). "Sudan: conflict in Darfur." from www.parliament.uk/commons/lib/research/rp2004/rp04-051.pdf [accessed on 10th September 2011]

²⁸ Glickman, *Op, cit.*, p. 269.

²⁹ Voll, J. O. (1990). "Sudan: State and Society in Crisis." The Middle East Journal 44(4): 575-579. p.576.

³⁰ *Ibid.*, 577.

³¹ Deng, F. M. (1990). "War of Visions for the Nation." The Middle East Journal 44(4): 596-609. p. 596.

³² Waal, A. d., Ed. (2007). War in Darfur and the Search for Peace. Boston, Harvard Global Equity Initiative, p. 199.

The causes of the Darfur crisis:

The Darfur region in western Sudan, an area the size of France, was a Sultanate that emerged in 1650 in the area of Jebel Marrah. The Fur Sultanate had been independent for almost four centuries and was incorporated into the Sudan by the British government in 1917.³³ Some of its borders were not finalised until as late as 1938. Previously administered as one entity, Darfur was divided into three states, North, South, and West Darfur, in the early 1990s.³⁴ It is located in the north western region of Sudan, bordering Chad to the west, Libya to the northwest, and the Central African Republic to the southwest.³⁵ Darfur is 'variously thought to be made up of between 40 and 150 ethnic groups or tribes, with groups ranging in size from a few thousand to a million or more'.³⁶ Often nomadic, these groups have many points of similarity but only a loose linkage between territory and identity. This mobility has meant that 'identities in Darfur have always been complex, subtle and fluid, with the possibility of individuals or groups changing identity in response to political and economic circumstance'.³⁷ Darfur is mostly Muslim as well as mostly black. Its conflict is characterized by violence not only between Muslims, but also between dark-skinned people who Westerners perceive as all being black. The Sudanese government insists that the Darfur conflict is actually a decentralized series of smaller disputes, none of them based on a clear racial or ethnic divide, and that reports of mass atrocities are exaggerated.³⁸

There have been sporadic conflicts in Darfur for several decades. Pastoralists from the north, including the northern Rizeigat, Mahariya, Zaghawa, and others, typically migrate south in search of water sources and grazing in the dry season. Beginning in the mid-1980s, when much of the Sahel region was hit by recurrent episodes of drought and increasing desertification, the southern migration of the Arab pastoralists provoked land disputes with agricultural communities.³⁹ However, the war in Darfur between 27 Arab tribes and the Fur did not begin until 1986. It arose as a result of political and land

³³ Babiker, *Op, cit.*, page 21.

³⁴ Hoile, D. (2005). "Darfur in Perspective." from darfurinformation.com/pdf/Darfur-Book-New-Edition.pdf [accessed on 10th September 2011].

³⁵ Human Rights Watch (2004). "Darfur in Flame." from www.hrw.org/en/reports/2004/04/01/darfur-flames-0 [accessed on 10th September 2011].

³⁶ Campbell, D. (2007). "Geopolitics and Visuality: Sighting the Darfur Conflict." *Political Geography* 26: 357-382. p. 363.

³⁷ *Ibid.*,

³⁸ Hong, *Op, cit.*,

³⁹ Human Rights Watch report (2004). "Darfur in Flame." From www.hrw.org/en/reports/2004/04/01/darfur-flames-0 [accessed on 10th September 2011]

problems.⁴⁰ By 1986, many incidents involved not only the Arab tribes, but also Zaghawa pastoralists who tried to claim land from Fur farmers, and some Fur leaders were killed.⁴¹ Arab tribes considered they were not sufficiently represented in the Fur-dominated local administration in Darfur and, in 1987, a number of Arab tribes formed what became known as the Arab alliance, aimed at establishing their political dominance and control of the region. Meanwhile, Fur leaders came to distrust the increasing tendency of the federal government to favour the Arabs, especially since Arabs from the northern Nile Valley had controlled the central government since independence.⁴² In 1988-1989 the clashes in Darfur evolved into a full-scale conflict between the Fur and Arab communities. The situation developed a more political character when the Khartoum government 'inflamed tensions by arming the Arab tribes and neglect[ed] the core issues underlying the conflict over resources: the need for rule of law and socio-economic development in the region.'⁴³

Since tribal war is very common in Africa, the crisis in Darfur needs to be understood as a contemporary political fracture rather than an ancient ethnic fault line.⁴⁴ Since Sudan has always been governed by 'mostly centrist policies, Darfur's geographical remoteness increased its victimization in terms of regional disparities, marginalisation, and social and economic injustice.'⁴⁵ In the view of the Public Congress Party (PCP), which is one of the main political opposition forces to the ruling National Congress Party (NCP), the Darfur conflict is based on 'a national, political problem relating to issues of freedom, justice, political participation, and good governance.'⁴⁶ The complexity of the Darfur crisis is not only due to Islamism but is also connected to the liberation movements and the Umma Party, especially because of the loyalty to that party of some of the Islamic leaders within the National Islamist Front (NIF) political establishments.⁴⁷

The war in Darfur is in many respects a replay of the war in southern Sudan, 'waged with weapons that include ethnic militias, scorched-earth tactics and denial of

⁴⁰ From confidential source.

⁴¹ HRW report, "Darfur in Flame." *Op. cit.*,

⁴² *Ibid.*,

⁴³ *Ibid.*,

⁴⁴ Campbell, *Op. cit.*,

⁴⁵ Waal, *Op. cit.*, p. 111.

⁴⁶ *Ibid.*, p.109.

⁴⁷ Salih, M. (2005). "Understanding the Conflict in Darfur."

www.teol.ku.dk/cas/research/publications/occ_papers/muhamed_salihsamletpaper.pdf [accessed on 10th September 2011].

humanitarian access.’⁴⁸ In other words, the Darfur conflict is a result of a civil war which started in the South and eventually ‘radiated to Darfur.’⁴⁹ Both wars ‘pit Sudan's Islamist, Arab-dominated government against African rebels demanding equal rights and an end to decades of neglect.’⁵⁰ In the South it is the Sudan People’s Liberation Army (SPLA) that is doing the fighting; in Darfur it is the similarly named but quite separate Sudan Liberation Army (SLA). Professor Fouad Ibrahim has claimed that ‘it is often said that the cause of the war in Darfur is the conflict between pastoralists and farmers over limited natural resources: water, agricultural land and pasture. No doubt, conflicts have always existed over these resources. But they are not the true cause of the current brutal war...so that the problem is not resource scarcity but central government neglect of the Darfur region.’⁵¹

It is widely believed that the conflict in Darfur is a tribal one originating in the competition for land between pastoralists and crop farmers during the eighties and nineties. However, in recent years inter-tribal relations changed and the tribal fight for scarce resources became more intense since weapons could be obtained through channels via Chad and Libya.⁵² Inter-tribal conflict has been exacerbated by the arms trade in the region as a consequence of the Sudanese civil war as well as Libyan-inspired efforts to pour arms into the region to fuel rebellions in neighboring Chad.⁵³ In this sense, Mahmood Mamdani has claimed that what began as a ‘localized civil war’ in the late 1980s developed into ‘a rebellion’ in 2003.⁵⁴ The current conflict in Darfur was initiated by two rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), who blame the central government in Khartoum for many of the region’s problems. These groups claim that Darfurians have been consistently marginalized and not allowed to participate in high positions of government.⁵⁵

The fact that Darfur is underdeveloped is self-evident. However, it is no more underdeveloped than several other parts of Sudan. It is particularly difficult to accept

⁴⁸ www.healingthebody.net/articles/shameful%20muslim%20silence.htm [accessed on 10th September 2011]

⁴⁹ Salih, *Op. cit.*,

⁵⁰ www.healingthebody.net/articles/shameful%20muslim%20silence.htm [accessed on 10th September 2011]

⁵¹ Salih, *Op. cit.*,

⁵² Babikar, *Op. cit.*, p. 22.

⁵³ Alexander, K. (2006). "Ignoring the Lesson of the Past: The Crisis in Darfur and the Case for Humanitarian Intervention " *Journal of Transnational Law and Policy* 15(1): 1-48. p. 35.

⁵⁴ www.nyulawglobal.org/Globalex/Darfur_Crisis_Research.htm

⁵⁵ Alexander, *Op. cit.*, p. 37.

that underdevelopment and marginalisation account for the level of focused and orchestrated violence aimed at the Government of Sudan since early 2003 – violence that was clearly planned for some considerable time beforehand.⁵⁶ Alex de Waal is one of the few recognised experts on Sudan and he has published widely on the subject. He has pointedly challenged the ‘Arab’ versus ‘African’ stereotype, stating that, ‘characterizing the Darfur war as Arabs versus Africans obscures the reality. Darfur’s Arabs are black, indigenous, African Muslims – just like Darfur’s non-Arabs.’⁵⁷ Ghazi Suleiman, a well-known Sudanese human rights lawyer, has also claimed that the conflict in Darfur has nothing to do with marginalisation or the inequitable distribution of wealth. Inherently, it is a struggle between the two factions of the Sudanese Islamist movement, the opposition PCP and the ruling NCP.⁵⁸ Moreover, ‘reorganization by the Sudanese Government of President Omar Al-Bashir gave Arab groups new positions of power in Darfur, which the Fur, Masalit and Zaghawa tribes saw as an attempt to undermine their leadership roles and powers’.⁵⁹ Finally, ‘the outbreak of large-scale crimes was prompted by the SLA and the JEM attack on El Fashir airport in April 2003’.⁶⁰

Hoile has suggested that, for all the claims of marginalisation, there can be no doubt that conflict within the Sudanese Islamist movement is central to the Darfur conflict.⁶¹ In fact, it is ‘a struggle to seize power in Khartoum and the battlefield is in Darfur.’⁶² The ruling NCP split in 2000-2001 with hard-liners under Turabi, many of them from Darfur, forming the PCP in opposition to any engagement with Washington and the West and opposition to peace in southern Sudan.⁶³ The general-secretary of the Pan African Movement and co-director of Justice, Tajudeen Abdul-Raheem, has also confirmed this line of analysis. He said, ‘Darfur is a victim of the split within the National Islamic Front personified by Hassan al-Turabi and his former protégé, General Omar Al-Bashir. Al-Turabi’s support is very strong in Darfur.’⁶⁴ Richard Cornwell, the

⁵⁶ Hoile, *Op, cit.*, p. 13.

⁵⁷ *Ibid.*, p. 11.

⁵⁸ *Ibid.*,

⁵⁹ Trahan, J. (2008). "Why the Killing in Darfur is Genocide " *Fordham Int'l L.J.*, **31**: 990-1057. p. 995.

⁶⁰ *Ibid.*, p. 996.

⁶¹ Hoile, *Op, cit.*, p. 17.

⁶² Raghavan, S. “Sudan Violence is Part of Power War”, News Article by Knight Ridder Newspapers, 20 August 2004.

⁶³ Hoile, *Op, cit.*,

⁶⁴ What Kind of Intervention Will Work in Darfur?”, News from Africa, Nairobi, August 2004. at www.newsfromafrica.org/newsfromafrica/articles/art_6518.html [accessed on 10th September 2011]

Sudan expert at the South African-based Institute of Security Studies, has claimed that many Sudanese believe that the JEM was formed as result of the power struggle between President Al-Bashir and Hasan Turabi.⁶⁵ It has also been noted by the International Crisis Group that, '[t]he belief that the Darfur rebellion has been hijacked by disaffected rival Islamists is a main reason behind the government's refusal to talk to the rebels, particularly JEM. The personal rivalry between Vice-President Taha and his ex-mentor Turabi for control of the Islamist movement and the country is being played out in Darfur, with civilians as the main victims.'⁶⁶ In response to rebellious activities, the Government did not fully trust the army to resist the rebels; instead, it withdrew its troops from the rural areas of Darfur and called upon local tribes to assist in the fighting against rebels. Several nomadic tribes, known as *Janjaweed*, responded favorably to the government's call.⁶⁷ The *Janjaweed* are primarily 'camel-herding nomads who migrated to Darfur from Chad and West Africa in the 1970s, and from Arab camel-herding tribes from North Darfur.'⁶⁸ The UNCOI noted in its report that some tribal leaders with relationships with both local and central Government officials played a key role in recruiting and organizing militia members and liaising with Government officials.⁶⁹ However, the *Janjaweed* are not organized in one single coherent structure and multiple testimonies and material evidence confirmed for the Commission that, in practice, the term 'Janjaweed' is being used interchangeably with other terms used to describe militia forces working with the Government. The relationship between government and the militias was also confirmed by the Commission, based upon some official statements.⁷⁰

Violations of international humanitarian law and human rights:

In the early stages of the crisis, the two main aforementioned rebel groups in Darfur, the Sudan Liberation Army/Movement (SLA/M) and the JEM, claimed that they were seeking redress for decades of grievances over perceived political marginalization, socio-economic neglect, and discrimination. As Berclaut has observed, the situation in Darfur is 'transforming from a highly destructive armed conflict between these two rebel groups and the government into a violent scramble for power and resources

⁶⁵ Hoile, *Op, cit.*, p. 20.

⁶⁶ *Darfur Rising: Sudan's New Crisis*, International Crisis Group, Africa Report No 76, Brussels, 25 March 2004.

⁶⁷ Alexander, *Op, cit.*,

⁶⁸ Trahan, *Op, cit.*,

⁶⁹ UNCOI Report, *Op, cit.*, para 102.

⁷⁰ *Ibid.*, para 115.

involving government forces, its *Janjaweed* allies, various rebel and former rebel factions, and bandits.⁷¹ On the one hand, the situation is beyond full control by the authorities but on the other, the Government did not take any initiative to protect the people.⁷² The Sudanese government, instead of disarming the militias, has incorporated them into security, police and military forces. Indeed, the climate of impunity fostered by the unwillingness of the Sudanese government to prosecute serious crimes has encouraged government-backed militias and its forces to continue to commit abuses.⁷³

The strategy of using tribal militias such as the *Janjaweed* as a proxy has led to tragic humanitarian consequences.⁷⁴ Gross violations of international human rights and humanitarian law have been committed by both the *Janjaweed* armed militia, supported by the Sudanese Government forces, and by the armed opposition groups, SLM/A and the JEM.⁷⁵ The NCOI, which was established by Presidential Directive No. 97 of 2004, also verified that various violations of human rights were committed in the three Darfur States.⁷⁶ Subsequently, in the past few years, the internal conflict in Darfur has drawn major international attention because of the magnitude of its impact on the civilian populations within the affected territory.⁷⁷ In addition, the United Nations Security Council, in its resolutions 1556 and 1564, emphasized the urgent need for justice in Darfur and reiterated the call for immediate action by the international community to end serious crimes committed against the civilian populations there.⁷⁸ The violations include persecution of groups based on ethnicity; murder and wilful killing; rape and other forms of sexual violence; torture or cruel, inhuman or degrading treatment; arbitrary deprivation of liberty; intentional and indiscriminate attacks against the civilian population; collective punishment and pillage; illegal internal displacement of the population and forcible transfer.⁷⁹ The conflict have resulted in the deaths of nearly 300,000 people and forced more than two million to flee their homes.⁸⁰ Some of the

⁷¹ Bercault, O. (2007-2008). "Photo Essay: The Crisis in Darfur." *Fordham Int'l L.J.* **31**: 859-861. p. 860.

⁷² Babiker, *Op. cit.*, p. 24.

⁷³ Human Rights Watch, *Op. cit.*, 2006

⁷⁴ Babiker, *Op. cit.*, xi

⁷⁵ Alexander, *Op. cit.*,

⁷⁶ From confidential source.

⁷⁷ Totten, *Op. cit.*, p. 1072.

⁷⁸ United Nations Security Council Resolution 1556 (2004), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/446/02/PDF/N0444602.pdf?OpenElement>

⁷⁹ UNCOI, *Op. cit.*, para. 522.

⁸⁰ Alexander, *Op. cit.*,

crimes committed in Darfur, as characterised by the UNCOI and by the ICC Prosecutor, amount to war crimes, crimes against humanity and genocide.

The question of whether or not the violence in Darfur can be called genocide has been debated. The UNCOI concluded in its report that the Government of Sudan has not pursued a policy of genocide. However, it noted that what had happened was 'as bad as genocide' and that 'the Government of Sudan and the *Janjaweed* are responsible for serious violations of international human rights and humanitarian law.'⁸¹ In addition to the UNCOI's conclusion that 'the Government of the Sudan has not pursued a policy of genocide',⁸² a number of scholars have criticized labelling of Darfur genocide. For instance, Mamdani has argued that the term 'genocide' should be avoided in relation to the situation in Darfur since such a label gives legitimacy to those who seek to punish rather than to reconcile.⁸³ However, Hong has claimed that calling a conflict genocide appears to trigger a large obligation under the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (the Genocide Convention) for states parties to prevent and to punish the acts in question. In effect, the word genocide carries a historical and moral weight that is not present with other types of crimes, and tends to create a moral obligation in the view of the public. Hong believes that 'calling a conflict genocide spreads responsibility throughout the international community in a way that regular mass killing does not'.⁸⁴ Although the official position of the United Nations is that the atrocities that have been committed in the Darfur region of Sudan were not acts of genocide pursuant to plan or policy of the state, mass killings, mass beatings, mass rape, and mass violations have taken place⁸⁵ and what the killing is called should be irrelevant.⁸⁶ It is important, regardless, to bring those responsible to justice in order to genuinely investigate and prosecute the international crimes by holding perpetrators accountable.⁸⁷

Considering the political dimension of the conflict in Darfur, it is important to note here that in response to a power struggle inside the ruling party, the Sudanese government declared a state of emergency in 1999. Although the emergency status in most regions of Sudan has been lifted after the conclusion of the Comprehensive Peace

⁸¹ UNCOI, *Op. cit.*,

⁸² *Ibid.*, para. 518.

⁸³ www.nyulawglobal.org/Globalex/Darfur_Crisis_Research.htm [accessed on 10th September 2011]

⁸⁴ Hong, *Op. cit.*, p. 238.

⁸⁵ Babakir, *Op. cit.*, p. x

⁸⁶ Trahan, *Op. cit.*, p. 994.

⁸⁷ Redress, "Accountability and Justice for International Crimes in Sudan." *Op. cit.*,

Agreement (CPA) and the adoption of the Interim National Constitution (INC), the state of emergency is still in force in Darfur and in Eastern Sudan.⁸⁸ The state of emergency means important legal rights, such as due process guarantees and freedom of assembly, are suspended and the President has extraordinary powers to rule by decree.⁸⁹ In this sense, the scale of the violence in Darfur, even before the outbreak of rebellion in 2003, led to Khartoum introducing special measures, including this declaration of a state of emergency.⁹⁰ In 2001, three separate sets of special courts were established under the state of emergency provisions. In 2003, these special courts were replaced by specialized courts. The specialized courts, like the special courts they replaced, have jurisdiction over crimes of particular interest to the state. It is worth mentioning that judges who sit on the specialized courts are frequently lay people with no legal training or have been recruited from the military. The new Special Criminal Court on the Events in Darfur (SCCED), established in 2005, has concurrent jurisdiction over the same crimes as the specialized courts have.⁹¹

Development of Sudanese criminal justice system:

In order to analyse the Sudanese criminal justice system in relation to the complementarity regime of the ICC, the following section will briefly address the development of the Sudanese criminal justice system. Some fundamental questions may be raised about whether the origins of Sudanese law lie in religious, economic, domestic, or military institutions. Sudan's criminal laws and procedures are historically influenced by common law and Egyptian law with some elements of *Shari'a*.⁹² El Amin has observed that five historical phases generated the significant characteristics of the Sudanese legal system during the past five centuries.⁹³ In the year 1504, the first Islamic monarchy was established in the Sudan and there were three rival kingdoms in the western part of the Sudan: Darfur Kingdom, Kurdufan, and Fung. Darfur Kingdom (1500-1916) was established by Arabs and Fur tribes who emigrated from western

⁸⁸ ICJ report, Administration of Justice in Sudan: The Case of Darfur, *Op, cit.*,

⁸⁹ UNCOI, *Op, cit.*,

⁹⁰ 'Sudan: State of Emergency after Southern Darfur Tribal Clashes', News Article by Integrated Regional Information Network, UN Office for the Coordination of Humanitarian Affairs, Nairobi, 22 May 2002.

⁹¹ UNCOI, *Op, cit.*,

⁹² Redress, *Op, cit.*,

⁹³ Bassiouni, M. C. and Z. Motala, Eds. (1995). The protection of human rights in African criminal proceedings. Dordrecht, Martinus Nijhoff Publishers, p. 237.

Africa. The legal system of Darfur Kingdom was based on Islamic laws. In this era, the judges were appointed by the Sultan as heads of the court to administer justice.⁹⁴

In the early nineteenth century, Sudan was governed by Egypt, which was still part of the Ottoman Empire.⁹⁵ Here, the Islamization of the people was largely the work of individual learned men who immigrated to Sudan from Egypt, North Africa, and the Arabian Peninsula. Thus, Islam gradually extended its influence upon Sudan's legal system.⁹⁶ In the period of Turko-Egyptian Conquest, 1820- 1898, the judicial powers shifted to the chiefs and heads of the native tribes in the rural areas, supported by Egyptian and British personnel. However, the courts were governed by Islamic law. Salih has stated that in 1881 the Mahdiya revolution against Turko-Egyptian rule 'brought mixed fortunes on Darfur'.⁹⁷ The Mahdiya legal system of 1881-1898 was aimed at modifying or abolishing Sudanese customs, which were socially undesirable or contrary to Islamic teachings. Criminal cases were decided in accordance with *Shari'a* and the Mahdi's teachings.⁹⁸ Although administering justice and establishing fairness was the main stated object of the Mahdi's mission, it was not fulfilled since all his efforts were directed to strengthening his own political powers. In essence, political ambitions had a great impact on the realization of justice.⁹⁹ However, while *Shari'a* courts were established in northern Sudan and Islamic law was practiced throughout the area, in southern Sudan most of the inhabitants practiced tribal religions unrelated to Islam.¹⁰⁰

During the Anglo-Egyptian Condominium, 1899-1956, the legal system was influenced by English legal theories rather than by Egyptian theories, which were based on the French legal system.¹⁰¹ In 1899, a Criminal Procedure Code was enacted which was drafted by a British lawyer in the Egyptian service.¹⁰² The Code of Criminal Procedure was an adaptation to the needs of the Sudan of precedents taken from India and from the Ottoman Empire and African Orders in Council. The resultant Code was 'neither British, Indian, French, nor indeed wholly marked with the characteristics of the system in force in any other country. It was a scheme, which may correctly be called Sudanese,

⁹⁴ *Ibid.*, p. 228.

⁹⁵ Gravelle, *Op, cit.*,

⁹⁶ Bassiouni and Motala, *Op, cit.*, p. 227

⁹⁷ www.teol.ku.dk/cas/research/.../muhammed_salih_samletpaper.pdf

⁹⁸ Bassiouni and Motala, *Op, cit.*, pp. 227-229.

⁹⁹ *Ibid.*,

¹⁰⁰ Gravelle, *Op, cit.*,

¹⁰¹ Bassiouni, *Op, cit.*,

¹⁰² Vogler, *A World View of Criminal Justice, Op, cit.*, p. 118.

in so far as it was truly framed with a special view to meet the requirements of the Sudan.'¹⁰³ In fact, the Code of Criminal Procedure was not to apply to the whole of the Sudan at once, but it was to be extended gradually to all the various provinces. Administrators were given power to introduce the Code with adaptations suitable to the needs of their province.¹⁰⁴ The Penal Code, introduced at the same time, adapted the Code drafted by Lord Macaulay for India to the needs of the Sudan.¹⁰⁵ The Sudanese Penal Code and the Code of Criminal Procedure of the year 1899 were subsequently amended on August 1, 1925.¹⁰⁶ According to the amended criminal laws, judicial powers were given to army officers, governors, district commissioners, police officers, and sheikhs. Special judicial powers were given to the tribal heads by the Chief Courts Ordinance of 1931 and, later, native laws were issued to control, prohibit, or restrict certain activities, and a *Shari'a* legal system was established to deal with the personal affairs of Muslim people.¹⁰⁷

In November 1958 the military took power, suspended the transitional constitution, and dissolved the parliament and the political parties. In this era, full legislative, executive and judicial powers were invested in a supreme council of the armed forces.¹⁰⁸ In theory, the judiciary should have been independent in the performance of its duties but, since 1958, the country's various military governments have routinely interfered with the judicial process.¹⁰⁹ This era witnessed a series of struggles amongst the political parties, and disagreement between the secularists and Islamic state supporters remained as an obstacle.¹¹⁰

On September 5, 1966 the whole chapter of the Constitution dealing with the judiciary was amended to set up supreme (civil and *Shari'a*) Courts and to confer on *Shari'a* division a status of full independence and equality. According to this amendment, the judiciary consisted of the civil division headed by the chief justice and *Shari'a* division headed by the chief *qadi* and were independent from each other.¹¹¹ Prior to Nimeiri's consolidation of the court system in 1980, the civil courts considered all criminal and

¹⁰³ Guttman, E. (1957). "The Reception of Common Law in The Sudan " International and Comparative Law Quarterly 6: 401-417. p. 405.

¹⁰⁴ *Ibid.*,

¹⁰⁵ *Ibid.*, p. 406.

¹⁰⁶ Bassiouni and Motala, *Op, cit.*, p. 230.

¹⁰⁷ *Ibid.*,

¹⁰⁸ *Ibid.*,

¹⁰⁹ countrystudies.us/sudan/65.htm [accessed on 10th September 2011]

¹¹⁰ Bassiouni and Motala, *Op, cit.*, p. 232.

¹¹¹ Khalil, M. I. (1971). "The Legal System of the Sudan " International and Comparative Law Quarterly 20: 624-644. p. 644.

most civil cases. The *Shari'a* courts, comprising religious judges trained in Islamic law, adjudicated for Muslims in matters of personal status, such as inheritance, marriage, divorce, and family relations. However, the fully independent status of these divisions did not survive more than three years and a new judiciary Act 1969 conferred on *Shari'a* courts the power of executing their judgements.¹¹² The structure of the legal system changed again in 1983 when an Islamic state was declared by Nimeiri;¹¹³ *Shari'a* was decreed to be the national law in September of that year and the government announced that it would apply *hudud* punishments to Sudanese jurisprudence.¹¹⁴ In other words, the President of the Republic decided to Islamize the legal system, nullifying all existing criminal justice laws.¹¹⁵

New Penal and Procedural Acts incorporating *hudud* punishments were enacted.¹¹⁶ The Civil Transaction Act 1984, the new Penal Code 2003, the Code of Criminal Procedure 2003 and the Civil Procedure Act were all enacted to facilitate the 'just and fast execution' of the newly implemented *hudud*.¹¹⁷ Some previous offences such as theft were modified to reflect the *hudud* punishment of amputation, reserved for more serious cases, while the *hudud* offence of adultery and fornication was redefined to include rape and sodomy.¹¹⁸ Subsequently, the High Court of Appeal, as well as all lower courts, was required to apply Islamic law exclusively.¹¹⁹

Mayer has claimed that, in the Sudan, Islamization programmes 'have been disrupted by political turbulence and have been wracked by protracted civil war.'¹²⁰ It seems that, in the Sudanese legal system, political and legal processes cannot be sealed off from one another. The law and the courts are weak in the face of political power. The political class may directly regulate institutional decisions, refusing to allow decentralized institutional decision-making and the outcome of the legal process is often determined

¹¹² *Ibid.*, p. 631.

¹¹³ Gravelle, *Op. cit.*,

¹¹⁴ Fluehr-Lobban, C. (1990). "Islamization in Sudan: A Critical Assessment." The Middle East Journal 44(4): 610-623. p. 619.

¹¹⁵ Bassiouni, *Op. cit.*, p. 232

¹¹⁶ Vogler, *Op. cit.*, p. 121.

¹¹⁷ Warburg, G. R. (1990). "The Sharia in Sudan: Implementation and Repercussions, 1983-1989." The Middle East Journal 44(4): 624-637. p. 633.

¹¹⁸ Sherman, S. (1989). "Shari's Law in the Sudan: Why it Does not Work Under the Sudanese Constitutions of 1973 and 1985." Dickinson Journal of International Law 7(2): 277-299. p. 285.

¹¹⁹ Metz, H. C. (1991). "Sudan: A Country Study." from <http://countrystudies.us/sudan/> [accessed on 10th September 2011].

¹²⁰ Mayer, A. E. (2002). "Islamic Law as a Cure for Political Law: The Withering of an Islamist Illusion." Mediterranean Politics 7(3): 117-142. p. 118.

by political relationships and personal connections.¹²¹ The influence of politics on the judicial process can be seen during the state of emergency, which was imposed by the Sadiq Al-Mahdi regime in 1987. The government had extensive authority, in areas declared to be emergency zones in the southern and western areas of the country, to use detention powers on people suspected of sympathy with the rebellion, and to arrest and preventively detain for an indefinite period anyone suspected of contravening emergency regulations.¹²² Moreover, in July 1989, the Revolutionary Command Council for National Salvation (RCC-NS) declared a state of emergency for the whole of Sudan and issued Decree No. 3, which gave the President the power to appoint and dismiss all judges.¹²³ As a consequence, the court system was seriously backlogged and the judiciary was less independent of the executive than previously. Under the authority of this decree, President Al-Bashir dismissed more than seventy judges because they were allegedly not sufficiently committed to applying the *Shari'a* in their decisions, and replaced them with supporters of the regime. The effect of these actions was to make the judiciary directly responsible to the President.

Consequences of the political dimension of the Sudanese criminal justice system:

The 1998 Sudanese constitution asserts the independence of the judiciary. Nevertheless, the judiciary appears to have been manipulated and politicised during the last decade.¹²⁴ Human Rights Watch (HRW) and other non-governmental organizations have documented that, although widespread crimes have been committed by Sudanese government forces and the *Janjaweed*, there have been no meaningful efforts to establish accountability for violations of international humanitarian law in Sudan by the government or the rebels.¹²⁵ Instead of acknowledging state responsibility for the scale and gravity of the crimes committed in Darfur, senior Sudanese officials continue to deny and evade such responsibility for the atrocities. A series of committees set up presumably to deal with these issues have produced no meaningful results.¹²⁶ The Government of Sudan, in order to strengthen domestic criminal justice, has set up

¹²¹ *Ibid.*, p. 119.

¹²² countrystudies.us/sudan/65.htm [accessed on 10th September 2011]

¹²³ ICJ Report on DAR

¹²⁴ UNCOI Report, *Op. cit.*, para 432.

¹²⁵ HRW report, Lack of Conviction: The Special Criminal Court on the Events in Darfur, *Op. cit.*, 2006

¹²⁶ *Ibid.*,

several special courts, commissions, committees and other bodies to investigate and prosecute crimes in Darfur. However, most observers do not believe that enough has been done to bring those responsible to justice, which demonstrates shortcomings in the working of the Sudanese criminal justice system.¹²⁷ For instance, in the view of HRW the Sudanese government has done little to demonstrate ‘its professed intent to ensure justice for the crimes committed in Darfur during the conflict.’¹²⁸ From a Kantian point of view, there can be a tendency to move between the universal and the local law, and implicitly accept different levels of law through global, regional, and national down to very local. However, the Darfur situation illustrates the importance of different legal patterns which complicate the diffusion of legal order.

The Interim National Constitution (INC) was passed by the National Assembly on July 6, 2005 as part of the January 2005 Comprehensive Peace Agreement between the government and the southern-based rebels.¹²⁹ The adoption of an INC sent a positive signal for peace and promised the beginning of a period of transition to democracy, respect for the rule of law, and promotion of human rights.¹³⁰ However, although the INC guarantees fair trial rights, there are concerns about the independence of judges since statutory laws do not fully guarantee due process rights. In practice, detainees are often not informed about their rights. The National Security Act and emergency legislation provide broad powers of arrest and detention that lack safeguards and may facilitate human rights violations. In addition, there is no legislation to provide effective protection of victims and witnesses to ensure that they do not suffer when coming forward to report a crime or to seek a remedy, especially in the course of conflict.¹³¹

The lack of political will to take these cases begins at the lowest levels, as police often refuse to take complaints from victims and do not investigate cases brought to them. Victims or witnesses who report crimes to the police often face indifference, harassment or possibly even arrest. In particular, victims of sexual violence are treated with disregard by the police.¹³² The UNCOI observed that very few victims registered

¹²⁷ REDRESS report, Accountability and Justice for International Crimes in Sudan, *Op, cit.*,

¹²⁸ HRW report, Lack of Conviction: The Special Criminal Court on the Events in Darfur, *Op, cit.*,

¹²⁹ UNCOI Report, *Op, cit.*,

¹³⁰ ‘Interim National Constitution of the Republic of Sudan’, Republic of the Sudan Gazette, Special Supplement, No. 1722, 10 July 2005, at

unmis.unmissions.org/Portals/UNMIS/CPA%20Monitor/Annexes/Annex%201-%20Interim%20National%20Constitution%20of%20Sudan%20-%20FIXED.pdf [accessed on 10th September 2011]

¹³¹ REDRESS report, Accountability and Justice for International Crimes in Sudan, *Op, cit.*,

¹³² HRW report, Lack of Conviction: The Special Criminal Court on the Events in Darfur, *Op, cit.*,

official complaints regarding crimes committed against them due to a lack of confidence in the criminal system. Moreover, of the few cases where complaints were made, most were not properly pursued.¹³³ In other words, victims and witnesses do not enjoy protection and thus active participation of victims in criminal proceedings is still largely unknown in Sudan's criminal justice system.¹³⁴ In the case of *hudud* crimes, if a woman chooses to pursue a complaint that she was raped, for instance, but fails to prove it, she could face charges of adultery and be in danger of facing criminal charges punishable by death or lashing. In this regard, HRW has concerns about procedural rights that may undermine defendants' right to receive a fair trial.¹³⁵

With regard to the rights of the accused, according to the special courts decree, the accused cannot exercise the right to be represented by a counsel of choice. In addition, counsel has limited time to cross-examine prosecution witnesses and defence witnesses, and there are restrictions for visiting the accused in detention to facilitate the preparation of his defence.¹³⁶ Moreover, Sudanese military courts fail to meet with international standards of fairness. Military trials do not provide procedural safeguards or an effective appeal process for death sentences, and have sometimes taken place when legal representation was denied or when the defence lawyers were given only one-day's notice prior to the commencement of a trial.¹³⁷ Also, the 1991 Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. In fact, as the UNCOI noted, the law provides wide powers to the executive and grants immunity from prosecution to many state agents.¹³⁸ Sudan has enacted many immunity provisions that 'impede the prosecution of those in the military, police and security agencies responsible for the crimes in Darfur.'¹³⁹ For instance, Article 33 of the National Security Forces Act of 1999, article 45 of the Police Act 2007 (article 46 of the former Act) and article 34 of the Armed Forces Act 2007, all provide immunities for state officials for any acts committed in the course of their duties. The immunities shield officials from any civil suits or criminal prosecutions unless the head of their forces approve such legal action. In practice, immunity legislation has resulted in impunity for serious

¹³³ UNCOI report, *Op. cit.*, para. 587.

¹³⁴ REDRESS report, Accountability and Justice for International Crimes in Sudan, *Op. cit.*,

¹³⁵ HRW report, Lack of Conviction: The Special Criminal Court on the Events in Darfur, *Op. cit.*,

¹³⁶ UNCOI Report on Darfur para 446.

¹³⁷ Amnesty International report, 'Justice? The Trial of Father Hillary Boma and 25 others', AFR54/003/1999, 22 February 1999, at www.amnesty.org/en/library/info/AFR54/007/1998/en [accessed on 10th September 2011]

¹³⁸ UNCOI, Report on Darfur para 451.

¹³⁹ HRW report, Lack of Conviction: The Special Criminal Court on the Events in Darfur, *Op.cit.*,

human rights violations.¹⁴⁰ Babiker has argued that people are still being evicted from their land without due process, judges are under political pressure, critics of human rights violations risk being jailed, harassed and tortured.¹⁴¹ International bodies have held that criminal laws in Sudan have facilitated violations because they are overly broad and contain offences and punishments that in themselves violate human rights. The laws do not proscribe international crimes in line with international definitions, and provisions such as immunity legislation have resulted in impunity for officials.¹⁴² They have also failed to protect individuals from crimes committed by or with the consent of state officials.

Concluding observations by the United Nations Human Rights Committee, decisions by the African Commission on Human and Peoples' Rights, and reports by national and international bodies and organisations, have all identified such failings and called upon Sudan to undertake the necessary reforms.¹⁴³ For real justice to take hold in Sudan, the criminal laws need to be changed in order to implement the Bill of Rights contained in the INC, and to better ensure human rights protection, particularly for the most vulnerable members of society. In this sense, victim's rights and impartial and effective investigation must be guaranteed, and judges and prosecutors must be fully independent in their work.¹⁴⁴ The criminal law may require a reform of both substantive provisions and procedural norms. An example would be the definition of torture, war crimes and crimes against humanity in line with international standards (substantive) and the related question of lifting immunity for officials suspected of having committed such crimes (procedural).¹⁴⁵ The National Assembly on 24 May, 2009 adopted amendments (Chapter 18) which penalize perpetrators of crimes against humanity, genocide and war crimes. This is a positive development in legal reform in Sudan, as the Criminal Code of 1991 did not include these three categories of crime.¹⁴⁶ However, the African Union High-Level Panel on Darfur (AUPD), in its report entitled 'Darfur the Quest for Peace, Justice and Reconciliation', considered that without formal definition within the

¹⁴⁰ Redress (2008). "Priorities for Criminal Law Reform in Sudan: Substance and process." from www.redress.org/publications/Options_Paper_Law_Reform%20FinalEngl.pdf [accessed on 10th September 2011]

¹⁴¹ Babiker, *Op. cit.*, p. x.

¹⁴² www.pclrs.org/Miscellaneous/TRAINING%20MATERIALS%20FINALFeb08.pdf [accessed on 10th September 2011]

¹⁴³ REDRESS report, Priorities for Criminal Law Reform in Sudan: Substance and process, *Op. cit.*,

¹⁴⁴ *Ibid.*,

¹⁴⁵ *Ibid.*,

¹⁴⁶ From confidential source, 23 May 2009- p. 5.

Sudanese legal system there will continue to be a certain degree of uncertainty about International Humanitarian Law (IHL), which might prove problematic for a source of criminal law.¹⁴⁷

Sudan's failure to engage with its international obligations regarding genocide, crimes against humanity and war crimes under the ICC Rome Statute:

Two main bodies of international law apply to the Sudan in relation to the conflict in Darfur: international human rights law and international humanitarian law, which seek to guarantee safeguards for persons subject to criminal justice proceedings.¹⁴⁸ Sudan, as a party to some human rights treaties, is obliged to respect the human rights and fundamental freedoms of all persons within its jurisdiction. These treaties include the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁴⁹ the International Covenant on Civil and Political Rights (ICCPR),¹⁵⁰ the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), etc. In compliance with these laws, implementation is effected by the national authorities and by international bodies such as the ICCRC, the UN and the ICC.¹⁵¹ Accountability for serious violations of both international human rights law and international humanitarian law is provided for in the Rome Statute.¹⁵² Sudan has signed but not yet ratified the Statute and therefore is bound to refrain from 'acts which would defeat the object and purpose' of the Statute.¹⁵³

In this regard, the International Commission of Jurists (ICJ) observed that, based upon the principle of *pacta sunt servanda*, the Government of Sudan is also bound to implement treaties, and any obligation arising from them, in good faith. Interestingly, the ICJ report noticed that 'a corollary of this general principle of international law is that the authorities of a particular country cannot escape their international commitments by arguing that domestic laws prevent them from doing so. They cannot

¹⁴⁷ Report of the African Union High-Level Panel on Darfur (2009), para 216.

¹⁴⁸ UNCOI Report, *Op, cit.*, para. 143.

¹⁴⁹ Ratified on 13 October 2003. UN GA Res. 260 A (III) of 9 December 1948.

¹⁵⁰ Ratified on 18 March 1986.

¹⁵¹ Babiker, *Op, cit.*, p. 195.

¹⁵² UNCOI Report, *Op, cit.*, para. 145

¹⁵³ *Ibid.*, para. 145. See also Article 18, Vienna Convention on the Law of Treaties (1969). Ratified by Sudan on 18 April 1990.

cite provisions of their constitutions, laws or regulations in order not to carry out their international obligations or to change the way in which they do so.’¹⁵⁴ In addition to international treaties, the Sudan is also bound by customary rules of international humanitarian law. The core of these customary rules is contained in Common Article 3 of the Geneva Conventions. It contains the most fundamental principles related to respect for human dignity which are to be observed in internal armed conflicts. These principles and rules are thus binding upon any state, as well as any insurgent group that has attained some measure of organized structure and effective control over part of the territory.¹⁵⁵

A number of provisions of these treaties are of particular relevance to the armed conflict in Darfur. For instance, ‘the right to fair trial; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest or detention; the obligation to bring to justice the perpetrators of human rights violations.’¹⁵⁶ The UNCOI, based upon its mandate from the United Nations Security Council, analyzed reports from different sources including government, inter-governmental organizations, various United Nations mechanisms, as well as non-governmental organizations. The UNCOI found that military engagements between government and rebel forces have resulted in severe violations of the rights of civilian populations, including hundreds of incidents involving the killing of civilians, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction.¹⁵⁷ In addition, the National Commission of Inquiry reported that ‘grave human rights breaches took place’. In fact, the NCOI admitted that incidents of civilian killings were committed by all parties to the conflict in Darfur and violated Common Article 3 of the Geneva Conventions of 1949.¹⁵⁸ However, as the UNCOI asserted, the National Committee attempts in its report to justify the violations rather than seek effective measures to address them.¹⁵⁹ The UNCOI claimed that the National Commission was ‘under enormous pressure to present a view that is close to the Government’s version of events. The report of the National Commission provides a glaring example of why it is

¹⁵⁴ ICJ report, *The Administration of Justice in Sudan: The Case of Darfur*, *Op. cit.*,

¹⁵⁵ UNCOI Report, *Op. cit.*, para 157.

¹⁵⁶ *Ibid.*, para 148.

¹⁵⁷ *Ibid.*, para 183.

¹⁵⁸ NCOI Report, from confidential source, conclusion part F.

¹⁵⁹ UNCOI Report, *Op. cit.*, para 421

impossible under the current circumstances in Sudan for a national body to provide an impartial account of the situation in Darfur, let alone recommend effective measures.’¹⁶⁰

The Government of Sudan has taken some steps to investigate international crimes in Darfur in order to demonstrate that Sudan is willing and able genuinely to investigate and prosecute international crimes there.¹⁶¹ According to one view, ‘the Government has taken some steps, which however constitute more a window-dressing operation than a real and effective response to large scale criminality linked to the armed conflict.’¹⁶² As a result of the report of the NCOI and its investigative committee, the Chief Justice, in accordance with the Emergency Act 1997, established the special courts in 2003.¹⁶³ Following the report of the UNCOI, the United Nations Security Council, acting under Chapter VII of the UN Charter, decided in Resolution 1593, on 31 March 2005, to refer the situation in Darfur from 1 July 2002 to the Prosecutor.¹⁶⁴ On June 7, 2005, one day after the Prosecutor announced that he was opening investigations into the events in Darfur, the Sudanese authorities established the SCCED to demonstrate the government’s ability to handle prosecutions domestically with reference to Article 17 of the ICC Rome Statute.¹⁶⁵ An amended decree, issued in November 2005, broadened the SCCED’s jurisdiction to include international humanitarian law, and established three permanent seats for the Court in El Fasher, Nyala and Geneina, the capitals of North Darfur, South Darfur and West Darfur respectively.¹⁶⁶ The jurisdiction of the Nyala Criminal Court for Darfur’s incidents was extended to cover ‘actions which constitute crimes pursuant to the Sudanese Criminal Act, other penal laws and the international humanitarian law.’ The jurisdiction of the Nyala Criminal Court, though important, only covers one part of Sudan and not the entirety of the country. According to the REDRESS this appears to allow the SCCED to try war crimes. It is less clear whether the amendment also covers genocide and crimes against humanity.¹⁶⁷

The Government of Sudan stated in 2005 that it had identified around 160 suspects for investigation and prosecution for crimes in Darfur. However, by mid-2006, the first

¹⁶⁰ *Ibid.*, para 421.

¹⁶¹ REDRESS report, "Accountability and Justice for International Crimes in Sudan ", *Op. cit.*,

¹⁶² UNCOI report, *Op. cit.*, para 567.

¹⁶³ United Nations Security Council, S/2005/403- 22 June 2005- Letter dated 18 June 2005 from the Chargé d’affaires a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council, See also

www.unhcr.org/refworld/country,,HRW,,SDN,456d621e2,44c765c74,0.html

¹⁶⁴ ICJ report, The Administration of Justice in Sudan: The Case of Darfur, *Op. cit.*,

¹⁶⁵ *Ibid.*,

¹⁶⁶ HRW report, Lack of Conviction: The Special Criminal Court on the Events in Darfur, *Op. cit.*,

¹⁶⁷ REDRESS report, "Priorities for Criminal Law Reform in Sudan: Substance and process", *Op. cit.*,

Special Court (SCCED) had only carried out six trials from a total of 13 cases.¹⁶⁸ According to the report of HRW, the Court's first operation indicates that there is no genuine willingness on the part of Sudanese authorities to ensure that the perpetrators of the atrocities in Darfur are brought before the SCCED for prosecution. Nor is there evidence that the SCCED has the capacity to try these cases effectively even if appropriate cases were brought before it.¹⁶⁹ In practice, investigations are slow, there are few prosecutions, the jurisdiction of the Special Court and other courts is not always clear, and judges work from a distance, as many of them are based in Khartoum. Most cases before the SCCED concern ordinary crimes such as armed robbery, receipt of stolen goods, possession of firearms without a licence, intentional wounding and murder. This gives the misleading impression that the crimes committed in Darfur are acts of banditry, ignoring the widespread and systematic nature of crimes. The defendants in cases before the SCCED are mainly low-ranking military officials and civilians.¹⁷⁰ HRW observed that Sudanese authorities have failed to press charges before the SCCED for a single major atrocity committed in Darfur and no state official has been charged based on command responsibility for these crimes.¹⁷¹ So far, the SCCED has tried eight cases involving 30 defendants - 21 military or law enforcement officials and nine civilians. The charges against military and police personnel have included the murder of detainees, the killing of a student demonstrator, robbery and one case of rape. 'Five low-ranking officers were sentenced to prison and five others sentenced to death, out of which two were executed by hanging in May 2007 and another two released because of an amnesty, eleven other soldiers were acquitted.'¹⁷² Sudanese law does not criminalise most of the 51 counts enumerated in the ICC's arrest warrants for two Sudanese officials. Even after a November 2005 Decree broadened the jurisdiction of the SCCED to include international humanitarian law, the Court still applied only the Sudanese Criminal Act 1991.¹⁷³

The establishment of the United Nations Mission in Sudan (UNMIS) by Security Council Resolution 1547, in early 2004, was an important step taken by the international community in order to investigate conflicts in Sudan.¹⁷⁴ Due to the

¹⁶⁸ REDRESS report, "Accountability and Justice for International Crimes in Sudan ", *Op. cit.*,

¹⁶⁹ HRW report, "Lack of Conviction: The Special Criminal Court on the Events in Darfur ", *Op. cit.*,

¹⁷⁰ REDRESS report, "Accountability and Justice for International Crimes in Sudan.", *Op. cit.*,

¹⁷¹ HRW report, "Lack of Conviction: The Special Criminal Court on the Events in Darfur ", *Op. cit.*,

¹⁷² ICJ report, "The Administration of Justice in Sudan: The Case of Darfur." *Op. cit.*,

¹⁷³ *Ibid.*,

¹⁷⁴ www.un.org/en/peacekeeping/missions/unmis/background.shtml [accessed on 10th September 2011]

escalating crisis, the Security Council, in its resolution 1556 (2004), extended its mandate in relation to Darfur. As part of its broad mandate to further peace, humanitarian assistance, recovery and development, UNMIS was established to maintain a human rights programme with several human rights monitors working in Darfur.¹⁷⁵ UNMIS, through consultations with officials, has continued to promote expanded access to justice, right to counsel, and due process in the courts of Sudan. However, many serious gaps remain between international standards and Sudanese laws governing criminal laws and procedure. 'Some gaps in due process are cited as cause for political grievances. The lack of express right to counsel in pre-trial proceedings was recently cited by the JEM when protesting the convictions and death sentences of its members for crimes against the state.'¹⁷⁶ It is important to mention that the National Assembly, on 20 May 2009, adopted several amendments to the Criminal Procedure law, as well as amendments to the Criminal Code, by adding a new chapter defining crimes against humanity, genocide and war crimes.¹⁷⁷ It has been claimed that these amendments 'come on the heels of the arrest warrant issued by the ICC for President Al Bashir, and a few days after a Darfurian rebel figure presented himself to the ICC in response to an ICC summons.'¹⁷⁸

The ICJ observed that, despite the November 2005 Decree, which broadened the SCCED's jurisdiction to include international humanitarian law, and the 2005 Interim National Constitution, which provides a basis for the application of international law in Sudan under Article 27, the SCCED applied only the Criminal Act in the eight cases before it. In fact, the Special Criminal Act (SCA) does not criminalise the acts mentioned above in the report of the UNCOI, nor most of the 51 war crimes and crimes against humanity alleged to have been committed by Ahmad Harun and Ali Kushayb, for which the ICC issued arrest warrants on 27 April 2007 to direct them to appear before the ICC.¹⁷⁹ Therefore, while the Special Court may end up trying some low level offenders, the ICC will still have to try the key players, especially key government officials indicted by the ICC.¹⁸⁰ The ICJ stated that the local mechanisms established by the Government to investigate human rights violations in Darfur have failed to produce any transparent findings and charges brought before the Special Court did not reflect

¹⁷⁵ REDRESS report, "Accountability and Justice for International Crimes in Sudan.", *Op, cit.*,

¹⁷⁶ Confidential source, 23 May 2009- p. 5

¹⁷⁷ *Ibid.*, p. 1.

¹⁷⁸ *Ibid.*, p. 2.

¹⁷⁹ ICJ report, "The Administration of Justice in Sudan: The Case of Darfur.", *Op, cit.*,

¹⁸⁰ www.issafrica.org/cdromestatute/pages/status.html [accessed on 10th September 2011]

international crimes.¹⁸¹ Thus, the Government of Sudan continues not to have the political will, and the Sudanese justice system continues to be unable to prosecute adequately perpetrators of gross violations of international human rights law and serious violations of international humanitarian law.¹⁸² In this regard, the president of the SCCED, Judge Mahmoud Mohammad Akbam, has claimed that ‘the court has been unable to hold accountable individuals who may have committed grave crimes because of the reticence of witnesses and the general insecurity in the region.’¹⁸³ Other representatives of the Sudanese government have also stated that they cannot investigate or prosecute individuals responsible for crimes in Darfur because witnesses refuse to come forward and identify the perpetrators.¹⁸⁴ Akbam has also said that the reason for the lack of accountability in Darfur is that ‘higher authorities are not interested in these cases to be presented to the court or for them to even come to the knowledge of the court.’¹⁸⁵ Furthermore, the African Union High-Level Panel on Darfur (AUPD) in February 2009 observed that the Special Prosecutor of the SCCED had announced that three men, including Ali Kushyab who is the subject of an outstanding ICC arrest warrant, had been charged with criminal offences. However, those cases have not yet come before a court.¹⁸⁶

Overall evaluation of whether Sudanese criminal procedure is inadequate in terms of Article 17 of the ICC Rome Statute:

As discussed previously, complementarity is operationalised in the form of an admissibility examination set forth in Articles 17-20 of the Rome Statute. Article 17 sets out the substantive principles of complementarity, while Article 18 and 19 provide its procedural components.¹⁸⁷ Unwillingness and inability are the most important admissibility criteria according to the provisions of Article 17.¹⁸⁸ Darfur represents the

¹⁸¹ ICJ report, *Op. cit.*,

¹⁸² *Ibid.*,

¹⁸³ Sudan Organization Against Torture (SOAT), "Annual Report on the Human Rights Situation in Sudan", March 2005 – March 2006, from www.sudantribune.com/IMG/pdf/SOAT_Annual_Report_2005-2006.pdf [accessed on 10th September 2011]

¹⁸⁴ HRW report, "Entrenching Impunity: Government Responsibility for International Crimes in Darfur", (2005) from www.hrw.org/sites/default/files/reports/darfur1205webwcover.pdf [accessed on 10th September 2011]

¹⁸⁵ Rubin, *Op. cit.*,

¹⁸⁶ AUPD report, *Op. cit.*, para 223.

¹⁸⁷ Articles 17, 18, 19 of the Rome Statute.

¹⁸⁸ Article 17 of the Rome Statute.

first time a situation was referred to the ICC involving crimes taking place in the midst of ongoing conflict within the territory of a state that is not a party to the Rome Statute. It also marks the first time that the Security Council has referred a case to the ICC, as it is permitted to do under the Rome Statute.¹⁸⁹ In this context, the Darfur situation sheds light on the development and assessment of the complementarity regime of the ICC, since the regime provides the ability to prosecute international criminals on behalf of the international community.¹⁹⁰

In fact, Darfur is the first ICC case in which a question of complementarity has been raised between the ICC's jurisdiction and the jurisdiction of concurrently established national courts such as those in Sudan.¹⁹¹ Although the Rome Statute does not define what constitutes a genuine prosecution, the drafting history indicates that the term allows for subjectivity in determining the unwillingness of a state to prosecute.¹⁹² Article 17 of the Rome Statute states that the Pre-Trial Chamber of the ICC may determine a case is admissible before the ICC under the complementarity principle if national proceedings were initiated for the 'purposes of shielding the person from criminal responsibility', or were not conducted 'independently or impartially.'¹⁹³

As mentioned in the previous section, the gravity of the crimes and inadequacy of domestic Sudanese accountability mechanisms - as documented by the UNCOI - became the basis for the Security Council's referral of the Darfur situation to the Prosecutor in Resolution 1593 of 2005.¹⁹⁴ The Government of Sudan reacted to the ICC by creating a domestic tribunal. However, in the ICC case against Thomas Lubanga Dyilo, the Court decided that in order for a case to be inadmissible before the ICC under the complementarity principle as a result of concurrent national court proceedings, these proceedings must 'encompass both the person and the conduct which is the subject of the case before the Court.'¹⁹⁵ As previously noted, the Special Court for Darfur was replaced by special courts for each of the three Darfur regions, North, West and South Darfur, and completed only thirteen cases, which were against low-level suspects. None

¹⁸⁹ Totten, *Op, cit.*,

¹⁹⁰ Plessis, M. D. (2008). "Complementarity in Africa." from se1.isn.ch/serviceengine/Files/ISN/101515/...4E9B.../Chapter11.pdf [accessed on 10th September 2011].

¹⁹¹ Tottan, *Op, cit.*,

¹⁹² Hewett, *Op, cit.*, p. 276.

¹⁹³ Article 17 (2)(c) of the Rome Statute of the ICC.

¹⁹⁴ www.hrw.org/en/news/2009/05/11/letter-un-security-council-advance-africa-trip [accessed on 20th May 2011]

¹⁹⁵ ICC public redacted document, Situation in Darfur, the Sudan, Prosecutor's Application under Article 58(7), ICC-02/05-56 (Feb. 27, 2007), from www.icc-cpi.int/iccdocs/doc/doc259838.PDF, para. 256.

of them was charged with crimes of the same gravity or magnitude as those in the Prosecutor's Application against Harun or Kushaby.¹⁹⁶ The UNCOI stated that, 'the measures taken so far by the [Sudanese] Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur.'¹⁹⁷ In this sense, Hewett has argued that 'inaction followed by hasty action may lend credence to the claim that the Sudanese court was only established to shield the accused from liability for their alleged crimes.'¹⁹⁸ Moreover, regarding the operation of domestic authority, the UNCOI implicated the current Khartoum government in atrocities committed in Darfur, stating that any court established by 'this government will naturally be suspected of lacking the crucial elements of independence and impartiality.'¹⁹⁹ The findings of the AUPD have also illustrated that the absence of political will, impunity for the crimes committed in Darfur, an unwillingness to use the law to attend to violations of human rights, and failure to reform the judiciary, are the major obstacles to justice in Darfur.²⁰⁰

The 2005 Interim National Constitution stipulates in Article 128 that 'the judges of the National Supreme Court and all judges of other national courts shall be independent and shall perform their functions without political interference.' However, the Sudanese judiciary remains largely under the control of the executive.²⁰¹ The judiciary in the Sudan is 'largely subservient to the Government.'²⁰² The judiciary is not truly independent and many judges have not been selected primarily based on their legal qualifications and can be subject to pressure through a supervisory authority dominated by the Government. Furthermore, unfair trials are built into the system of justice.²⁰³

However, the independence and impartiality of the Sudanese justice system and its ability to tackle impunity and deliver fair trials has been further undermined by a web of military, security, police and other exceptional courts that do not comply with internationally accepted procedures, and assist in protecting state officials from being accountable under the law.²⁰⁴ Members of the police forces who commit offences that are considered crimes under the Criminal Act 1991, or other supplementary law, can

¹⁹⁶ *Ibid.*,

¹⁹⁷ UNCOI report, *Op, cit.*,

¹⁹⁸ Hewett, *Op, cit.*,

¹⁹⁹ *Ibid.*,

²⁰⁰ AUPD report, *Op, cit.*, p. 47.

²⁰¹ ICJ report, *Op, cit.*,

²⁰² Babiker, *Op, cit.*, p.247.

²⁰³ *Ibid.*,

²⁰⁴ ICJ report, *Op, cit.*,

only be tried before Police Courts established by the President, unless the Commissioner of Police decides to refer them to ordinary courts. This rule applies to all cases except for *huddud* or *qisas* crimes (special crimes in violation of *Shari'a*).²⁰⁵ As previously mentioned, *Shari'a* was refined and strengthened in Sudan's criminal law by the Criminal Act of 1991 and is still the basis of law in Darfur. In 1991, *Shari'a* was applicable to all of Sudan with the exception of the southern region. Under the Interim National Constitution of July 2005, following the January 2005 Comprehensive Peace Agreement (CPA) with the southern rebels, *Shari'a* is applicable to all of Sudan with the exception of the southern autonomous region.²⁰⁶ However, the question of where *Shari'a* punishment may be administered in the Sudan raises further critical difficulties in terms of territorial application of the Bill of Rights of the Interim Constitution.²⁰⁷ In addition, the Sudanese legal system and the compatibility between Islamic law and human rights law may raise particular controversies. For instance, the Criminal Act of 1991 lays down many Islamic penalties which are inconsistent with the provisions of relevant international human rights treaties to which the Sudan is party. Such penalties include limb amputations for theft or robbery, public flogging for consumption or possession of alcohol, stoning to death for adultery, and the death penalty for apostasy and waging war against the state.²⁰⁸ Amnesty International maintains that Sudan's legal ratification of *Shari'a* under the Criminal Act of 1991, 'coupled with the fact that some areas of Darfur are still governed under a continued state of emergency decree, creates a tangled web of legal complications that could hamper any efforts for transparency in the Special Courts prosecution proceedings.'²⁰⁹

As noted before, in 2004 Sudan and its judiciary began to take action in response to the crimes committed within its jurisdiction in the form of the National Commission of Inquiry and Special Courts to investigate Darfur crimes. In Sudan, these special jurisdictions are established either by the Chief Justice or by the President and not by the law, and are composed of a majority of military judges who are accountable to the executive. These jurisdictions contravene Article 14 of the ICCPR and paragraph 5 of the UN Basic Principles on the Independence of the Judiciary,²¹⁰ which provide that everyone has the right to be tried by ordinary courts or tribunals according to

²⁰⁵ *Ibid.*,

²⁰⁶ UNCOI report, *Op. cit.*,

²⁰⁷ Babiker, *Op. cit.*, p. 243.

²⁰⁸ *Ibid.*, p.250

²⁰⁹ ipsnews.net/news.asp?idnews=33549 [accessed on 10th September 2011]

²¹⁰ www2.ohchr.org/english/law/indjudiciary.htm [accessed on 10th September 2011]

established legal procedures. In other words, they are in violation of the basic rights to fair trial guaranteed by international standards, as cases before such Special Courts are heard summarily, their decisions immediately executed, and appeals against convictions must be made to the District Chief Justice within seven days.²¹¹ Despite the CPA and INC promulgation of human rights, Sudanese criminal legislation has not been harmonized with international human rights law and due process standards, and as a consequence it does not contain comprehensive substantive legal definitions of crimes exclusively related to sexually based violence in the context of armed conflicts. For instance, rape crimes are mixed with adultery under the regulations of the Criminal Code, 1991. The Evidence Act, a part of this Code, requires a very strict and complicated evidentiary procedure for rape crimes, which results in impunity for most of the perpetrators.²¹² Moreover, the procedural law does not provide judicial mechanisms to prevent, investigate and punish serious gender based violations nor effective remedies to victims of sexual violence that allow them to seek meaningful redress. Even the newly adopted Armed Forces Act 2008 that brought into Sudanese law a whole chapter on International Humanitarian Law, codifying crimes during war, does not address sexual violence as a crime during armed conflicts.²¹³ In this context, the ICC Prosecutor should be aware of the ideas and values of local traditions, particularly *Shari'a* jurisprudence in Sudan where Islamic law is recognised as a main source of law.

Jan Pronk, the UN Special Representative of the Secretary-General for Sudan, has observed that the Darfur situation represents 'anarchy and a total collapse of law and order', in which 'the border lines between the military, the paramilitary and the police are being blurred.'²¹⁴ Restrictive laws that grant broad powers to the executive have undermined the effectiveness of the judiciary, and many of the laws in force in Sudan today contravene basic human rights standards.²¹⁵ Senior counsel to the International Justice Programme at Human Rights Watch, Sara Darehshori, has maintained that 'there is no real effort on the ground to prosecute and ultimately bring justice to the

²¹¹ ICJ report, *Op. cit.*,

²¹² UNCOI report, *Op. cit.*,

²¹³ RoL input to SG Report to Security Council, From confidential source.

²¹⁴ Pronk, J. (2004). "Statement on Darfur to the UN Security Council, November 2004 www.janpronk.nl/speeches/english/statement-on-darfur-to-the-un-security-council-november-2004.html [accessed on 10th September 2011].

²¹⁵ UNCOI report, p. 5.

victims.’²¹⁶ Amnesty International, in relation to the operation of the Special Courts, also claims that the trials have failed to meet international standards of fairness in a number of ways. Some defendants were only allowed to meet their lawyers for the first time after their trial had begun and others were convicted on the basis of confessions extracted under torture.²¹⁷

Conclusion:

The Sudanese system of criminal justice has been heavily influenced by *Shari’a* and the judiciary has historically been under control of government. This system, due to lack of independence and impartiality, has failed to deliver fair trials in the national judicial system on the one hand, and to comply with international accepted procedures on the other. In fact, criminal laws in Sudan have facilitated violations since they are overly broad and contain offences and punishments that themselves violate human rights. The laws do not proscribe international crimes in line with international definitions, and provisions such as immunity legislation have resulted in impunity for officials. In short, they have failed to provide adequate protection against serious crimes that have taken place in Darfur.²¹⁸ The shortcomings of the Sudanese criminal justice system have been identified in a number of reports by national, regional and international bodies. The reports made clear that the Government of Sudan was not taking sufficient action to investigate and prosecute the international crimes genuinely, including by holding the perpetrators accountable.²¹⁹

Although the Government of Sudan has taken some steps to investigate international crimes in Darfur in order to demonstrate that they are willing and able genuinely to investigate and prosecute such crimes, neither the commissions nor the special courts set up to deal with serious crimes have investigated any possible links between individual crimes and the chain of command of the army and other forces. Furthermore, there has not been any attempt to establish the systematic nature of the crimes and the role of higher-ranking officials in them.²²⁰ The National Commission of Inquiry which was established by the government to investigate specified crimes in Darfur, concluded

²¹⁶ ipsnews.net/news.asp?idnews=33549 [accessed on 10th September 2011]

²¹⁷ Amnesty International report (2009), p. 309.

²¹⁸ www.pclrs.org/Miscellaneous/TRAINING%20MATERIALS%20FINALFeb08.pdf [accessed on 10th September 2011]

²¹⁹ Redress report, *Op. cit.*,

²²⁰ *Ibid.*,

that crimes committed in Darfur were the result of rebel activities and that they were not sufficiently widespread to consider as crimes of international concern under the Rome Statute. The government furthermore declared that, according to the fact that complementarity is the core premise of the Rome Statute; the Sudanese competent authorities are willing to finalize the process of investigations and prosecutions based on their national laws of procedure.

However, according to the findings of UNCOI, the International Commission of Jurists and other national and international bodies, recent investigatory bodies and courts set up by the Government to address human rights law in Darfur have not delivered justice. The courts are neither independent nor impartial, and a range of national laws make the courts incapable of providing justice in a way that reflects the gravity of the crimes and conforms to international standards. The special courts have never addressed the criminal responsibility of senior-level Sudanese officials in relation to Darfur. In fact, the sophisticated system of immunities, guaranteed by the Constitution and various laws, protects military, police and other Government officials from prosecution for human rights violations.

In addition, the special court trials do not consider the large scale attacks, as described by the UNCOI and many NGO investigations, involving the killing of civilians, torture, enforced disappearances, rape etc., conducted on a widespread and systematic basis.²²¹ The failure to address legal and structural obstacles appears to underscore the lack of political will of the Sudanese Government to bring to justice state officials and members of the *Janjaweed* militia operating in conjunction with government forces responsible for gross human rights violations in Darfur.²²² In the view of the impunity it grants, the judicial system has demonstrated that it lacks adequate structures, authority, credibility, and willingness to effectively prosecute and punish the perpetrators of the alleged crimes in Darfur.²²³ In particular, many serious gaps remain between international standards and Islamic law in Sudan governing criminal matters and procedure.²²⁴ It was mentioned earlier in chapter two that Kantianism has provided the inspiration for much of our thinking about universalism in criminal justice and according to this model; one cannot isolate questions of domestic justice from those of international justice. There is a clear tension for Islamic states which seek to impose their Islamic beliefs in practice,

²²¹ UNCOI and ICJ reports, *Op, cit.*,

²²² ICJ report

²²³ UNCOI report, *Op, cit.*, para 455.

²²⁴ From confidential source, p. 5.

on the one hand, while expressing a liberal inclination towards the securing of human rights on the other. However, the Kantian set of imperatives are still crucial in all attempts to move the global judicial condition towards some kind of cosmopolitan civil society. Islamic criminal law recognizes some of the basic rights of defendants, such as the presumption of innocence, the principle of legality and non-retroactivity, the intention of the perpetrator, and duress. However, such rights do not address the more pressing issue of the lack of specificity of the elements of core crimes under the Rome Statute. An Islamic perspective on various elements of crimes of gender highlights the conflict between *Shari'a* and ICC provisions, and it is a particular example of the general tension between domestic and international law in underdeveloped legal systems - *Shari'a* has never provided a comprehensive system of codes and it is only a path for striving towards God's will. Sudan's legal system and the compatibility between Islamic law and international criminal justice may raise particular controversies,²²⁵ which need to be considered in the ICC prosecutorial decision-making process with regard to particular cases.

Overall, the Prosecutor came to conclusion that the Sudan is unwilling to genuinely investigate; thus, there is reasonable basis to initiate an investigation into the situation in Darfur. The next chapter will examine the legitimacy of prosecutorial discretion in making admissibility assessment with regard to particular cases in the Darfur situation. In particular, the ethical quality of prosecutorial performance will be analyzed in relation to different phases of the proceedings before the Court and the Prosecutor's selection of cases. While this chapter has examined the factual basis of the situation on the ground, the next chapter will explore how the Prosecutor has reacted, in order to assess the relevance of the normative approach established in Chapter Two to the operation of Article 17 of the Rome Statute.

²²⁵ Babiker, *Op, cit.*, p. 250.

Chapter Five: Decision-Making Process in the Darfur Situation

Introduction:

International crimes are almost always committed within a system of atrocities where intellectual authors make the plans, leaders order or incite the commission of the crimes, and lower ranked persons carry the plans out.¹ As far as administration of justice concerned, it is crucial that the Prosecutor apply the law in a manner that is impartial, equitable and independent. Prior to the establishment of the ICC, the selection of situations and cases before international criminal jurisdictions had been ‘highly *political* and *not very transparent*.’² As Schabas has pointed out, ‘in contrast with both Nuremberg and the *ad hoc* tribunals, the judicial oversight of the Prosecutor in the selection of cases is considerably more robust’³.

Having said that the ICC Prosecution is the ‘principal agency responsible for safeguarding the complementarity regime during the triggering and criminal procedures’⁴ a complex issue may be raised here is when the ICC should interfere in a national criminal proceeding. At the heart of the complementarity principle is the ability to prosecute international criminals in a state’s national courts on behalf of the international community, or ‘to have in place mechanisms to arrest and surrender to the ICC persons that the ICC seeks to prosecute.’⁵ The Prosecutor’s unique brand of discretion is a new issue for international criminal justice⁶ and the Prosecutor must consider a range of policy and strategy questions which will have an impact on the framework of international criminal justice.⁷ In fact, the Prosecutor must be able to exercise his or her discretion based on a normative approach, which accommodates its moral and legal duties in order to produce effective criminal investigations and prosecutions of human rights atrocities. However, as Kantian normative theory has its roots in post-Enlightenment rationalism; it represents a form of a secular liberation

¹ Stigen, *Op, cit.*, p. 369.

² *Ibid.*, p. 346.

³ Schabas, W. (2008). "Prosecutorial Discretion vs. Judicial activism at the International Criminal Court " *Journal of International Criminal Justice*: 731-761. p. 734.

⁴ Olasolo, H. (2003). "Issues regarding the general powers of the ICC Prosecutor" www.icc-cpi.int

⁵ Plessis, M. D. (2008). "Complementarity in Africa." from se1.isn.ch/serviceengine/Files/ISN/101515/...4E9B.../Chapter11.pdf [accessed on 10th September 2011]

⁶ Stahn, *Op, cit.*, p. 185

⁷ Stigen, *Op, cit.*, p. 87.

theology movement, which is in sharp contrast with the aspiration of some Islamic countries, such as Sudan. As Stigen has noted, bringing criminals to justice before any court requires a complex body of procedural law, and the Prosecutor must address the issue of how to detect national failure in order to proceed, considering at what stage, how and by whom, the admissibility and prosecutorial discretion are to be settled.⁸

The Security Council's referral to the ICC regarding the conflict in the Darfur region of Sudan sheds light on the development and meaning of the complementarity regime provided in the Rome Statute.⁹ A number of interesting issues have arisen in light of the Security Council's first referral to the ICC, including the extent to which the Prosecutor is bound by the terms of any Security Council referral. In other words, will the Prosecutor of the ICC be implicitly bound by findings of the Council's investigation? Considering the operational difficulties of conducting an investigation with limited investigative resources, 'there may be a temptation to rely heavily upon predeterminations that will inevitably accompany Security Council referral'.¹⁰ When the Security Council refers a situation to the ICC, an *a priori* determination by the Security Council as to how cases should be allocated remains problematic.¹¹ Furthermore, it must be asked whether the admissibility criteria will still apply, or whether such referral effectively vests the ICC with primacy *vis-a-vis* national jurisdictions.¹²

Prosecutorial discretion at the ICC has been subject, in this context, to critiques in the early years of its work regarding the application of the complementarity principle. In a way, prosecutorial authority, and its inconsistency with governing principles of case strategy for the prosecution at an early stage of the criminal justice process, challenge the legitimacy of prosecutorial discretion and may complicate the work of the ICC. As Ropper has noted, the Darfur case is the most challenging case before the ICC, and Sudan will be a test case not only for the ICC but ultimately for the international community as to whether it is truly committed to ending the cycle of violence and impunity.¹³ The purpose of this chapter is to examine to what extent prosecutorial policy has been effective and transparent in evaluating the admissibility assessment in

⁸ *Ibid.*,

⁹ Totten, *Op. cit.*, p. 1070.

¹⁰ Gallavin, C. (2006). "Prosecutorial Discretion within the ICC: Under the Pressure of Justice " Criminal Law Forum **17**: 43-58. p. 44.

¹¹ Stigen, *Op. cit.*, p. 244.

¹² *Ibid.*, p. 238.

¹³ Ropper, S. and L. Barria (2008). "State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects." Leiden Journal of International Law **21**: 457-476. p. 476.

the given situation. The first section of this chapter will analyse the decision-making process in the Darfur situation in terms of prosecutorial policy, in order to explore how the ICC Prosecution has made its decisions on the admissibility of situations and cases. In this regard, the Prosecutor's requests for the issuance of warrants of arrest and the decisions which were made by the Pre-Trial Chamber will be examined. The second part of this chapter will evaluate the exercise of the discretionary power of the Prosecutor based upon core ethical principles of transparency, independence, and impartiality in prosecutorial policy, and the legitimacy of prosecutorial discretion.

1. Analysis of decision-making process:

Several issues are raised by the Darfur cases, such as admissibility, command responsibility and sovereign immunity.¹⁴ However, the following analysis attempts to focus on admissibility issues alone. The prosecution of a matter before the ICC and the process leading to the decision to prosecute normally requires very considerable investigation, information gathering, and often high levels of confidentiality and information or witness protection. Contact between the Prosecutor and the national authorities becomes extensive during the course of an investigation and any request for arrest and surrender or any prosecution.¹⁵ The selection process involves comparative analysis and, while the Prosecutor will have access to the whole crime base, the judges will only be able to compare the present case with previous cases that the Prosecutor has brought before the Court.¹⁶

In the Darfur situation, the Prosecutor must show to the Pre-Trial Chamber that the efforts of the Sudanese national courts are not genuine and that the ICC therefore may retain its jurisdiction over the case.¹⁷ Sudan is a non-state party to the ICC and it was the Security Council who first referred the situation to the ICC. Therefore, coming to terms with 'an *ad hoc* agreement' based upon Article 12 of the Rome Statute does not apply in this case.¹⁸ Even though Sudan is a non-state party, they are a signatory to the Rome Statute, and as such have certain obligations to refrain from 'acts which would defeat the object and purpose' of the Rome Statute. Therefore, the argument can be

¹⁴ Elagab, O. Y. (2009). "Indicting the Sudanese President by the ICC: Resolution 1593 revisited." The International Journal of Human Rights 13(5): 654-667. p. 662.

¹⁵ Plessis, *Op, cit.*,

¹⁶ Stigen, *Op, cit.*, p. 404.

¹⁷ Hewett, *Op, cit.*,

¹⁸ Thompson-Flores, T. (2009). "The International Criminal Court: Will it Succeed or Fail?". from works.bepress.com/thomas_thompson_flores/1/ [accessed on 10th September 2011].

made that by committing war crimes and crimes against humanity Sudan has violated its obligations.¹⁹

1.1 Referral of the Darfur situation to the ICC:

As prosecutorial discretion is formulated, neither states parties or the Security Council can instruct the Prosecutor to investigate or prosecute.²⁰ At the Rome Conference, the issue of the relationship between the Security Council and the Court was one of the most pressing. The finally agreed system of Security Council referral indicated the ability of the Council to refer situations to the Court under Article 13 (b) of the Statute.²¹ However, for a referral to be made pursuant to Article 13 (b), the Council must act under Chapter VII of the Charter.²² It is arguable that the Security Council referral of the Darfur situation to the Prosecutor is the first opportunity to explore the complex relationship between the Security Council and the power of the Prosecutor.²³ It is worth mentioning here that while Article 12 details the preconditions to the exercise of the Court's jurisdiction in the case of State Party referrals or *proprio motu* investigations, Security Council referrals are only subject to the jurisdictional limitations of the crimes themselves and the operation of Article 17. In this sense, Security Council referrals are required to focus upon a 'situation' and not an individual.²⁴

The general principles of admissibility as articulated in Article 17 of the Rome Statute do not distinguish between trigger mechanisms for prosecution.²⁵ As was addressed in chapter three, the complementarity regime also applies in the event of a Security Council referral since Articles 17 and 19 of the Rome Statute do not indicate any exception for these. Under such an approach, the ICC would remain free to make an independent and final determination of issues of jurisdiction and admissibility.²⁶ In response to the Security Council referral of the Darfur situation, the Prosecutor noted, 'before starting an investigation, I am required under the Statute to assess factors

¹⁹ *Ibid.*,

²⁰ Stigen, *Op, cit.*, p. 344.

²¹ Gallavin, *Op, cit.*, p. 44.

²² Article 13 (b) of the Rome Statute

²³ Stahn, *Op, cit.*, p. 187.

²⁴ Gallavin, *Op, cit.*, p. 48.

²⁵ Article 17 of the Rome Statute.

²⁶ Informal policy paper: Complementarity in practice, p. 21, para 68. from <http://www.iclklamberg.com/Caselaw/OTP/Informal%20Expert%20paper%20The%20principle%20of%20Ocomplementarity%20in%20practice.pdf> [accessed on 10th September 2011]

including crimes and admissibility; I look forward to cooperation from relevant parties to collect this information.’²⁷

However, there has been a debate over the extent to which the Prosecutor is bound by the terms of Security Council referral made in March 2005. For instance, Jens David Ohlin has argued that in cases of Security Council referral, prosecutorial discretion to make a determination about the initiation of an investigation is inconsistent with the role of the Security Council.²⁸ He has further pointed out that when the Security Council invokes its authority in accordance with Chapter VII of the UN Charter in making a referral to the Court, such referrals are mandatory ‘to restore peace and security.’²⁹ Therefore, prosecutorial discretion would be restricted and it is not for the Prosecutor under Article 53(1) to determine whether there is a reasonable basis to proceed.³⁰ Article 103 of the UN Charter stipulates that ‘in the event of 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.’³¹ Thus, Ohlin has suggested that the process of Security Council referrals limits the prosecutor’s independence and that the prosecutor has no power to ignore a referral made by the Security Council.³²

By contrast, Crawford has noted that ‘[o]nce a crime has been referred by the Security Council, the normal requirements of the Rome Statue will apply, including independent prosecution’.³³ In his view, the Security Council cannot instruct the Prosecutor to investigate a situation or to prosecute a specific individual.³⁴ Article 53(1) of the Rome Statute stipulates that the Prosecutor must conduct a full analysis of ‘the information made available to him or her’ for the purpose of determining whether a ‘reasonable basis’ exists.³⁵ Furthermore, Gallavin has maintained that Security Council referrals are still subject to examination by the Prosecutor under Article 17 and 19 of the Rome Statute;³⁶ the Prosecutor has the authority to ‘judicially review referrals

²⁷ Stigen, *Op, cit.*, p. 115.

²⁸ Ohlin, J. D. (2009). Peace, Security, and Prosecutorial Discretion. The Emerging Practice of the International Criminal Court. C. Stahn and G. Sluiter. Leiden, Martinus Nijhoff, p. 189.

²⁹ *Ibid.*,

³⁰ *Ibid.*,

³¹ Article 103 of the United Nations Charter.

³² Stahn, *Op, cit.*, p. 191

³³ Crawford, J. (1994). "The ILC's Draft Statute for an International Criminal Tribunal." American Journal of International Law **88**(1): 140-152. p. 147.

³⁴ *Ibid.*,

³⁵ *Ibid.*,

³⁶ Gallavin, *Op, cit.*,

and deferrals of the Security Council.’³⁷ In other words, the Court would be required to review a Security Council decision to determine whether the requirements of complementarity had been met. The notion of complementarity does not otherwise apply in cases of Security Council referral, since it has already determined ‘a reasonable basis to initiate an investigation’ into the concerned situation.³⁸ Gallavin has asserted that the Prosecutor must be bound by the provisions of the Rome Statute. As it stands, he or she does not have any obligation based on whether a situation is referred by a state or the Security Council.³⁹ Security Council referrals are still subject to scrutiny by the Prosecutor under Articles 17 and 19 of the Rome Statute⁴⁰ and in addition, Article 53, which establishes the admissibility requirements necessary for the Prosecutor to decide whether or not to proceed with an investigation, also applies to Security Council referrals.⁴¹

The Prosecutor, in determining whether to conduct a preliminary examination or investigation, will have to consider whether guidelines cover the factors in Article 53 (1) (a) to (c) and Article 17, which apply to any state or Security Council referrals. The most serious challenge facing the Prosecutor will be in determining which crimes to select for a preliminary examination and investigation based on referral by the Security Council pursuant to Article 13 (b), or by a state party pursuant to Article 13 (a) and 14.⁴² Under the Statute, the Prosecutor is entrusted with a broad measure of discretion with respect to what additional steps should be taken in relation to information received. The Office of the Prosecutor must analyse information in order to determine whether the statutory threshold to start an investigation is met: there must be ‘*a reasonable basis to proceed*’.⁴³ In the case of Darfur, prior to the initiation of the investigation on 1 June 2005, the Office of the Prosecutor carried out a fact-finding process in relation to national proceedings concerning alleged crimes in Darfur, based upon information that was gathered from witnesses and organisations active in the region. The Prosecutor concluded that ‘there were cases that would be admissible

³⁷ Condorelli & Villalpando, ‘Relationship of the Court with the United Nations’, in *The Rome Statute of The International Criminal Court: A Commentary* vol. 1 649 (A. Cassese, P. Gaeta, J. Jones, eds., 2002).

³⁸ Stahn, *Op. cit.*, p. 194.

³⁹ Gallavin, *Op. cit.*,

⁴⁰ *Ibid.*,

⁴¹ Lipscomb, R. (2006). "Restructuring The ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan." *Colum. L. Rev.* **106**: 182-212. p. 201.

⁴² Hall, *Op. cit.*,

⁴³ Annex to the Paper on some policy issues before the Office of the Prosecutor: Referrals and Communications available at www.icc-cpi.int

within the situation in Darfur because there were no national proceedings focusing on the most serious crimes and on those who bear greatest responsibility for those crimes.⁴⁴ Furthermore, it was stated that once specific cases are selected within a situation for full investigation, the Office assesses the admissibility of those cases.⁴⁵ The informal expert paper on the principle of complementarity in practice noted that admissibility is not an issue for litigation and judicial determination, but rather a matter for the Prosecutor to consider and assess in their decision over whether to proceed with an investigation and whether there could be cases that would be admissible within the situation in Darfur since 1 July 2002.⁴⁶ According to Articles 17 and 53 of the Rome Statute, the Prosecutor has the primary role at an early stage of proceedings, with the decision whether or not the ICC gets involved in different situations resting with him or her. Establishing the admissibility of the case is one of the important factors in determining whether there is a reasonable basis to open an investigation.⁴⁷ In this context, a senior ICC officer has asserted that:

‘In the preliminary examination, the Prosecutor does not exercise any investigative power. The Prosecution conducts a fact-finding inquiry to assess the situation.’⁴⁸

In making this assessment, the Prosecutor takes into account the nature of the alleged crimes, as well as information relating to those who may bear the greatest responsibility for such crimes.⁴⁹ As outlined in Chapter Three, decision-making on whether to investigate or prosecute is one of the issues of prosecutorial discretion. The issue of when and how prosecutorial discretion should be exercised is one of the deepest and most difficult questions facing the Court.⁵⁰ Given the purpose of the Rome Statute, which is to put an end to impunity in any given situation, prosecutorial policy should focus only on the seriousness of crimes committed, rather than on military conflict, in selecting military or political leaders who have been involved in a particular conflict. The assessment of the seriousness of the crimes is critical for impartial prosecutorial

⁴⁴ Fourth Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005), p. 7

⁴⁵ *Ibid.*,

⁴⁶ Informal policy paper, *Op. cit.*, p.9, para 25.

⁴⁷ Article 58 (1) (b) of the Rome Statute.

⁴⁸ Interview with senior ICC officer A, October 2008, the ICC, The Hague.

⁴⁹ First Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005) p. 3. www.icc-cpi.int

⁵⁰ Greenwalt, *Op. cit.*,

decision-making; otherwise it could ‘fuel the politicization of the ICC’.⁵¹ The question of who to prosecute is the other important issue which should be considered in prosecutorial decision-making, and how far the Prosecutor should focus on higher-level accused and/or low ranking perpetrators.⁵² Thus, it is important to consider how far the Prosecutor is accountable for his or her admissibility and charging decisions. Article 1 of the Rome Statute declares that the Court ‘shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.’⁵³ However, selected cases in current situations at the ICC have met this criterion in different ways. For instance, in the situation of DRC, the first case selected concerned recruiting child soldiers. In contrast, in the situation of Darfur, it was announced that there will be a preference for ‘big fish’ in investigating crimes.⁵⁴ The crucial question here is why the prosecutor has not sought to bring charges against any further members of Sudan’s political and military leadership. We may also ask why the prosecutor is seeking Al- Bashir’s arrest for genocide, the most serious crime with which he can be charged and the most difficult to prove.⁵⁵

1.2 Decision-making process of the Prosecution:

In 2005, the Security Council, pursuant to Resolution 1593, asked the Prosecution to report every six months to the Council on actions taken and on upcoming activities in the Darfur situation.⁵⁶ So far, fourteen reports have been submitted. However, the following section will mainly focus on the first four reports in order to analyse the Prosecutor’s strategies and methodology in assessing this situation. The first report of the Prosecutor to the Security Council pursuant to UNSCR 1593 (2005) established that for the purpose of analysing the admissibility of cases, the Office of the Prosecutor (OTP) had studied the Sudanese institutions, laws and procedures. In this context, the Government of Sudan had provided information relating to the Sudanese justice system, the administration of criminal justice in various parts of Darfur, traditional systems for alternative dispute resolution, and also furnished copies of materials relevant to the

⁵¹ Danner, *The American Journal of International Law*, *Op, cit.*, p. 543.

⁵² Takemura, *Op, cit.*, p. 685.

⁵³ Preamble of the Rome Statute

⁵⁴ Statement of the Prosecutor of the International Criminal Court, Mr. *Luis Moreno-Ocampo*, to the United Nations Security Council Pursuant to UNSCR 1593 (2005) (14 December 2006) 2.

⁵⁵ Rozenberg, *Op, cit.*, ‘Why the world’s most powerful prosecutor should resign’, part 3

⁵⁶ UN SC Resolution 1593 (2005) on the Darfur situation

report of the National Commission of Inquiry.⁵⁷ The Office also gathered information regarding multiple *ad hoc* mechanisms that have been created by the Sudanese authorities in the context of the conflict in Darfur, such as the Committees against Rape established by a Ministerial order in 2004, the Special Court created under the Special Courts Act in 2004, the Specialized Courts that replaced them pursuant to a decree issued by the Chief Justice (also in 2004), as well as the National Commission of Inquiry (NCOI) and other *ad hoc* judicial and non judicial committees.⁵⁸ In light of the information reviewed, on 1st June 2005 the Prosecutor determined the existence of sufficient evidence to believe that there were cases that would be admissible in relation to the Darfur situation. The Prosecutor emphasised that the decision to initiate formal investigation was about the absence of criminal proceedings relating to the cases on which the OTP was likely to focus.⁵⁹ That is, the admissibility assessment is a case specific assessment and not a judgement of the Sudanese justice system as a whole.⁶⁰ In other words, the Prosecution highlighted that admissibility assessment is an ongoing assessment that relates to the specific cases to be prosecuted by the Court. Once investigations have been carried out, and specific cases selected, the Prosecution will assess whether or not those cases have been the subject of genuine national investigations or prosecutions. An informal policy paper of the Office of the Prosecutor maintains that the unwillingness test cannot be based on the outcome of proceedings - for example, on the acquittal of an obviously guilty person.⁶¹

In accordance with the policies and strategies of the Prosecution, the second report of the Prosecutor to the Security Council indicated that the investigation focused on a selected number of criminal incidents and those persons bearing greatest responsibility for those incidents, based on an analysis of the evidence collected as a result of a full and impartial investigation.⁶² However, the report highlighted that the continuing insecurities in Darfur represented a serious obstacle to the conduct of effective investigation into alleged crimes there by national judicial bodies seeking to bring to justice those responsible.⁶³ Therefore, given the on-going violence and attacks in

⁵⁷ First Report of the Prosecutor, *Op. cit.*, p. 3

⁵⁸ *Ibid.*, p. 4

⁵⁹ *Ibid.*,

⁶⁰ Third Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005) p. 6.

⁶¹ Informal policy paper, *Op. cit.*, p. 14, para 46.

⁶² Second Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005) p. 2.

⁶³ *Ibid.*, p. 6.

Darfur, and the absence of an effective system of witness protection, investigation activities by the ICC had taken place outside Darfur.⁶⁴ There is an important question which may be raised here: within a context of on-going violence, as well as a complex process of political transition, how would the Prosecutor be able to select specific cases and assess whether or not those cases are the subject of genuine national investigations or prosecutions (that is, whether such proceedings meet the standards of genuineness set out in Article 17 of the Statute)? Furthermore, the Prosecutor by taking a Kantian universalist approach ignored the fact that Islamic religious tradition plays an important role in the Sudanese legal system.

Interestingly, the Prosecutor, in his third report to the Security Council, claimed that identifying those individuals with greatest responsibility for the most serious crimes in Darfur was a key challenge to the investigation.⁶⁵ Furthermore, the full investigation of those individuals with greatest responsibility for the most serious crimes, and an assessment of the admissibility of cases, required the full support of the Security Council and the unfettered cooperation of the international community, in particular the Government of Sudan and all parties to the conflict.⁶⁶ However, the strategy announced by the Prosecutor of a sequence of cases, rather than a single case dealing with the situation, is problematic given the complexities associated with the identification of those individuals bearing greatest responsibility for the crimes.⁶⁷ In its fourth report, the Prosecution maintained that the Office was completing an investigation and had collected sufficient evidence to identify those who bore the greatest responsibility for crimes against humanity and war crimes, including the crimes of persecution, torture, murder and rape.⁶⁸ The continued commission of such crimes by different groups and shifting factions within these groups was also the subject of investigation and analysis.⁶⁹

1.3 Pre-Trial Chamber decisions on Darfur cases:

Although the evidence collected and analysed by the Prosecutor confirmed the complex nature of the conflict in Darfur and the nature of the challenges facing the identification of specific individuals,⁷⁰ the Prosecutor announced that the Office was

⁶⁴ *Ibid.*, p. 4.

⁶⁵ Third report of the Prosecutor, *Op, cit.*, p. 3.

⁶⁶ *Ibid.*, p. 9

⁶⁷ *Ibid.*, p. 3.

⁶⁸ Fourth report of the Prosecutor, *Op, cit.*, p. 2.

⁶⁹ *Ibid.*, p. 3.

⁷⁰ *Ibid.*,

seeking to finalise the preparation of the submission to the Judges by February 2007.⁷¹ Thereafter, the Office announced that they had finished their review, that sought ‘to determine whether the criteria to initiate an investigation are satisfied’, and concluded that such an investigation was warranted.⁷² With regard to assessing the admissibility of cases, the report noted that the Prosecutor requested in November 2006 an updated account from the Sudanese government on their national proceedings. It concluded that although there had been indications of developments, such as the arrest of 14 individuals, including Ali Kushayb, in relation to the commission of core crimes, ‘these indications did not appear to render the current case inadmissible.’⁷³ After examining the application of the Prosecutor and all the evidence and information submitted, the Judges rendered their decision on 27 April 2007 that the arrest of the two suspects was necessary.⁷⁴ Therefore, the Pre-Trial Chamber issued warrants of arrest against Ahmad Muhammad Harun, former Minister of State for the Interior and current Minister of State for Humanitarian Affairs of the Sudan, and Ali Kushayb, a militia leader, for war crimes and crimes against humanity.⁷⁵ The Chamber also concluded that, according to the Prosecution’s application, ‘there appeared to be no proceedings, which were ongoing or had taken place in relation to Harun and Kushayb, which formed the basis of the Prosecutor’s application.’⁷⁶ Therefore, the Chamber found that ‘without prejudice to any challenge to the admissibility of the case under Article 19 (2) (a) and (b) of the Statute or any subsequent determination, the case falls within the Court’s jurisdiction and appears to be admissible.’⁷⁷

The seventh report of the Prosecution to the Security Council claimed that ‘the prosecutorial policy is transparent in regard to admissibility assessment and the selection of cases’;⁷⁸ however, it did not demonstrate how this process worked in the given situation, particularly when the opening of the second and third investigations in relation to ongoing crimes by all parties was announced. The report noted that the

⁷¹ *Ibid.*,

⁷² Luis Moreno Ocampo, *Letter to Judge Claude Jorda* (June 1, 2005), from www.icc-cpi.int/library/cases/ICC-02-05-2_English.pdf

⁷³ Fourth report of the Prosecutor, *Op. cit.*, p. 2.

⁷⁴ Decision on the Prosecutor Application under Article 58 (7) of the Statute, in the case of *the Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al- Rahman (Kushayb)*, ICC-02/05-01/07, 27 April 2007.

⁷⁵ Sixth Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005), p. 11.

⁷⁶ *Ibid.*,

⁷⁷ *Ibid.*,

⁷⁸ Seventh report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), June 2008

Office was proceeding with two new investigations. It stated that the second case in the Darfur situation was investigating the question of who is maintaining Harun in a position to commit crimes and who is instructing him and others, remarking that ‘the official denial of such crimes is a characteristic feature of the case under investigation.’⁷⁹ The Prosecution maintained that ‘decisions to commit crimes, to deny crimes, [and] to disguise crimes are taken at the highest level. Denial of crimes, by authorities that vowed to protect Darfurians, is an additional harm to the victims.’⁸⁰ Therefore, on 14 July 2008, the Prosecution presented the second case to Pre-Trial Chamber I and requested a warrant of arrest against the Sudanese President, Al-Bashir, on seven counts of crimes of genocide, crimes against humanity and war crimes allegedly committed in Darfur.⁸¹ On March 3, 2009, the Pre-Trial Chamber issued an arrest warrant for President Al- Bashir, which listed seven counts: five counts of crimes against humanity and two counts of war crimes.⁸²

The third case focused on a rebel attack during the Haskanita incident, targeting AU and UN peacekeepers and aid workers in September 2007.⁸³ On 20 November 2008, the Prosecution presented its third case to Pre-Trial Chamber I against three rebel commanders allegedly responsible for the Haskanita attack.⁸⁴ The ICC prosecutors charged Abu Garda and other unnamed rebel commanders with leading an attack on African Union (AU) peacekeepers that left 12 soldiers dead and wounded eight others according to court documents. The counts include war crimes of violence to life, intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission, and pillaging.⁸⁵ A summons to appear was issued instead of an arrest warrant as Abu Garda had communicated to the ICC that he would appear voluntarily.⁸⁶ This was the first time the court had issued a summons to appear in any case. On May 18, 2009, Abu Garda appeared before a judge at the ICC.⁸⁷ Arguably,

⁷⁹ *Ibid.*,

⁸⁰ *Ibid.*,

⁸¹ ICC, *Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR* (July, 2008)

⁸² Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Public redacted version, CC-02/05-01/09, 4 March 2009, p. 92.

⁸³ Seventh report of the Prosecutor, *Op, cit.*,

⁸⁴ Summary of the Prosecutor's Application under Article 58, Case No. ICC-02/05, 20 November 2008. Public document, para. 4.

⁸⁵ Pre-Trial Chamber 's Decision in the case of *the Prosecutor v. Bahr Idriss Abu Garda*, Public document, ICC-02/05-02/09, 7 May 2009

⁸⁶ www.sudantribune.com/Darfur-war-crime-suspect-confident,31207

⁸⁷ New suspect in the situation in Darfur, Sudan: First appearance scheduled for Monday, 18 May 2009 www.icc-cpi.int/situations/cases

an investigation into an on-going conflict makes the political consequences of any investigation more sensitive. This is particularly pertinent as all of the ICC's ongoing investigations, notably in the Darfur region, the Sudan and the DRC, are taking place in the midst of ongoing conflict.⁸⁸ The view of the Prosecutor, as stated in his Office's policy paper on the interests of justice, is that the ICC is not concerned with the interests of peace but justice.⁸⁹

2. Evaluation of the exercise of discretionary power by the Prosecutor:

The Security Council referral of the Darfur situation to the Prosecutor presents one of the first test cases of the manner in which the ICC will interpret the Rome Statute's criteria for whether a state is genuinely willing and able to try 'suspected atrocity perpetrators who otherwise fall under the Court's jurisdiction.'⁹⁰ Heller has maintained that 'the situation of the Sudan is an excellent example of the shadow side of complementarity',⁹¹ meaning that the Sudanese government is more than willing and able to investigate and prosecute members of rebel groups as well as low-level government officials and soldiers. In this sense, the Special Courts have been governed by a selective prosecution strategy which violates international due process in order to make those defendants easier to convict.⁹²

2.1 Assessment of the preliminary examination:

The Prosecutor acts on behalf of the world community and is vested with the authority to investigate and prosecute crimes of concern to the international community as a whole. Therefore, the community should be heard. Moreover, a public debate regarding prosecutorial policies is 'a sound democratic feature, which can only promote justice.'⁹³ Such discussion would indicate public engagement, which in turn might amplify the positive effects of the Rome Statute and the complementarity principle. However, the Prosecutor should 'never make a certain prosecutorial decision for the purpose of

⁸⁸ Greenwalt, *Op, cit.*,

⁸⁹ Policy paper on the interests of justice, September 2007. from www.icc-cpi.int

⁹⁰ Kaufman, Z. (2005). "Justice in Jeopardy: Accountability for the Darfur Atrocities " *Criminal Law Forum* **16**: 343-360. p. 358.

⁹¹ Heller, K. J. (2006). "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process " **17**: 255-280. p. 273.

⁹² *Ibid.*, p. 275.

⁹³ Stigen, *Op, cit.*, p. 411.

satisfying popular opinion.⁹⁴ The sensible approach is to clarify the criteria on the basis of which inability and unwillingness to prosecute should be determined.⁹⁵ According to the Annex to the ‘Paper on some policy issues before the Office of the Prosecutor’, one of the important tasks of the Prosecutor has been the development and refinement of a clear methodology and general practice for the handling of information submitted to the Office.⁹⁶ In the Prosecutor’s policy paper, the prosecutor outlines the four guiding principles of his office in the selection of situations and cases: independence, impartiality, objectivity, and non-discrimination.⁹⁷ However, the criteria upon which the Prosecutor’s discretion is being exercised are complex,⁹⁸ and the methodologies for assessing those criteria are vague; particularly in the selection of situations, the assessment of preliminary investigation, and charging decisions.⁹⁹

In relation to the assessment of the preliminary examination of the situation, a senior ICC officer has suggested that:

‘If the concerned State is not conducting initial proceedings, thus it is a case of inaction. And other criteria are irrelevant because inaction of the State allows the Court to declare that the case or situation is admissible automatically. However, it should be considered when, where, and which criteria must apply in the State in order to which the state is acting. There are no criteria. The OTP has tried to create some criteria but they are not public and we don’t know how far they have gone.’¹⁰⁰

The ICC prosecution, however, believe that at this very early stage when the Prosecutor must decide whether to proceed with an investigation, complementarity is assessed in a more general way by analyzing whether possible cases arising under the situation concerned have been investigated at the national level.¹⁰¹ Both with regard to the factual basis and in terms of admissibility, the Prosecutor only has to analyse the situation as a whole and does not need to target specific cases in the preliminary stage; it is certainly not necessary to have enough information to prove all elements of the crimes or to have evidence against specific individuals.¹⁰² In this sense, in the early

⁹⁴ *Ibid.*,

⁹⁵ Elagab, *Op. cit.*,

⁹⁶ Annex to the Paper on some policy issues before the Office of the Prosecutor: Referrals and Communications available at www.icc-cpi.int

⁹⁷ Policy Paper, *Op. cit.*, pp. 1-2.

⁹⁸ Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, December 8, 1997, at 7-8.

⁹⁹ Stahn, C. and G. Sluiter, Eds. (2009). *Op. cit.*, p. 185

¹⁰⁰ Interview with senior ICC officer B, 19 December 2008, The Hague.

¹⁰¹ www.amicc.org/docs/Complementarity.pdf [accessed on 10th September 2011]

¹⁰² From confidential source.

phases of the investigation, the Prosecutor first identifies one or more events within a situation in order to establish the existence of particular cases.¹⁰³

It is important to point out that there is a difference between the admissibility test of a situation and the admissibility test of a case.

‘[T]he admissibility test of a case is easier than the admissibility test of a situation. In terms of a case, the same individual and the same conduct should be considered. However, in the admissibility test at the situation level before the opening of an investigation, it is difficult to determine what the State is doing and what is sufficient to consider whether the State is acting or not? This is complicated and there are no established criteria.’¹⁰⁴

2.2 Legitimacy of the Prosecution policy

Although the actions of the Prosecutor will inevitably be guided by some principles, even if these are unacknowledged¹⁰⁵, an articulation of public prosecutorial guidelines must assist the Prosecutor in establishing the legitimacy and transparency of his or her policies and discretionary decision-making.¹⁰⁶ As mentioned in Chapter Three, the purpose of the Prosecutorial guidelines - including provisions concerning investigation and charging decisions - is to promote fair and consistent decision-making and to make the prosecutorial process more understandable.¹⁰⁷ In essence, guidelines will set out clear standards and indicate clarification, in particular during the preliminary examination phase.¹⁰⁸

As mentioned in the Darfur background chapter, the war and the involvement of different parties in the Darfur conflict are complex, particularly when it comes to identifying those individuals who are most responsible for mass crimes.¹⁰⁹ Regarding the strengthening of the legitimacy and accountability of the Prosecutor, Greenwalt has argued that Prosecutorial authority, and its inconsistency with governing principles of case strategy for the prosecution at an early stage of the criminal justice process, challenges the legitimacy of prosecutorial discretion and will complicate the work of the ICC.¹¹⁰ For instance, in relation to the prosecution of crimes committed in the Darfur region in the Sudan, it was proposed that the governing principles of the case

¹⁰³ Amic, *Op, cit*,

¹⁰⁴ Interview with senior ICC officer B, *Op, cit.*,

¹⁰⁵ Sklansky, *Op, cit.*, p. 521.

¹⁰⁶ Danner, *Op, cit.*,

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*,

¹⁰⁹ Kastner, P. (2007). "The ICC in Darfur- Savior or Spoiler ?" *ILSA J. Int'l & Comp. L.* **14**(1): 145-188. p. 155.

¹¹⁰ Greenwalt, *Op, cit.*,

strategy for this situation should be set ‘to target those most responsible for the crimes, to concentrate the investigation on senior military and political figures and then local level, to concentrate the investigation on a very limited number of criminal episodes, to cover all facts and evidence for the purpose of the establishment of the truth.’¹¹¹ The risk of politically motivated investigations might be the outcome of the abuse of political discretion by the Prosecutor,¹¹² and a failure to exercise cultural sensitivity in the context of the situation in Darfur. When a situation is referred by the Security Council, an investigation is automatically opened if the Prosecutor decides that there is a ‘reasonable basis to proceed.’¹¹³ In doing so, the Prosecutor should consider reports of violations of international criminal law by all parties to the conflict, in addition to the report of the UNCOI and other local and international organizations and academic experts.¹¹⁴ However, although Security Council referral may help to strengthen the cooperative relationship between the Prosecutor and the Council, it also raises important concerns with regard to the potential abuse of prosecutorial discretion by the Prosecutor.¹¹⁵

2.3 Independence and political interference in prosecutorial policy

As far as the Darfur case is concerned, the Prosecutor should be aware at all times of the political context that is self-evident in his role, prosecuting and not engaging in politicised prosecution.¹¹⁶ Critics of ICC prosecutions argue that criminal trials can be selective, politicized, and prevent social and ethnic reconciliation.¹¹⁷ Elagab has claimed that ‘the Prosecutor of the ICC is in a difficult position. He is supposed to act as a Prosecutor dealing with a legal case, but that is not strictly true, as he unwittingly involved himself in the political aspect of the case of Darfur’.¹¹⁸

Since the aims of prosecutorial policy have an impact on the administration of international justice, the role of the Prosecutor should be only to apply the law and not to become politically involved. As Human Rights Watch have maintained, ‘political factors [do not] constitute a legitimate basis for the Prosecutor’s decision to initiate an

¹¹¹ Cayley, *Op, cit.*,

¹¹² Olasolo, *International Criminal Law Review* , *Op, cit.* p. 132.

¹¹³ *Ibid.*,

¹¹⁴ Udombana, N. (2005). "Pay Back Time in Sudan? Darfur in the International Criminal Court." *Tulsa. J. Comp. & Int'l L.* 13: 1-58. p. 29.

¹¹⁵ Olasolo, *Op, cit.*,

¹¹⁶ Elagab, *Op, cit.*,

¹¹⁷ Kastner, *Op, cit.*, p. 148.

¹¹⁸ Elagab, *Op, cit.*,

investigation or prosecution.’¹¹⁹ On the other hand, according to Goldstone, ‘however powerful the aspiration for neutral principles, experience and common sense suggest that law can never be entirely divorced from its surrounding environment.’¹²⁰ Thus, the Prosecutor has been given the necessary political discretion to evaluate the appropriateness of starting a criminal prosecution in order to achieve a certain political goal identified as the interest of justice.¹²¹ Clearly, political considerations must not be disregarded; however, rushing into indictments is not advisable. The question of the right timing ‘in order to exercise a genuine threat while minimizing potential political risks will always be crucial’.¹²² Kastner has suggested a pragmatic approach that takes into account the political effects of indictments in order to show the ICC’s willingness and capability to act independently and impartially in Darfur.¹²³ According to this strategy, the Prosecutor should start by ‘selecting a similar number of individuals from the various warring parties in order to avoid appearing partial’.¹²⁴ It is worth mentioning here that Stigen has suggested that the Darfur referral could not have been made without ‘an extensive dialogue between the Council and the Prosecutor.’¹²⁵ Security Council Resolution 1672 named four individuals allegedly responsible for crimes committed in Darfur.¹²⁶ In choosing individuals from the different warring parties, the Security Council sought to appear as impartial as possible, which was an important step.¹²⁷ However, the Prosecutor noted that ‘impartiality does not mean that we must necessarily prosecute all groups in a given situation. Impartiality means that we will objectively apply the same criteria for all, in order to determine whether the high thresholds of the Rome Statute are met.’¹²⁸

2.4 Critique of the Darfur cases:

As mentioned earlier in this chapter, the Prosecutor, in order to comply with the complementarity principle, determined that his case against the two Sudanese suspects,

¹¹⁹ Goldston, J. A. (2010). "More Candour about Criteria :The Exercise of Discretion by the Prosecutor of the International Criminal Court." *Journal of International Criminal Justice* 8(2): 1-24.

p. 4.

¹²⁰ *Ibid.*, p. 5.

¹²¹ Olasolo, *Op, cit.*,

¹²² Kastner, *Op, cit.*, p. 185.

¹²³ *Ibid.*, p. 184.

¹²⁴ *Ibid.*, p. 185.

¹²⁵ Stigen, *Op, cit.*, p. 379

¹²⁶ S.C. Res. 1672, U.N. SCOR, 5423rd mtg. 1, U.N. Doc. S/RES/1672 (Apr. 25, 2006).

¹²⁷ Kastner, *Op, cit.*,

¹²⁸ Stigen, *Op, cit.*,

Ahmad Harun and Ali Kushayb, was admissible for prosecution at the ICC since the Sudanese courts had not brought a case against Harun while the pending case against Kushayb, who was in domestic custody, was related to different crimes.¹²⁹ Therefore, in early 2007, the Prosecutor requested that the Pre-Trial Chamber issue a summons for the two suspects to appear before the Court, rather than a warrant that would have constituted a stronger mandate for their arrest.¹³⁰ Peskin has claimed that by asking the Pre-Trial Chamber to issue a summons, the Prosecutor sought to increase the chances of the suspects' appearance in The Hague by demonstrating his desire to avoid legal confrontation.¹³¹ However, in late April 2007 the Pre-Trial Chamber rejected the prosecution's request for a summons and issued arrest warrants instead.¹³²

The performance of the Prosecutor regarding 'the protection of victims and the preservation of evidence' in the region of Darfur was criticised by Antonio Cassese and Louise Arbour when they reported to the Pre-Trial Chamber that victims would benefit from more visible involvement by the Prosecutor in Darfur.¹³³ In June 2006, the Prosecutor reported to the Security Council on the Darfur situation and stated that 'the continuing insecurity in Darfur is prohibitive of effective investigations inside Darfur'.¹³⁴ Arbour has noted that 'it is rare that there can be a complete assurance to victims' for their protection and that testifying will always be a risk. 'The existence of such a risk, however, cannot be held by itself as reason sufficient not to undertake any investigation at all. If that were the case, few investigations in a conflict or post-conflict situation would be capable of significant progress.'¹³⁵ She has argued that 'it is possible to conduct serious investigations of human rights during an armed conflict in general, and Darfur in particular, without putting victims at unreasonable risk.'¹³⁶ In this regard, in 2005 Cassese criticised the Prosecutor's failure to undertake even 'targeted and brief

¹²⁹ Warrant of Arrest for Ahmad Harun, Pre Trial Chamber 1, 27 April 2007, from www.icc-cpi.int/iccdocs/doc/doc279813.PDF; Warrant of Arrest for Ali Kushayb, Pre Trial Chamber 1, 27 April 2007, from www.icc-cpi.int/iccdocs/doc/doc279858.PDF

¹³⁰ *Ibid.*,

¹³¹ Peskin, V. (2009). "Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan." *Human Rights Quarterly* 31(3): 655-691. p. 670.

¹³² *Prosecutor v. Harun*, Case No. ICC -02/05-01/07, Warrant of Arrest for Ahmad Harun (27 Apr. 2007).

¹³³ Arbour, L. 'Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence,' ICC-02/05, October 10, 2006

¹³⁴ www.rnw.nl/international-justice/article/arbour-and-cassese-criticize-icc-darfur [accessed on 10th September 2011]

¹³⁵ *Ibid.*,

¹³⁶ *Ibid.*,

interviews' in Darfur¹³⁷ and advocated swift prosecutorial action: 'By pinpointing the five or so most responsible, establishing the chain of command and issuing arrest warrants, the Sudanese leadership would come under serious pressure to cooperate'.¹³⁸ The Prosecutor replied to Cassese that this was a 'matter over which the Office of the Prosecutor alone enjoys discretion and the strategy does not currently involve investigative operations in Darfur'.¹³⁹ However, Flint and de Waal have claimed that 'court sources say that in 2006 an ICC delegation visiting Khartoum was invited to travel to Darfur but the Prosecutor didn't call Khartoum's bluff and didn't push at the door'.¹⁴⁰

The Darfur situation, particularly the Al-Bashir case, poses challenges for the ICC in relation to the efficacy of the prosecutions of international crimes in furthering justice and accountability for international criminal justice.¹⁴¹ Lutz has asserted that the discussions surrounding the Al-Bashir case 'have brought into sharp focus the exercise of the ICC OTP's discretion and its impact on the politics of international criminal justice. The OTP had, until June 2008, exercised its discretion rather cautiously'.¹⁴² Indeed, the challenges of the Darfur situation may serve to undermine the legitimacy of the ICC prosecution.¹⁴³ That is to say, the legitimacy of the ICC requires various political strategies in order to address 'the political overtones of the exercise of the ICC Prosecutor's discretionary power consistent with its legal standards and rules of fairness'.¹⁴⁴

For instance, concerning the Prosecutor's application for the issuance of a warrant of arrest for President Al-Bashir of Sudan, a number of commentators have pointed out that the prosecution of a state's leadership is always a political act.¹⁴⁵ Gosnell notes that an arrest warrant issued for 'a sitting head of state is nothing less than a demand for

¹³⁷ Cassese, A. 'Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC,' ICC-2/05, August 25, 2006.

¹³⁸ Arbour, *Op. cit.*,

¹³⁹ *Ibid.*,

¹⁴⁰ Case Closed: A Prosecutor Without Borders, www.worldaffairsjournal.org/articles/2009-Spring/full-DeWaalFlint.html [accessed on 10th September 2011]

¹⁴¹ Oette, L. (2010). "Peace and Justice, or Neither? The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond." *Journal of International Criminal Justice* 8: 345-364. p. 346.

¹⁴² *Ibid.*, p. 357.

¹⁴³ *Ibid.*,

¹⁴⁴ Roach, *Politicizing the International Criminal Court: the Convergence of Politics, Ethics, and Law*, *Op. cit.*, p. 4.

¹⁴⁵ Harrison, T. (2008, 21 July 2008). "What Does it Mean for the Prosecutor to be a Political Actor?." from www.csls.ox.ac.uk/documents/Harrison.pdf [accessed on 10th September 2011]

regime-change'.¹⁴⁶ The Prosecutor's effectiveness depends precisely on claims of objectivity and impartiality.¹⁴⁷ Therefore, there should be some measures to ensure the independence of the Prosecutor from unjustified political influence.¹⁴⁸ Bamu has argued that 'it seems the ICC has learnt little from its experiences in the Uganda situation and the ICC Prosecutor is playing politics rather than law - in an attempt to intimidate Al-Bashir into faster negotiation of a peace deal and resolution of the Darfur conflict and possibly handing over the other two suspects from Sudan.'¹⁴⁹ The Prosecutor must be aware of the relationship between Arab-Islamic culture and Western culture while pursuing arrest warrant of Al- Bashir. While the West will generally resort to official legal institutions and instruments to resolve conflicts, Arabs and Africans rely more on socio-cultural formations and values. Hence, most Arab and African governments instinctively condemned the indictment as politically motivated.

It seems evident that a state headed by a widely supported leader will not easily cooperate with the Court if the leader is subject to a prosecution and threatened with arrest. Given these conditions, we may ask why the Prosecutor, who has not yet succeeded in arresting the first two accused, would engage himself in this pernicious and unrealistic direction. This kind of strategy in the exercise of his mandate risks weakening his authority.¹⁵⁰ It is worth mentioning here Cassese's opinion that if the Prosecutor 'intended to pursue the goal of having Al-Bashir arrested, he might have issued a sealed request and asked the ICC's judges to issue a sealed arrest warrant, to be made public only once Al-Bashir travelled abroad'¹⁵¹, instead of publicly requesting the warrant, allowing Al-Bashir to avoid arrest simply by remaining in Sudan. Peskin has further claimed that the Prosecutor's move, as a strategic attempt to persuade Al-Bashir to hand over the suspects, was 'emblematic of the Prosecutor's propensity to play the politics of conciliation with a defiant state.'¹⁵²

Bamu also added that the ICC is playing politics by trying to force the Security Council into engaging fully with Sudan to end the conflict.¹⁵³ Schabas has described the

¹⁴⁶ Gosnell, C. (2008). "The Request for an Arrest Warrant in Al Bashir: Idealistic Posturing or Calculated Plan?" *Journal of International Criminal Justice* 6: 841-851. p. 845.

¹⁴⁷ *Ibid.*,

¹⁴⁸ Harrison, *Op, cit.*,

¹⁴⁹ Bamu, P. (2009). "Head of State Immunity and the ICC: Can Bashir be Prosecuted?". from www.cslls.ox.ac.uk/documents/BamuF.pdf [10th September 2011].

¹⁵⁰ www.haguejusticeportal.net/eCache/DEF/9/763.html [accessed on 10th September 2011]

¹⁵¹ www.project-syndicate.org/commentary/cassese4/English

¹⁵² Peskin, *Op, cit.*, p. 670.

¹⁵³ Bamu, *Op, cit.*,

request by the Prosecutor for an arrest warrant for the Sudanese President ‘as the most spectacular move to date by the ICC’.¹⁵⁴ Schabas has suggested that ‘this is Moreno-Ocampo’s third blunder after having already failed with the first trial and facing labour relations problems.’¹⁵⁵ Rozenberg has asserted that ‘the move against Al-Bashir is intended to show that the ICC is willing to pursue difficult cases of high-ranking officials and to regain some of the legitimacy that the Court has lost in Uganda and the Democratic Republic of Congo.’¹⁵⁶ Meanwhile, Goldstone has claimed that while it would surely be foolish for any prosecutor to bring criminal charges for the purpose of ending a war, many remain sceptical that the Prosecutor does not, in practice, give consideration to the impact of its decisions on the prospect of continued conflict.¹⁵⁷ As such debate demonstrates, there has been some criticism of the Prosecutor on the Darfur matter for moving directly from the mid-level indictees charged in 2007 to the July 2008 arrest warrant application against President Al-Bashir.¹⁵⁸ Prof. Bassiouni, in respect of the Sudanese government’s involvement in crimes committed, and the responsibility for these crimes up the chain of command, has stated that:

‘The logic of every proceeding should be considered. For instance, considering the function of the local military and local chief of the police would help the Prosecutor to build the chain of command responsibility.’¹⁵⁹

He further maintains that:

‘We cannot presume that a national legal system is going to be considered unwilling simply because it was the judgement of the Prosecutor to decide to indict the head of state. I think this was a big jump.’¹⁶⁰

In fact, knowledge of the legal framework and the operational dynamics of the military and political structure of the concerned situation are crucial to establishing the chains of command. Knowledge of the evidence for this purpose should not be considered based only upon secondary sources, especially when there are parallel mechanisms of decision-making for individuals in their personal capacity versus their

¹⁵⁴ Prosecuting Sudanese President Al-Bashir before the International Criminal Court: A Risky Venture? from www.biicl.org/files/3601_sudan_rapid_response_-_al-bashir.pdf [accessed on 10th September 2011]

¹⁵⁵ *Ibid.*,

¹⁵⁶ Rozenberg, J. www.telegraph.co.uk/news/newstopics/lawreports/joshuarozenberg/2700862/Why-the-worlds-most-powerful-prosecutor-should-resign-Part-3.html [accessed on 10th September 2011]

¹⁵⁷ Goldstone, *Op. cit.*,

¹⁵⁸ *Ibid.*,

¹⁵⁹ Interview with Prof. Bassiouni, 2nd September 2008, The Hague.

¹⁶⁰ *Ibid.*,

official positions in the chain of command.¹⁶¹ Since the judges will certainly be subject to ‘immense international scrutiny and political expectations, the inevitable subjectivity of these judgements [about issuing the arrest warrant for Al-Bashir] provide[ed] an opportunity to tinker with the procedural rules. This is especially problematic given that the data accumulated by the Prosecutor is almost entirely secondary.’¹⁶²

Ginsburg has suggested that the ICC has a legal and political imperative to make its prosecution credible. On the other hand, states may sometimes need another type of credible promise, namely not to prosecute or to grant an amnesty. Ginsburg has called this tension ‘the clash of commitment.’¹⁶³ In this sense, he believes that the decision to indict a sitting head of state is a high-risk strategy for the Prosecutor that brings the clash of commitments to a head.¹⁶⁴ It can provide a challenge and an opportunity for the ICC judges, who need to establish a reputation of producing decisions that generate compliance.¹⁶⁵ Clearly, the Prosecution of a head of state has political consequences and the consideration of such political consequences plays an important role in the prosecutorial decision-making process. Passing a sensitive case to the Judges from the Prosecutor would create an unnecessarily complex relationship between various organs of the Court. On the other hand, the delay in deciding on the issue of an arrest warrant on the part of the Judges would ‘reinforce prejudice and doubts, including the possible suspicion of Judges’ involvement in back-door negotiations, to the detriment of [the] Court’s independence.’¹⁶⁶

The Prosecutor’s decision-making in the Darfur situation has also been challenged by some Sudan analysts, such as Julie Flint and Alex de Waal, who have criticized the ‘zealous pursuit’ of Al-Bashir and the Prosecutor’s legal judgment in seeking a genocide charge against the president.¹⁶⁷ Alex de Waal, commenting on the ICC Prosecutor’s determination to charge President Al-Bashir with genocide, argues that ‘he would have been better advised to confine his charges to the events of 2003-04, when, according to the Court’s own crime base data, about 90 percent of the killings took

¹⁶¹ Cayley, A. T. (2005). Senior Trial Attorney’s Advice on Darfur Case Strategy Internal Memorandum of Law, the Hague: p. 9.

¹⁶² Dasgupta, *Op, cit*,

¹⁶³ Ginsburg, T. "The Clash of Commitments at the International Criminal Court " The from Chicago Journal of International Law. from works.bepress.com/tom_ginsburg/26/ [accessed on 10th September 2011].

¹⁶⁴ *Ibid.*,

¹⁶⁵ *Ibid.*,

¹⁶⁶ Ciampi, *Op, cit.*, p. 891.

¹⁶⁷ Peskin, *Op, cit.*, p. 674.

place’¹⁶⁸ Regarding the credibility of the prosecution, de Waal and Flint wrote just before the Prosecutor filed his request for an arrest warrant that: ‘Evidence of such a [murderous] plan is purely circumstantial. There are daily crimes of violence in Darfur and the government has failed to provide security for the camps. But when the prosecutor alleges there is a centralized conspiracy to destroy the social fabric of Darfur, describes the whole region as a crime scene, and makes comparisons with the Nazis, we feel he is going beyond the facts and risks jeopardizing the credibility of the prosecution.’¹⁶⁹

Regarding the ICC’s third case on Darfur, the ICC’s Pre-Trial Chamber I dismissed all charges against Bahr Abu Garda, formerly of the Justice and Equality Movement, in connection with the attack that killed 12 African Union peacekeepers in Haskanita in 2007.¹⁷⁰ The message from the ICC’s Pre-Trial Chamber I to the Prosecutor was ‘you showed us the crime but not the criminal.’¹⁷¹ The Court concluded that there were no substantial grounds to believe that Abu Garda issued orders because it found there are no substantial grounds to believe that he was even in a position to issue orders on the date of the Haskanita attack.¹⁷² Flint has claimed that the Pre-Trial Chamber decision on the confirmation charges is ‘an astonishing tale of incoherence, inconsistency and poor legal practice.’¹⁷³ Moreover, regarding the weakness of the Prosecutor’s case, one of the three PTC judges, Judge Cuno Tarfusser, filed a separate opinion - not to dissent with the decision to decline to confirm the charges against Abu Garda but to say that the case was not even worthy of consideration.¹⁷⁴ He said, ‘[t]he lacunae and shortcomings exposed by the mere factual assessment of the evidence are so basic and fundamental that the Chamber need not conduct a detailed analysis of the legal issues pertaining to the merits of the case.’¹⁷⁵

De Waal claims that the decision of the Pre-Trial Chamber regarding *Abu Garda case* poses some sharp questions about the strategy followed by the Prosecutor in this case, such as ‘What process of investigation was followed in this case?’¹⁷⁶ The Chamber

¹⁶⁸ Case Closed: A Prosecutor Without Borders, *Op. cit.*,

¹⁶⁹ Gosnell, *Op. cit.*, p. 848.

¹⁷⁰ Decision on the Confirmation of Charges, in the case of the *Prosecutor v. Bahr Idriss Abu Garda*, Public version, No. ICC-02/05-02/09, 8th February 2010 from www.icc-cpi.int

¹⁷¹ bechamilton.com/?p=1641 [accessed on 10th September 2011]

¹⁷² *Ibid.*,

¹⁷³ blogs.ssrc.org/sudan/2010/02/09/the-abu-garda-case-and-the-otp/

¹⁷⁴ *Ibid.*,

¹⁷⁵ Separate opinion of Judge Cuno Tarfusser, para.3. ICC-02/05-02/09-243-Red 08-02-2010

¹⁷⁶ blogs.ssrc.org/sudan/2010/02/09/the-abu-garda-case-and-the-otp/

explicitly left the door open for the Prosecution to request the confirmation of charges if such a request was accompanied with additional evidence in the future,¹⁷⁷ but the ICC judges' comments and findings are surely damaging for the Office of the Prosecutor. Is the Prosecutor going to focus on attempting to prove that he is right about Abu Garda and the ICC judges wrong, or is he going to do what Darfurians want him to do? Namely, concentrate on putting in the dock those responsible for the destruction of their communities and the deaths of their families.¹⁷⁸

Conclusion:

Darfur represents the first time a case has been referred to the ICC involving crimes taking place in the territory of a state that is not a party to the ICC. The case also marks the first time the U.N. Security Council has referred a case to the ICC as it is permitted to do under the Rome Statute.¹⁷⁹ It is considered that the complementarity regime also applies in the event of a Security Council referral since Articles 17 and 19 of the Rome Statute do not indicate any exception for such referrals. Under such an approach, the ICC would remain free to make an independent and final determination of issues of jurisdiction and admissibility.¹⁸⁰ As Crawford has noted, '[o]nce a crime has been referred by the Security Council, the normal requirements of the Statute will apply, including independent prosecution'.¹⁸¹ Article 53(1) of the Rome Statute stipulates that the Prosecutor must conduct a full analysis of 'the information made available to him or her' for the purpose of determining whether a 'reasonable basis' exists for prosecution.¹⁸² The Prosecutor has the authority to 'judicially review referrals and deferrals of the Security Council'.¹⁸³ In other words, the Court is required to review a Security Council decision to determine whether the requirements of complementarity have been met.¹⁸⁴ As Brubacher has noted, 'the Prosecutor of the ICC represents the accusations and interests of the entire international community and must therefore weigh the interest of the parties to the case with those of the international community.

¹⁷⁷ Decision on the Confirmation of Charges, in the case of the *Prosecutor v. Bahr Idriss Abu Garda*, para 236. *Op, cit.*,

¹⁷⁸ blogs.ssrc.org/sudan/2010/02/09/the-abu-garda-case-and-the-otp/

¹⁷⁹ Tottan, *Op, cit.*,

¹⁸⁰ Informal policy paper, *Op, cit.*, page 21, para 68.

¹⁸¹ Stigen, *Op, cit.*, page 378.

¹⁸² *Ibid.*,

¹⁸³ Condorelli & Villalpando, *Op, cit.*,

¹⁸⁴ Stahn, *Op, cit.*, p. 194.

[It is] within this view that the criteria for public policy interest, as expressed in Article 53, must be identified and interpreted.¹⁸⁵ In addition to the concerns of the world community as such, the exercise of discretion must also address the need to ensure the Court's credibility, the need for successful proceedings, and the need to establish a meaningful role for the Court.¹⁸⁶

In the Darfur situation, the Sudanese government made some effort to show that domestic courts meet the complementarity criteria. However, there were some major obstacles to the achievement of justice in Darfur, notably the lack of political will, the poor enforcement of law and order, the failure to reform the judiciary, etc. Moreover, it has been suggested that there is a tension between *Shari'a* and international standards and that there is a need to adopt new approaches and techniques to reconcile them with contemporary democratic values and international standards of justice. In other words, the Prosecutor should consider taking into account the need for cultural sensitivity since up until now, crimes of gender violence have been actively prosecuted in a number of outstanding Darfur cases; particularly the arrest warrant for Al-Bashir which includes rape as a predicate act of genocide.¹⁸⁷ In fact, the Darfur situation is an extreme example of the impact of cultural difference on international criminal proceedings where ICC crimes are not compatible with Sudanese criminal law and procedure. For example, rape is difficult to prove in accordance with Islamic rules of evidence because of the differential weight of evidence. In this context, the exercise of prosecutorial discretion has been controversial. This suggests that the repressive state practices of some Islamic states will continue to provoke further conflict between domestic and international criminal law. Therefore, it is the Prosecutor's obligation to be cautious about local traditions notwithstanding that the ICC investigators and prosecutors are taking a Kantian approach in order to secure justice and eliminate disorder when national authorities fail to do so.

In the Darfur situation, the effectiveness of international criminal prosecutions depends on support from the public and governments. The ICC Prosecution policy has been treated with suspicion both by the public and the Sudanese government, due to a lack of transparency and clarity of prosecutorial strategies in relations to focus on

¹⁸⁵ Stigen, *Op, cit.*, p. 357.

¹⁸⁶ *Ibid.*, p. 358.

¹⁸⁷ *Prosecutor v. Harun & Abd-al-Rahman*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, (Apr. 27, 2007), *Prosecutor v. Harun & Abd-al-Rahman*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun. Warrant of Arrest for Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09.

African and Muslim countries. Above all, the Darfur situation highlights the fact that the Prosecutor needs to accept the idea of legal and normative pluralism rather than relying on a legitimate claim to a monopoly of authority and force.

Although there have been some developments in the Darfur cases at the Court, it seems that a lack of consistency in the prosecutorial policy and different approaches to different situations have led to complex issues over the possibility of a fair trial at the ICC.¹⁸⁸ This will be explored more in the next chapter in the DRC situation which was referred to the Prosecutor by the Congolese government. This provides the opportunity to analyse the normative dimension of prosecutorial decision-making in a very different context and under circumstances of self-referral.

¹⁸⁸ Bellemare, *Op, cit.*,

Chapter Six: The Situation in the Ituri Region of the Democratic Republic of Congo (DRC)

Introduction:

There is complication in the case of the DRC, where contradictory views of justice are prevalent. On the one hand, justice is fervently desired but, at the same time, people do not trust it in practice. Historically, the Congolese have seen a lot of inconsistencies between the written law and the reality on the ground. A justice system rife with corruption, lacking independence, prone to being partial and easily influenced by others' opinions and desires, and marred by double standards, has helped to contribute to this distrust. Judges, meanwhile, 'complain about the conditions in which they work and think they are also victims of politics'.¹

Over the past decade, the people of the DRC have endured horrific atrocities at the hands of a multitude of armed groups, foreign forces, militias and the national Congolese army. The victims are ordinary citizens who have suffered massacres, torture, widespread sexual violence, forced displacement and property loss. Impunity for grave violations of human rights has long been the norm in the DRC. Only a small number of perpetrators have been arrested and brought to justice; dozens of others have been promoted to senior positions in the Congolese army or the government. As one Congolese lawyer recently commented, 'in Congo we reward those who kill, we don't punish them.'² Since August 1998, the DRC 'has been enmeshed in one of Africa's most internationalized wars',³ directly involving six other countries. The armies of Rwanda, Uganda, and Burundi, together with Congolese rebel groups, were pitted against the government of the DRC, who were supported by Zimbabwe, Angola, and Namibia.⁴ In many parts of the eastern DRC, such as Ituri, South Kivu and northern Katanga, the fighting between armed groups continues today with

¹ Prospects for Justice in the Democratic Republic of Congo, from gr.convio.net/site/DocServer/DRC_April_06.pdf?docID=5023 [accessed on 10th September 2011]

² Courting conflict? Justice, Peace and the ICC in Africa, 2007, www.royalafricansociety.org/index.php?option=com_content&task=view&id=415 [accessed on 10th September 2011]

³ Human Rights Watch (2004). "Democratic Republic of the Congo: Confronting Impunity." From www.hrw.org/en/reports/2004/02/02/democratic-republic-congo-confronting-impunity [accessed on 10th September 2011].

⁴ *Ibid.*,

widespread human rights crimes including ethnic massacres, sexual violence, and the recruitment of child soldiers.⁵

In this context, the UN Security Council Resolution 1493(2003) prepared for the departure of the European Union (EU) forces by authorizing the Ituri with a strengthened mandate.⁶ In addition, the UN Secretary-General Annan outlined the violence occurring in Ituri, especially between the Hema and Lendu ethnic groups, from February through May 2003, and recommended the creation of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) to operate in Bunia beginning in August 2003.⁷ The individuals and armed groups that have carried out massacres, murders, rapes, inhumane acts such as cannibalism, and other crimes in Ituri must bear primary responsibility for them. But armed forces and political movements under the control of the government are also responsible for having provided military and other support to local groups with abysmal human rights records.⁸

National courts clearly have the responsibility to undertake the fight against impunity and thereby contribute to the rebuilding of the nation. However, the significant question arises as to whether domestic courts have prosecuted any of the serious crimes committed during the wars. There is no legislation 'domesticating' the Rome Statute which defines such crimes; which is to say that there is no law to integrate the crimes falling within the jurisdiction of the ICC into national law and grant national courts jurisdiction in this regard. Thus, these serious crimes may only be prosecuted by military courts since the adoption in 2002 of the military criminal code, which includes the crimes stipulated in the Rome Statute.⁹ In this sense, with no prospect of prosecution by the domestic DRC national legal system in sight, President Joseph Kabila referred 'the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of

⁵ *Ibid.*,

⁶ United Nations Security Council Resolution 1493 (2003), from access-dds-ny.un.org/doc/UNDOC/GEN/N03/443/15/PDF/N0344315.pdf?OpenElement

⁷ *Ibid.*,

⁸ Human Rights Watch (2003). "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo." from www.hrw.org/reports/2003/ituri0703/ [accessed on 10th September 2011]

⁹ Open Society Initiative (2010) Democratic Republic of Congo Military Justice and Human Rights: An urgent need to complete reforms from www.afriMAP.org/english/images/report/AfriMAP_DRC-MilitaryJustice_full_EN.pdf [accessed on 10th September 2011]

the Rome Statute' to the Prosecutor on 1 July 2002.¹⁰ As early as July 2003, the Prosecutor indicated that the Ituri region of the DRC was his first priority.¹¹

In the DRC situation, the ICC investigation must take account of different branches of the criminal justice system, civil and military, which in turn may differ as far as investigative and prosecutorial standards are concerned in the application of the complementarity regime. In this context, the role of the Prosecutor is crucial in obtaining a true picture from the people of the region and raising the standard of local trials in accordance with rule of law principles.¹² This chapter aims to assess the adequacy and effectiveness of the existing mechanisms for criminal justice in the Ituri region of the DRC with regard to Article 17 of the Rome Statute. It will focus on several aspects of the national justice system in order to highlight some of the most significant problems undercutting the capacity of national courts in the DRC to prosecute serious human rights crimes. In discussing this issue, this chapter is organized into three sections. The first will look at the contextual history of the DRC's crisis in Ituri. It attempts to examine the causes of the Ituri conflict. In particular, the violations of international humanitarian law by all parties to the conflict will be considered. The second section will address the development of the Congolese justice system. It will explore the military justice reforms and the operation of the justice system in the DRC. Finally, an overall evaluation of Congolese criminal procedure will be attempted in order to allow for an analysis of the inadequacy of the Congolese criminal justice system in light of Article 17 of the Rome Statute. This will be undertaken in the subsequent chapter.

Contextual history of the DRC's crisis in Ituri:

The DRC is the third-largest country in Africa and the biggest country in the Great Lakes region, which also includes Rwanda, Burundi, Uganda, and Tanzania. This region has been overwhelmed by a decade of devastating conflicts, in part following

¹⁰ Prosecutor receives referral of the situation in the Democratic Republic of Congo, ICC-OTP-20040419-50, from www.icc-cpi.int

¹¹ Schabas, W. (2008). "Complementarity in Practice: Some Uncomplimentary Thoughts." *Criminal Law Forum* 19(1): 12. p.11.

¹² Institute for War & Peace Reporting, (2008). *Sexual Violence in the Democratic Republic of Congo*, p. 15.

the regional destabilization caused by the Rwandan genocide.¹³ The Republic of Congo became independent in 1960 and General Joseph Mobutu Sese Sesko, chief of staff of the army, seized power in a military coup on November 24, 1965. He renamed the country 'Zaire',¹⁴ and began a three-decade rule of tyranny, absolute concentration of power, and widespread corruption from which the country is still trying to recover. It has been involved in armed conflict ever since.¹⁵

The final days of Mobutu's reign took place in the aftermath of the 1994 Rwandan Genocide in which an estimated 800,000 Tutsis and moderate Hutus were slaughtered by Hutu extremists. Faced with the advancing army of the predominantly Tutsi Rwandan Patriotic Front (RPF), a mass exodus consisting of thousands of civilians, as well as Hutu perpetrators of the genocide, fled west from Rwanda into neighbouring Zaire, resulting in a humanitarian disaster in the east of the latter country.¹⁶ Eastern Zaire also became a base from which the transplanted Hutu Power regime began launching attacks into Rwanda. In 1996, Rwandan and Ugandan forces invaded Zaire under the pretext of fighting Hutu rebels in the country.¹⁷ In 1996, Congolese dissidents with the support of neighbouring Angola, Rwanda and Uganda, established the *Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre*¹⁸ (AFDL), headed by Laurent-Desiré Kabila. The AFDL invaded Zaire from the east, Mobutu fled and the AFDL entered Kinshasa in May 1997. Laurent Kabila became President of the country, which he renamed the Democratic Republic of the Congo.¹⁹ This period of the DRC's history, from 1996 until the instalment of Kabila, has become known as the 'First Congo War'.²⁰

Following Kabila's ascension to power, his Ugandan and Rwandan allies were allowed to remain in the DRC and received military and economic benefits.²¹

¹³ International Centre for Transitional Justice (2004). "A First Few Steps: The Long Road to a just Peace in the Democratic Republic of Congo." from www.ictj.org/images/content/1/1/115.pdf [accessed on 10th September 2011].

¹⁴ www.haguejusticeportal.net/eCache/DEF/11/284 [accessed on 10th September 2011]

¹⁵ Gordon, G. (2008). "African Marshall Plan: Changing U.S. Policy To Promote The Rule Of Law and Prevent Mass Atrocity In The Democratic Republic Of Congo." From works.bepress.com/gregory_gordon/4/ [accessed on 10th September 2011].

¹⁶ Justice in the Democratic Republic of Congo: A background, from www.haguejusticeportal.net/eCache/DEF/11/284 [accessed on 10th September 2011]

¹⁷ *Ibid.*,

¹⁸ the Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL)

¹⁹ Davis, L. (2009). "Justice-Sensitive Security System Reform in the Democratic Republic of Congo." www.initiativeforpeacebuilding.eu/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC.pdf [accessed on 10th September 2011].

²⁰ Justice in the Democratic Republic of Congo: A background, *Op, cit.*,

²¹ *Ibid.*,

However, tensions soon arose between Kabila and these allies, and in August 1998 a mutiny in the Congolese army triggered 'Africa's First World War,' arguably the deadliest conflict since the end of World War II.²² Rwanda and Uganda were initially allies, but later became adversaries during the conflict. Each backed the creation of a rebel movement and sent its own army to eastern Congo. In response, Kabila requested military assistance from members of the Southern African Development Community. Angola, Zimbabwe, and Chad responded to this request and sent their own armies to the DRC; Angola and Zimbabwe played a key role in preventing the fall of Kinshasa to the rebels and their foreign allies.²³ This new conflict marked the beginning of the 'Second Congo War'.²⁴

The International Rescue Committee, in its report in 2008, announced that as many as 5.4 million people may have died from war-related causes in the DRC since 1998.²⁵ In the summer of 1998, two rebel movements – the *Rassemblement Congolais pour la Démocratie* (RCD) in the east, and the *Mouvement pour la Libération du Congo* (MLC) in the Orientale and Equateur provinces – launched attacks on the Kabila government. The RCD was primarily backed by Rwanda and the MLC by Uganda, while Zimbabwe and Angola supported the government. Therefore, the war in the DRC combined local, national and international elements.²⁶ By 1999, the war had reached a military stalemate. The country was divided into four zones: one controlled by the government, the MLC controlling the north, and the two RCD factions (RCD-Goma backed by Rwanda, and RCD-ML backed by Uganda) in the east and north-east. The government and rebel-controlled areas alike continued the patterns of governance dating back to the colonial era: of distributing access to land, economic resources and rights to select local communities to ensure their loyalty, while fuelling competition with other communities to prevent united local opposition.²⁷

In 1999 the major parties to the war signed the Lusaka Peace Accords, resulting in the deployment in 2000 of a United Nations force, MONUC, to monitor arrangements for ending the conflict.²⁸ The 1999 Lusaka Accords between Rwanda, Uganda,

²² ICTJ report, "A First Few Steps: The Long Road to a just Peace in the Democratic Republic of Congo.", *Op, cit.*,

²³ *Ibid.*,

²⁴ Justice in the Democratic Republic of Congo: A background, *Op, cit*

²⁵ *Ibid.*,

²⁶ Davis, *Op, cit.*,

²⁷ *Ibid.*,

²⁸ HRW report, "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo.", *Op, cit.*,

Kabila's government and its international allies, made provision for a ceasefire, the withdrawal of foreign troops, the arrival of a UN peacekeeping mission (MONUC) and the Inter-Congolese Dialogue (ICD) process.²⁹ A significant moment in the conflict came at the beginning of 2001 when President Kabila was shot by one of his bodyguards, later dying from his injuries. The Congolese Parliament voted Kabila's son, Joseph Kabila, to take power.³⁰ The Inter-Congolese Dialogue led to an inclusive power-sharing agreement, which was signed by delegates in Pretoria on December 17, 2002. By the end of 2002, all Rwandan, Angolan, Namibian, and Zimbabwean troops had withdrawn from the DRC. Ugandan troops officially withdrew from the DRC in May 2003.³¹ However, parts of the east of the country remain in conflict. In this uncertain environment, questions of justice are critical, especially when a number of those appointed to government positions have been accused of involvement in serious human rights abuses. If there is no justice, local populations may cause further violence by taking matters into their own hands. This has already been witnessed in Ituri, north-eastern Congo, where the culture of impunity has further fuelled the cycle of ethnic violence, allowing opposing groups to believe they are justified in carrying out revenge killings for crimes committed against them.³²

A number of independent reports, including those by a United Nations Panel of Experts and by International Non-governmental Organizations (NGOs), have documented the link between the conflict in the DRC and the exploitation of natural resources.³³ In fact, much of the DRC's armed conflict is driven by competition for control of natural resources and land. Also, rebel movements or their allies have used diamonds to finance armed conflict.³⁴ Therefore, in June 2000, in response to reports of widespread illicit resource exploitation, the President of the Security Council requested the UN Secretary-General to establish a Panel of Experts on the illegal exploitation of the DRC's natural resources and other forms of wealth, focusing especially on conflict in Ituri Province and elsewhere in the northern DRC since 1998. He also requested the Panel research and analyse the links between the resource

²⁹ Davis, *Op. cit.*,

³⁰ Justice in the Democratic Republic of Congo: A background, *Op. cit.*,

³¹ Gordon, *Op. cit.*,

³² HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op. cit.*,

³³ HRW report, "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo.", *Op. cit.*,

³⁴ Ezekiel, A. (2007). "The Application of International Criminal Law to Resource Exploitation: Ituri, Democratic Republic of the Congo " Natural Resources Journal **47**: 225-245. p. 226.

exploitation and the continuation of the conflict in the DRC.³⁵ The Panel delivered six reports and interim updates to the Security Council from 2001 to 2003, documenting the role various rebel groups, proxy groups, armies, and the governments of surrounding countries and their officers and officials play in natural resources crimes.³⁶ The Panel systematically documented the ways in which massive exploitation of natural resources was linked to the military conflict, arms trafficking, and human rights abuses in the DRC.³⁷ In general, the militias, rebel groups and criminal elements in the Congolese government military and security personnel have participated in mass murder, large-scale sexual violence, and numerous other human rights violations.³⁸ Crimes documented by the Panel and various NGOs include forced labour, kidnapping, mass rape and sexual slavery, mutilation, and mass murder. The Panel's reports emphasize that these crimes are both in aid of, and financed by, the profits from illegal appropriation of natural resources in the Ituri forest and elsewhere in the eastern DRC.³⁹

All parties to the conflict have been guilty of these violations of international humanitarian law, the incidence of which has increased and become more serious over time. *Union des Patriotes Congolais* (UPC), Union of Congolese Patriots, authorities have been responsible for the majority of these recent cases, often charging the agencies and their workers of being complicit with the Lendu.⁴⁰ Killings have also been attributed to the Congolese army or to government-backed militias, who are alleged to have committed massacres in Ituri, Kivu, North Katanga and Maniema. For instance, in 2002, at least 68 persons were killed and 3,500 houses were burnt down at Ankoro by the government armed forces. Elsewhere in North Katanga, Mai Mai militias supported by the government are responsible for acts of cannibalism, as well as looting and burning houses and constantly harassing civilians. On the government side, military, police and security services are reported to torture detainees. Common methods include being whipped, beaten with belts or metal tubes, burnt by cigarettes

³⁵ Gordon, *Op, cit.*,

³⁶ Ezekiel, *Op, cit.*, p. 227.

³⁷ Gordon, *Op, cit.*,

³⁸ *Ibid.*,

³⁹ Ezekiel, *Op, cit.*,

⁴⁰ HRW report, "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo." , *Op, cit.*,

or otherwise assaulted. Allegations are not investigated and victims do not receive reparation.⁴¹

The cause of the Ituri conflict:

Ituri forms part of the eastern province Orientale, whose capital is Kisingani. Ituri is made up of five territories: Aru, Djugu, Irumu, Mahagi and Mambasa, with its capital in Bunia.⁴² Ituri is one of the richest areas of the Congo with deposits of gold, diamonds, coltan and oil and an important cross-border trade with Uganda.⁴³ The competition for control of these resources by combatant forces has been a major factor in the evolution of the crisis in Ituri as in the rest of the DRC.⁴⁴ The war in Ituri is a complex web of local, national, and regional conflicts that developed after a local dispute between Hema and Lendu was exacerbated by Ugandan actors and aggravated by the broader international war in the DRC.⁴⁵

Ituri is home to eighteen different ethnic groups, with the Hema/Gegere and Lendu/Ngiti communities together representing about 40 per cent of the inhabitants. The other major groups are the Bira, the Alur, the Lugbara, the Nyali, the Ndo-Okebo, and the Lese.⁴⁶ After the Belgians withdrew, the Hema elite were left as a landowning and business class and as the administrative core, with greater access to wealth, education and political power,⁴⁷ with Hema elites seeking to assert or protect their control of the political and economic spheres in Ituri.⁴⁸ Land-motivated local conflicts periodically emerged (1966, 1973, 1990, and 1997) between Hema landholders and Lendu communities that felt disadvantaged and marginalised. These conflicts were mediated before they could escalate into large-scale fighting, and the great majority of

⁴¹ www.humanrightsfirst.org/international_justice/regions/DCR_Bckgrnd.pdf [accessed on 10th September 2011]

⁴² Amnesty International (2003). "Democratic Republic of Congo-Ituri: A Need for protection, a thirst for justice." from www.amnesty.org/en/library/asset/AFR62/032/2003/en/19e9a76f-a3a0-11dc-9d08-f145a8145d2b/af620322003en.pdf [accessed on 10th September 2011]

⁴³ HRW report, "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo.", *Op, cit.*,

⁴⁴ Amnesty International report, "Democratic Republic of Congo-Ituri: A Need for protection, a thirst for justice.", *Op, cit.*,

⁴⁵ HRW report, "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo.", *Op, cit.*,

⁴⁶ *Ibid.*,

⁴⁷ Amnesty International (2003). "Democratic Republic of Congo: On the precipice: the deepening human rights and humanitarian crisis in Ituri." from www.amnesty.org/en/library/info/AFR62/006/2003 [accessed on 10th September 2011].

⁴⁸ HRW report, , "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo.", *Op, cit.*,

poor Hema were rarely involved.⁴⁹ In this sense, the Ituri conflict is a conflict between the agriculturalist Lendu and pastoralist Hema ethnic groups,⁵⁰ although historically there has been a high degree of co-existence between the two groups and intermarriage has been common.⁵¹

‘After the discovery of the resource-rich highlands of Irumu and Djugu, the Ituri region was of particular interest to the Belgian colonists... on the eve of colonialism, the Hema dominated both the political and economic fields’.⁵² Belgian colonial rule exacerbated ethnic divisions between the two communities, however, by trying to reorganize traditional chieftaincies into more homogeneous groups and by favouring the Hema over the Lendu.⁵³ After independence, the Hema were not only in a more favourable position to take over the plantations left by the Belgian settlers, but they also had the intellectual, political and financial resources to manipulate Mobutu’s state to their advantage and increase their economic domination.⁵⁴

Therefore, the conflict in Ituri should be understood as a complex of dynamics which expresses the inner logic of the existing local social, economic and political order.⁵⁵ The conflict originally began as an economic conflict, but soon evolved into an ethnic one. Violence committed by traditional Lendu communities in the course of protecting their land eventually evolved beyond simply targeting landowners to targeting anyone of Hema ethnicity.⁵⁶ When a small number of Hema allegedly attempted to bribe local authorities into modifying land ownership registers in part of the Djugu district of Ituri, the Lendu decided to retaliate. In the absence of a strong local authority the incident quickly turned into a confrontation between the two communities.⁵⁷ According to a report of the Integrated Regional Information Networks (IRIN), ‘one month before the first eruption of violence Lendu chiefs had warned the Hema of an imminent attack, ordering them to leave their land and

⁴⁹ International CrisisGroup (2003). "Congo Crisis: Military Intervention in Ituri." from www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/064-congo-crisis-military-intervention-in-ituri.aspx [accessed on 10th September 2011].

⁵⁰ www.haguejusticeportal.net/eCache/DEF/11/284 [accessed on 10th September 2011]

⁵¹ HRW report, "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo *Op, cit.*,

⁵² Vlassenroot, K. and T. Raeymakers (2004). "The Politics Of Rebellion and Intervention in Ituri: The Emergence Of A New Political Complex ?" *African Affairs* **103**(412): 385-412. p. 389.

⁵³ HRW report, "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo.", *Op, cit.*,

⁵⁴ International Crisis Group report, "Congo Crisis: Military Intervention in Ituri.", *Op, cit.*,

⁵⁵ Vlassenroots, *Op, cit.*, p. 388.

⁵⁶ www.haguejusticeportal.net/eCache/DEF/11/284 [accessed on 10th September 2011]

⁵⁷ HRW report, , "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo.", *Op, cit.*,

crops'.⁵⁸ In response, the Hema started organizing armed groups to defend their property. On 5 September 2002, Lendu combatants brutally slaughtered almost a thousand Hema and Wabira in the local hospital of the Nyakunde.⁵⁹ Fighting in the Ituri and Kivu provinces intensified in late 2002 and early 2003, partly because of the withdrawal of Rwandan and Ugandan troops as part of peace accords signed in 2002. The Ugandan, Rwandan and the DRC governments have been widely accused of supporting rival military groups, often defined along ethnic lines.⁶⁰

Uganda occupied Ituri from 1998 to 2003, when the last of its troops returned to Uganda in accordance with the Luanda agreement of September 6, 2002. Uganda's withdrawal immediately increased instability in the region, and external support from Kampala, Kinshasa, and Kigali flowed in to fill the power vacuum and gain control of the resource-rich region.⁶¹ Ethnically based armed groups continue to fight against each other as well as against soldiers of the national army and the UN peacekeeping force, MONUC. War crimes and crimes against humanity have been committed following systematic abuses of human rights,⁶² with combatants often using sexual violence to target persons of ethnic groups seen as the enemy. According to the October 2004 estimate of humanitarian agencies, eight to ten persons were being raped each day in the town of Bunia and a limited number of other locations in Ituri.⁶³

Five armed political groups are contesting control of Ituri. Uganda, at one time or another, has backed all these groups, often simultaneously. The *Rassemblement congolais pour la Démocratie – Mouvement de Liberation* (RCD-ML), Congolese Rally for Democracy – Liberation Movement, is led by Mbusa Nyamwisi, while the UPC is led by Thomas Lubanga. This group, formed in April 2002, is drawn almost exclusively from the Hema ethnic community. Internal divisions subsequently emerged within the UPC, with one faction favouring alliance with Rwanda and another with Uganda. This latter faction emerged as a new armed political group, the *Front pour l'Intégration et la Paix en Ituri* (FIPI), led by Gegere Chief Kawa Mandro

⁵⁸ Vlassenroot, *Op. cit.*, p. 392.

⁵⁹ *Ibid.*,

⁶⁰ Humanitarian Issues in Ituri, Eastern DRC, www.odi.org.uk/hpg2003

⁶¹ ICTJ report, "A First Few Steps: The Long Road to a just Peace in the Democratic Republic of Congo.", *Op. cit.*,

⁶² Human Rights Watch (2004). "Making Justice Work: Restoration of the Legal System in Ituri, DRC A Human Rights Watch Briefing Paper ". from www.hrw.org/en/reports/2004/09/01/making-justice-work-restoration-legal-system-ituri-drc [accessed on 10th September 2011].

⁶³ Human Rights Watch (2005). "Seeking Justice: The Prosecution of Sexual Violence in the Congo War." from www.hrw.org/en/node/11816/section/1 [accessed on 10th September 2011].

Panga. Beyond these major armed political groups are a number of other armed groups and militias operating in Ituri. The Hema militia are now closely identified with the UPC (or the FIPI), while Lendu / Ngiti militia have increasingly allied themselves with the RCD-ML.⁶⁴ Since early 2002, the RCD-ML has sought 'greater rapprochement with the DRC government,' and has reportedly been supplied with arms from Kinshasa although this has been denied by government officials.⁶⁵ Early in 2002, the involvement of the Kinshasa Government centred on the military assistance that it provided to RCD-ML in Beni. Kinshasa sent trainers, weapons and also some military elements in support of the *Armée Populaire Congolaise*⁶⁶ (APC), which was reportedly sending weapons supplies from Beni to Lendu militia.⁶⁷

These national groups, as well as local ethnic groups in Ituri, have been and, in some cases, still are supported by the Ugandan, Rwandan and DRC governments.⁶⁸ In fact, the availability of political and military support from external actors, whether national governments or rebel movements, has encouraged local leaders to form new groups, generally based on ethnic loyalty.⁶⁹ Armed groups have committed war crimes, crimes against humanity, and other violations of international humanitarian and human rights law on a massive scale in Ituri. Human Rights Watch estimates that at least 5,000 civilians died from direct violence in Ituri between July 2002 and March 2003. These victims are in addition to the 50,000 civilians that the UN estimates have died there since 1999.⁷⁰ Armed groups have also committed summary executions, forcefully abducted persons whose whereabouts remain unknown, and arbitrarily arrested and unlawfully detained others, some of whom they subjected to systematic torture. The UPC conducted a 'man hunt' for Lendu and other political opponents shortly after taking power in August 2002. Many Lendu were arrested. In addition, Human Rights Watch has observed that senior UPC military officers were in charge of two prison areas that became infamous places of summary execution and torture.⁷¹

⁶⁴ Amnesty International report, "Democratic Republic of Congo-Ituri: A Need for protection, a thirst for justice." *Op, cit.*,

⁶⁵ *Ibid.*,

⁶⁶ Congolese People's Army

⁶⁷ A special report on the event of Ituri, 2003- UNSG report to the UNSC

⁶⁸ HRW report, "Ituri: 'Covered in Blood' Ethnically Targeted Violence In Northeastern DR Congo." *Op, cit.*,

⁶⁹ *Ibid.*,

⁷⁰ *Ibid.*,

⁷¹ *Ibid.*,

Development of the Congolese criminal justice system:

The DRC military justice system is linked to the ordinary justice system through a complex series of appeals, at the centre of which is an appeal on the grounds of the unconstitutionality of the laws applicable before the military courts.⁷² Congolese military justice has a long tradition of serving either as an ‘emergency’ system (*justice d’exception*) or as a judicial structure more or less similar to the ordinary courts.⁷³ Introduced at the same time as the *Force Publique*, the private army raised by King Léopold II for his *Etat Indépendant du Congo* (Congo Free State), military justice initially operated from 1888 onwards in the form of emergency courts termed *conseils de guerre*. Their jurisdiction was limited at the time to serious military misconduct committed by members of the *Force Publique*.⁷⁴ This system was maintained with minor modifications until 1958, when magistrates began to sit on the *conseils de guerre*. A provisional military justice code was drawn up for the first time in 1964. The first more or less complete reform of military justice took place in 1972, with the introduction of a *code de justice militaire* (code of military justice). This code organised the military courts for the first time into a complete judicial system, distinct from that of the ordinary courts. It introduced a procedure applicable to these courts and established rules for their jurisdiction. It also defined the offences falling under the jurisdiction of these courts as well as the corresponding sentences.⁷⁵

The penal code adopted by the Congo Free State in 1888 remained in force until it was replaced by the penal code of 1940. This later code was not abandoned at independence but has since undergone a variety of amendments, the most important of which was the creation in 1963 of a set of crimes concerning public order and state security. Unlike the penal codes of other French speaking states, the Zairian code does not distinguish among different classifications of criminal offences and refers to all of them as ‘infractions.’⁷⁶ The 1974 constitution ‘imbued Zairian criminal law’ with certain fundamental principles, but in practice these principles are often violated.⁷⁷ For example, although *habeas corpus* and bail do not exist, people arrested are

⁷² OSI report, "Democratic Republic of Congo Military Justice and Human Rights: An urgent need to complete reforms", *Op, cit.*,

⁷³ *Ibid.*,

⁷⁴ *Ibid.*,

⁷⁵ *Ibid.*,

⁷⁶ www.photius.com/countries/congo_democratic_republic_of_the/national_security/congo_democratic_republic_of_the_national_security_criminal_law_and_the~89.html [accessed on 10th September 2011]

⁷⁷ *Ibid.*,

supposed to be brought before a magistrate within forty-eight hours of arrest. This principle is rarely adhered to, however, and often those arrested are held for months without a hearing. People who can afford bribes buy their way out of detention without ever having been formally charged.⁷⁸ After the fall of Mobutu in 1997, President Laurent Kabila came to power with a deep suspicion of anyone associated with the Mobutu regime, especially the judiciary. He abolished all previously existing military tribunals and replaced them with a single military court (the *Cour d'Ordre Militaire*⁷⁹ - COM).⁸⁰ Military law was organised by government decree 1962-060 of 25 September 1962, and amended by the decree of 23 August 1997, which introduced a military law and institutions code and created the military court.⁸¹ The COM was the result of the deep suspicion with which the Kabila government regarded anyone who previously worked in the justice system under Mobutu as well as the preference of members of the new army to directly handle the arrest of such people and adjudication of their cases outside of the courts. During the five years of its existence, the COM was characterized by a total violation of due process and violations of basic guarantees of a fair trial, including an accused's right to appeal and to a counsel of his choice.⁸² In early 2003, the government abolished the COM and replaced it with new military tribunals. Nevertheless, *the Cour de la Sureté de l'Etat*⁸³, a special tribunal established in the 1970s to prosecute political offences, continues to try members of the opposition, journalists, and union leaders without due process.⁸⁴

Congolese law does not proscribe genocide, war crimes, and crimes against humanity; these violations are addressed only in military courts, where their definitions do not conform to international standards.⁸⁵ In fact, one of the principal problems of Congolese justice is the 'militarisation of the justice system'; that is, the

⁷⁸ *Ibid.*,

⁷⁹ The Court of Military Order

⁸⁰ HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op, cit.*,

⁸¹ FIDH (2004). "Democratic Republic of Congo Justice is overlooked by the transition." From

www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=country&docid=46f146af0&skip=0&coi=COD∓querysi=justice&searchin=title&display=10&sort=date [Accessed on 10th September 2011].

⁸² HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op, cit.*,

⁸³ The State Security Court

⁸⁴ HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op, cit.*,

⁸⁵ ICJT report, "A First Few Steps: The Long Road to a just Peace in the Democratic Republic of Congo." *Op, cit.*,

extension of the jurisdiction of military courts to the detriment of ordinary courts.⁸⁶ Over time, through a loose interpretation of the applicable laws, military courts have progressively extended their jurisdiction over civilians beyond legal provisions. The abuses of the COM were part of the reason for the military justice reform of 2002, which attempted to confine military justice within its traditional role as justice for members of the armed forces. However, the reform was only partial. In many cases, the codes of 2002 confirmed military court jurisdiction over civilians.⁸⁷ This extension of their jurisdiction to encompass civilians is contrary both to the constitution and to the African and international standards applicable in the DRC. The military justice reform instituted by Acts no. 023-2002 of 18 November 2002 on the military justice code, and no. 024-2002 of 18 November 2002 on the military criminal code, only addressed these issues very partially. The Minister of Justice has therefore initiated another reform process, which is still ongoing. The serious crimes mentioned above may only be prosecuted by military courts since the adoption in 2002 of the military criminal code, which includes the crimes stipulated in the Rome Statute.⁸⁸

The legal and institutional framework of Congolese military justice was extensively modified by the ratification of the Rome Statute in March 2002, and by the enactment of the military justice code and the military criminal code in November 2002. These three legal instruments made it possible to prosecute members of the armed forces and members of armed factions for serious crimes committed during the series of armed conflicts taking place since 1996.⁸⁹ In 2005, the adoption of the constitution of the Third Republic, which contains fundamental principles aimed at integrating military courts and judges into the ordinary justice structure, made it possible to establish rules governing military justice. The new constitution made the decisions of military courts subject to review by civilian high courts, and placed military judges under the supervision of the Judicial Service Commission. The successive reforms of military justice have tended towards the progressive integration of the rules of ordinary criminal procedure into military justice procedures and the establishment of a permanent court system responsible for enforcing justice in relation to the crimes stipulated under the military criminal code, which is separate from, but largely

⁸⁶ OSI report, "Democratic Republic of Congo Military Justice and Human Rights: An urgent need to complete reforms", *Op. cit.*,

⁸⁷ *Ibid.*,

⁸⁸ *Ibid.*,

⁸⁹ *Ibid.*,

inspired by, the ordinary criminal code.⁹⁰ Although it constituted an obvious positive difference in relation to the previous legislative framework, the legislative reform of 2002 remained largely insufficient, and allowed obstacles to the right to a fair trial to persist in military courts. For one thing, the military justice reform was not accompanied by a similar reform of the civilian justice system. Consequently, the most serious offences committed during the armed conflicts that have recently affected the Congo are now under the sole jurisdiction of the military courts, due to the lack of a law granting jurisdiction to ordinary courts.⁹¹ It is in this sense that the military courts have extended their jurisdictions to encompass civilians.⁹²

In the DRC, the history of the judiciary in the entire post-colonial phase has been marked by corruption and a lack of independence, integrity, and wealth infrastructure.⁹³ Only a very small number of the serious crimes committed in the DRC during the series of wars that have followed each other since 1996 have been brought to court, and proceedings have taken place in military courts only.⁹⁴ Human Rights Watch has observed that there are key deficiencies in the DRC justice system that undermine its capacity to bring justice for serious crimes.⁹⁵ There are many reasons why there is an absence of effective access to justice in the DRC, including the physical distance between the victim and the organs of justice (police, prosecutor and judge) combined with a lack of legal assistance, institutional obstacles to the effective pursuit of proceedings, and social obstacles such as ignorance of the law.⁹⁶ Mainly, it faces institutional problems relating to a lack of independence of the judiciary, poor infrastructure, nonexistent training, inadequate investigations, and a failure to protect fair trial standards and the rights of the accused.⁹⁷

Lack of independence:

Amongst the major issues facing military justice, it is important to note the problem of independence. Post-colonial constitutions of the DRC, including the current

⁹⁰ *Ibid.*,

⁹¹ *Ibid.*,

⁹² *Ibid.*,

⁹³ ICTJ report, "A First Few Steps: The Long Road to a just Peace in the Democratic Republic of Congo." *Op, cit.*,

⁹⁴ OSI report, "Democratic Republic of Congo Military Justice and Human Rights: An urgent need to complete reforms", *Op, cit.*,

⁹⁵ HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op, cit.*,

⁹⁶ "Justice, Impunity, and Sexual Violence in Eastern Democratic Republic of Congo" from www.appggreatlakes.org/index.php/appg-reports-mainmenu-35/116-sexual-violence-report-published

⁹⁷ HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op, cit.*,

transitional constitution, have asserted the principle of the separation of powers and recognized three branches of government. But, despite clear references to judicial independence, the constantly growing power of the executive since the mid-1970s has resulted in *de facto* subordination of the judiciary to the executive branch. In fact, the judiciary has lost the relative independence it once enjoyed in the late 1960s and early 1970s.⁹⁸ Consequently, the democratic reforms of the early 1990s restated the importance of a separation of powers and the judiciary showed significant signs of independence. In a celebrated ruling in 1992, for example, the Supreme Court refused to apply the 1967 authoritarian constitution that the President wanted. On August 16, 1993, the president of the Supreme Court and the *Procureur général* signed a joint statement declaring void the measures for dismissal and transfer of judges arbitrarily decreed by the Prime Minister.⁹⁹ By constitutional mandate, the President of the Republic presides over the Council of Ministers and is assisted by the Minister of Justice. The chairmanship of these executive officials over the *Conseil Supérieur de la Magistrature* (CSM) (Superior Council of Magistrate) needs to remain only symbolic to avoid undue infringement of the independence of the judiciary. However, the Minister of Justice assumed oversight functions, undermining authority of the CSM and making clear the government's will to exert tight control. In 1998 the Minister of Justice fired 315 judges and magistrates without even consulting the CSM.¹⁰⁰

It should be noted here that military courts continue to enforce provisions of the laws of 2002 which authorise them to judge civilians and people who are only very indirectly linked to the armed forces. This extension of the jurisdiction of military courts is taking place at a time when the political, institutional and legal pressures that have traditionally formed obstacles to the independence of military judges are growing. Thus, the control of the military command over the decisions of military prosecutors is increasingly direct. Similarly, political interference in legal decisions is increasingly common, partly due to the fact that the reform of 2002 increased the risks of prosecution of political stakeholders, many of whom have been recruited from

⁹⁸ *Ibid.*,

⁹⁹ *Ibid.*,

¹⁰⁰ *Ibid.*,

amongst the former heads of armed factions and who have committed crimes for which they are prosecuted in military courts.¹⁰¹

In the DRC there is no mechanism to ensure the fairness and independence of an investigation. The prosecutor enjoys large discretionary powers — called the ‘opportunity of prosecution’ (*opportunité de poursuite*) — to decide whether a particular crime warrants investigation. However, neither a *juge d’instruction* (an investigating magistrate in a civil law system) nor rules of disclosure exist to counter-balance the one-sided investigation by the prosecutor. This discretionary power may only be overruled by a complaint filed directly before the court by the victim of the crime.¹⁰² In fact, pre-trial investigation is usually one-sided and in some cases does not take place at all. Unlike many countries in francophone Africa, and most civil law countries, the investigative functions are not separate from the functions of prosecution, and the state prosecutor both investigates and prosecutes. For such a system to work, the prosecutor and the defence must be put on an equal footing, at least formally. They both must be able to investigate and have the opportunity to present the results of their investigations. Evidence must be disclosed to each other; ‘no side must be allowed to conduct a trial by ambush.’¹⁰³

The right to a fair trial stated in Articles 19 to 21 of the constitution, and in Article 7 of the African Charter on Human and Peoples’ Rights, is constantly violated in military courts. The principle of equality of arms between the prosecution and the defence is generally sacrificed on the altar of a speedy trial and the corps discipline that the judges associate with military justice.¹⁰⁴ The inquisitorial nature of the preliminary investigation in Congolese procedure deprives the accused of adequate access to the prosecution file before the trial and thereby puts the accused at a disadvantage in relation to the prosecution in terms of case preparation. By not being allowed access to the prosecution file before the beginning of the trial, the accused cannot make a list of defence witnesses because of the impossibility of knowing the allegations that he or she will have to refute.¹⁰⁵ In addition, judges have been granted extensive discretionary power by the military justice code in the conduct of the trial proceedings. Open Society Initiative for Southern Africa (OSISA) maintained in its

¹⁰¹ OSI report, "Democratic Republic of Congo Military Justice and Human Rights: An urgent need to complete reforms" , *Op. cit.*,

¹⁰² HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op. cit.*,

¹⁰³ OSI report, *Op. cit.*,

¹⁰⁴ *Ibid.*,

¹⁰⁵ *Ibid.*,

report that military judges regularly abuse their power when they make a decision as to whether and under what conditions defence witnesses will be heard. Moreover, judges use their discretionary powers to agree to hear prosecution witnesses without disclosing their names to the defence. Therefore, the defence is vulnerable to the surprise effect created by the prosecution and the judges who do not even give the defence sufficient time to prepare to refute the evidence produced by the prosecution.¹⁰⁶

In relation to the prosecutors, OSISA furthermore noted that they directly attach to the executive branch in an advisory capacity. In times of peace, the highest-ranking prosecuting judge, the Judge Advocate General (*auditeur général*), acted as a legal advisor to the Minister of Defence, whilst in times of war he or she acts as a legal advisor to the President of the Republic. The judge advocate general is also the head of the military judiciary and therefore takes precedence over the presiding judges. This illustrates the limitations on the independence of presiding judges with respect to the prosecution, which also ‘confirm[s] by the recognised power of the judge advocate’s department (*auditorat militaire*) to convene hearings in military courts’.¹⁰⁷

Lack of personnel:

Institutional problems in the Congolese judicial system have also been broadly examined by Human Rights Watch. They report that the lack of well-trained personnel is one of the most serious problems in the Congolese judiciary. At independence in 1960, there was not a single trained Congolese lawyer in practice. The government recruited foreign judges from Africa and Haiti to fill the vacuum left on the bench by the Belgians.¹⁰⁸ In the early 1960s, the first graduates of Congolese law schools joined the bench. In fact, in the Congolese judicial system, judges and prosecutors are appointed directly from law school without court experience. They enter a hierarchical structure where they depend on their superiors for job assignments and promotion. There must be specialized training for judges and a self-regulatory mechanism for promotion and such specialized training was provided in the early 1960s through the *Ecole Nationale de Droit et d’Administration*, a judicial college

¹⁰⁶ *Ibid.*,

¹⁰⁷ *Ibid.*,

¹⁰⁸ HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op. cit.*,

which lasted only a few years. Since that time, there have been no effective training programs for judges and prosecutors.¹⁰⁹

The legal system collapsed during the wars. As Human Rights Watch has observed, the legal system does not appear able to meet the requirements of modern, independent and community justice that is accessible to the entire population, despite the fact that the fight against impunity is crucial in the restoration of a state of law in the DRC. The DRC's existing legal system is considered to be part of the executive, where judges are simply agents of the executive and are deemed administrative officers. Despite the separation of powers under the transitional constitution, no reform to date has effectively separated the three traditional branches of power. The DRC's legal system suffers from a chronic staff shortage, with a total of 2,053 judges (1,678 civil court judges and 375 military courts judges) representing a ratio of one judge for more than 29,225 inhabitants. In the country's interior, particularly in the east, there is such a severe shortage of judicial personnel that courts can no longer hear cases, public prosecutor offices cannot conduct investigations, and those prisons that are still standing are being closed.¹¹⁰

Pre-trial detention:

Pre-trial detention is another problem in the operation of the justice system in the DRC. According to Article 27 of the Criminal Code, pre-trial detention may be exercised for crimes punishable by a prison term of a minimum of six months. The initial detention period of 15 days may be extended by a maximum of three extensions of no more than one month each. However, according to a recent survey conducted by *Avocats Sans Frontières* (ASF), the basic legal principles of pre-trial detention are simply not respected by the courts. Up to 75 per cent of detainees in Congolese prisons are awaiting trial.¹¹¹ Pre-trial detentions ordered by military judges are generally too long and the procedure does not allow detainees to refer to a judge to investigate whether their detention is lawful. Thus, defendants being prosecuted by

¹⁰⁹ *Ibid.*,

¹¹⁰ Global Rights (2005). "What Justice Is There for Vulnerable Groups in Eastern DRC ? Assessment of the Justice Sector in North and South Kivu, Maniema and North Katanga." from www.globalrights.org/site/DocServer/SOS_ExecutiveSummary_ENG_FIN.pdf?docID=4123 [accessed on 10th September 2011].

¹¹¹ International Bar Association's Human Rights Institute (2009) "Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo" from www.ibanet.org/Human_Rights_Institute/HRI_Publications/Country_reports.aspx,

military courts spend long periods of time in pre-trial detention without any way of knowing when the investigating judge intends to put them on trial or even whether he or she has any intention of doing so.¹¹²

Corruption:

Corruption is widespread in the justice sector. Due to the years of war and economic stagnation, the judicial system suffers from the logistical and financial problems that trouble other sectors of government. As Human Rights Watch has reported, it is common practice to bribe judges or other judicial officials to influence the outcome of an investigation or a trial,¹¹³ partly because governmental corruption has resulted in extremely low pay for federal judges. Moreover, less than half of the required 180 courts exist, and the lack of judicial power allows violence to continue without reprimand.¹¹⁴ Corruption may occur at any level of the judicial process and has a serious impact on access to justice for Congolese citizens. For example, in order to obtain free legal aid, individuals must present a certificate of indigence. While such a certificate should in principle be issued free of charge, all levels of the judicial sector (bar associations, magistrates and governmental officials) indicate that the local authorities will charge an applicant anywhere between US \$15 and US \$30 to issue a certificate of indigence. Similarly, some police officers will ask victims of criminal offences for 'fees' in order to look for and arrest individuals who have committed a criminal offence.¹¹⁵ In addition, many Iturians complain that they have to pay a fee of US \$5 or more in order to initiate any judicial proceedings. These people are also often ignorant of whom to turn to in order to bring a case to justice. Therefore, the population accuses the judicial system of being corrupt or unfair.¹¹⁶

Lack of confidence in the judiciary's administration of justice is widespread. Politicians and businesses are reluctant to bring their disputes to the courts, and the general population similarly lacks confidence in the judiciary. It is estimated that only a very small percentage of disputes end up in courts of law, not because parties to the

¹¹² OSI report, "Democratic Republic of Congo Military Justice and Human Rights: An urgent need to complete reforms", *Op, cit.*,

¹¹³ HRW report, "Seeking Justice: The Prosecution of Sexual Violence in the Congo War.", *Op, cit.*,

¹¹⁴ "Democratization in the Congo: A Lost Cause or a Reasonable Ambition?". from depts.drew.edu/lib/DrewReview/DR_April_2008.pdf [accessed on 10th September 2011]

¹¹⁵ IBA report, "Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo", *Op, cit.*,

¹¹⁶ www.irfj.org/category/drc/justice-magazine/ [accessed on 10th September 2011]

disputes have better options, but because they are so suspicious of the judiciary that they prefer other means, including the police, security services, the military, or traditional arbitration in rural areas. Also, victims of human rights abuses are generally reluctant to utilize judicial mechanisms for redress.¹¹⁷ It is worth mentioning that a lack of witness protection and the fear of testifying are depriving the judges of the means to investigate crimes committed in Ituri. Many witnesses, when summoned, insist that they will only talk to the investigative judges on the condition that they are not called to testify in court.¹¹⁸ Referring to the threats and the climate of insecurity, the DRC Chief Prosecutor proposed that cases be investigated locally, but that the trials take place elsewhere as a possible solution to the lack of safety for witnesses.¹¹⁹ However, conducting investigations in Bunia and holding trials in Kinshasa seemed like a poor compromise between witness safety and effective prosecutions.¹²⁰ It is worth mentioning that Congolese law gives the Minister of Justice the power to issue an 'injunction' to the Chief Prosecutor of the DRC to initiate a trial and prosecute certain crimes before any jurisdiction. However, the Congolese government did not give the prosecutor any mandate relating specifically to the prosecution of the perpetrators of war crimes and crimes against humanity committed during the conflict in Ituri.¹²¹ Human Rights Watch, in its report in 2004, noted that the criminal justice system in Ituri faces many challenges, including security conditions, the inadequacy of the existing criminal law, the shortage of police resources required for investigation, the lack of material and financial resources to support investigative judges, and the absence at the government level of a clear policy for fighting impunity.¹²²

The district of Ituri had long been deprived of an effective legal system, during which time armed groups imposed their own law.¹²³ Under the law regarding the organization and powers of the judiciary, the main town in all districts must have a regional court. The case of Ituri is a departure from this principle. As is the situation throughout the country, the problem with the legal system had already arisen in Ituri

¹¹⁷ HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op, cit.*,

¹¹⁸ HRW report, "Making Justice Work: Restoration of the Legal System in Ituri, DRC A Human Rights Watch Briefing Paper ", *Op, cit.*,

¹¹⁹ *Ibid.*,

¹²⁰ *Ibid.*,

¹²¹ *Ibid.*,

¹²² *Ibid.*,

¹²³ *Ibid.*,

even before the outbreak of inter-ethnic conflict in eastern DRC. In Ituri, a district inhabited normally by over 4.5 million people, there is only one court, with head offices in Bunia.¹²⁴ As mentioned earlier, in the eastern part of the country in particular, there is a shortage of judges, physical facilities, training opportunities and infrastructure. There is such a shortage of judges in nearly every civil and military court that some courts cannot hear cases at all. There is also a severe shortage of courts since they are only located in urban centres, despite a law from 1979 providing for tribunals to be set up in most rural areas (*tribunaux de paix*). Moreover, the legal framework cannot guarantee effective judicial independence as the courts are under the authority of the Executive through the Department of Justice.¹²⁵ This has meant, as Human Rights Watch remarked, that one of the judicial system's challenges is 'the absence at the governmental level of a clear policy for fighting impunity.'¹²⁶

It is also important to mention here, concerning the number of members of the legal service, that there were only four judges and four members of the State Counsel for the entire population of Ituri in 2004.¹²⁷ Like most public services, the legal system has been weakened by a separation from the central hierarchical structures based in Kinshasa. It has become difficult for those being tried from Ituri to follow the progress of their cases at the Court of Appeal in Kisangani,¹²⁸ meaning that the Court of Appeal is insufficiently independent from the perpetrators of crimes, particularly in cases where the judiciary may be linked to certain leaders. With rare exceptions then, no cases have been brought to justice over the violence perpetrated in the context of inter-ethnic conflict. This is creating a general sense of frustration and a desire for justice on the part of all communities in Bunia.¹²⁹

Reform of the judiciary in the Ituri:

Mass atrocities occurred in Ituri between 1998 and 2003.¹³⁰ When Ituri's bloody inter-ethnic conflict came to an end in late 2003,¹³¹ a UN assessment mission found

¹²⁴ *Ibid*,

¹²⁵ Global Rights report, "What Justice Is There for Vulnerable Groups in Eastern DRC ? Assessment of the Justice Sector in North and South Kivu, Maniema and North Katanga.", *Op, cit*,

¹²⁶ HRW report, "Making Justice Work: Restoration of the Legal System in Ituri, DRC A Human Rights Watch Briefing Paper "., *Op, cit*,

¹²⁷ Amnesty International report, "Democratic Republic of Congo-Ituri: A Need for protection, a thirst for justice.", *Op, cit*,

¹²⁸ *Ibid*,

¹²⁹ *Ibid*,

¹³⁰ *Ibid*,

that the judicial system in Bunia had entirely collapsed.¹³² However, there have since been some developments in the Congolese criminal justice system; for instance, the Joint Committee for Justice and the Action Plan '*Comité Mixte de la Justice and the Action Plan*'.¹³³ In 2004, through an initiative by the European Commission, the Congolese justice sector underwent an in-depth audit, which clearly demonstrated the need for radical reform. In order to address the many issues listed in the audit report, the *Comité Mixte de la Justice* (CMJ) was formed. The Ministry of Justice and the European Commission preside jointly over the CMJ.¹³⁴

Subsequently, the European Commission launched a pilot project to reform the judicial system in the east of the country, which had been devastated by the fighting.¹³⁵ The EU project was called REJUSCO (Restoring Justice to the East of the DRC) and took place in Ituri. It was the EU's main justice project in DRC and supported reforms in the judicial system, particularly the effort to reopen the court in Ituri.¹³⁶ The project was funded jointly by the European Commission, the Netherlands, Belgium and the United Kingdom to the tune of 11.7 million euros. As part of the process, judges, prosecutors and administrative staff underwent extensive training, and court buildings and other related infrastructure was constructed or renovated.¹³⁷ The project sought to provide access to justice in various ways, such as rebuilding court houses, providing basic equipment, furniture and transportation, and facilitating mobile courts in areas where there have been no courts for decades, as well as training programmes.¹³⁸ The programme had three phases. The first phase intended to ensure the functionality of places of justice and detention, the second phase to ensure the operation of justice, and the last phase for monitoring and legal awareness.¹³⁹ The project had two main objectives: to quickly establish a system of arrest and pre-trial detention for those who committed serious criminal offences; and to re-establish minimally functioning local police, judicial, and correction structures with the capacity to provide basic policing, conduct pre-trial detention hearings,

¹³¹ allafrica.com/stories/200910211106.html [accessed on 10th September 2011]

¹³² ICTJ report, "A First Few Steps: The Long Road to a just Peace in the Democratic Republic of Congo.", *Op, cit.*,

¹³³ IBA report, *Op, cit.*,

¹³⁴ *Ibid.*,

¹³⁵ allafrica.com/stories/200910211106.html [accessed on 10th September 2011]

¹³⁶ HRW report, "Seeking Justice: The Prosecution of Sexual Violence in the Congo War.", *Op, cit.*,

¹³⁷ allafrica.com/stories/200910211106.html [accessed on 10th September 2011]

¹³⁸ IBA report, *Op, cit.*,

¹³⁹ www.rejusco.org/pages/activites1.htm

detain prisoners, complete criminal investigations, and hold some criminal trials.¹⁴⁰ In November 2003, a six-month project was initiated to help restore the criminal justice system in Bunia. With support from the European Commission, the Ituri court resumed its work, having been closed since May 2003 when its judges had to flee deteriorating security conditions. This short-term funding helped judges and investigative judges start working again years after the court had been closed, but many serious problems remain.¹⁴¹ The project was implemented by a Belgian nongovernmental organization, and within a few months the Bunia judicial system started functioning. As ICTJ reported, by the end of July 2004, 440 cases were under investigation and 42 judgments had been rendered.¹⁴²

The International Bar Association has observed that efforts to reform the DRC's justice sector are guided by the principles set forth in the 2007 *Comité Mixte de la Justice* (CMJ) (Joint Committee for Justice) Action Plan, and the 2009 *Feuille de route du Ministère de la justice pour l'exercice* (Roadmap of the Ministry of Justice), which together identified three particularly urgent actions to fight impunity and improve the credibility of the justice system: hiring and training magistrates, bringing justice closer to the Congolese population, and strengthening the control, oversight and renovation of infrastructures of the justice system. Moreover, changes to the DRC's judicial structure in the country's new constitution created new higher courts and added a need for new administrative and specialist courts at the provincial and local level in an effort to improve access to justice.¹⁴³ According to the recent constitution which was adopted in 2006, the court system is divided into three separate jurisdictions: the judicial (civil and criminal) jurisdiction, the administrative jurisdiction and the military jurisdiction. As part of this reform, the Supreme Court of Justice (CSJ)(*Cour Suprême de la Justice*) is divided into three separate high court instances: The *Cour Constitutionnelle* (Constitutional Court), the *Cour de Cassation* (Supreme Court) and the *Conseil d'État* (Supreme Court for administrative matters).¹⁴⁴ The work of the CMJ resulted in the 2007 Action Plan; based on this, the Ministry of Justice issued its Roadmap in early 2009. This Roadmap takes a shorter

¹⁴⁰ ICTJ report, "A First Few Steps: The Long Road to a just Peace in the Democratic Republic of Congo.", *Op. cit.*, and see UN Special Report on Events in Ituri, para. 27

¹⁴¹ www.noticias.info/archivo/2004/200409/20040902/20040902_32098.shtm [accessed on 15th May 2011]

¹⁴² ICTJ report, *Op. cit.*,

¹⁴³ IBA report, *Op. cit.*

¹⁴⁴ *Ibid.*,

perspective (six to twelve months) than the Action Plan and concentrates on visible, quick-impact activities. It indicates as its two fundamental objectives the fight against impunity and the improvement of the credibility of the justice system, to be achieved via the implementation of the 2006 constitution and the improvement of the working conditions of the judiciary. The creation of the CSJ is a positive step towards a more independent judiciary, but it faces several serious problems. For instance, its General Assembly is made up of more than 100 members, which makes decision-making slow and expensive.¹⁴⁵

Over time, although there has been some progress in this area, open attacks on the independence of military justice officers continue to be conducted on a regular basis by members of the executive branch, the military command and the military justice hierarchy itself. Interference by the executive branch in the administration of military justice is not a new phenomenon;¹⁴⁶ it has been claimed by OSISA that there has been repeated interference from the political authorities. During the war, the government entered into alliances with certain rebel movements against other ones and, as a consequence, ties have developed between the government and certain movements, driving the government to counteract the independence of military justice in order to protect leaders of armed factions from being prosecuted in military courts.¹⁴⁷

Violations of international humanitarian law and human rights law:

To the extent that the government of the DRC is supporting militia groups in Ituri, it also has legal obligations for the conduct of what can be seen as ‘proxy forces’.¹⁴⁸ The DRC has ratified the main international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. The DRC is also a party to the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, but has not signed its

¹⁴⁵ *Op, cit*

¹⁴⁶ OSI report, *Op, cit.*,

¹⁴⁷ *Ibid.*,

¹⁴⁸ Humanitarian Issues in Ituri, Eastern DRC, www.odi.org.uk/hpg2003

Optional Protocol.¹⁴⁹ Therefore, the DRC is under an international obligation to take legal action against many of the crimes that have been committed in the conflict. National laws are also available; in particular Law No 8-98 adopted on 31 October 1998 by the Congolese Transitional Council, which provides the basis to prosecute genocide, crimes against humanity and war crimes.¹⁵⁰

In the context of the ICC, the DRC signed the Rome Statute on September 8, 2000, and ratified it on April 11, 2002. The project for law implementation of the Statute of the ICC was drafted in July 2003 by standing committee for reform of Congolese law at the request of the Minister of Justice following a year-long drafting process that involved the participation of magistrates, law professors, members of national and provincial bar associations, and the NGO community. The draft law provides a comprehensive definition of war crimes, crimes against humanity, and genocide consistent with the Rome Statute. It spells out the way in which the DRC government and judicial authorities will work with the ICC to prosecute such crimes. It provides for important safeguards of fair trial and respect for the rights of the accused for all crimes under Congolese law, as guaranteed by the transitional constitution, that are lacking in the current code of criminal procedure.¹⁵¹ Despite its ratification, the DRC has yet to actually adopt the bill formally incorporating the Rome Statute into Congolese law. The Permanent Commission of Congolese Law Reform handed the draft to the government two years ago. It has been a matter of debate for several years and some speculate that certain officials are resisting the legislation because of fears that they may themselves end up being prosecuted.¹⁵² However, given the monistic nature of the Congolese legal system, the Rome Statute is already part of domestic law even in the absence of an implementing law.¹⁵³

The Congolese civil court system has exclusive jurisdiction over serious international crimes, consistent with international law. Under the 2002 Military Criminal Code currently in force, military tribunals have exclusive jurisdiction over these crimes. The proposed draft Rome Statute implementation bill was submitted to the National Assembly in March 2008. This is the second Rome Statute implementation bill introduced before parliament. The first was submitted in 2005

¹⁴⁹ IBA report, *Op, cit.*

¹⁵⁰ www.iss.co.za/Pubs/ASR/10NO3/Friman.html [accessed on 10th September 2011]

¹⁵¹ HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op, cit.*,

¹⁵² IBA report, *Op, cit.*,

¹⁵³ *Ibid.*,

during the time of the DRC's political transition. After the 2006 elections, the transitional parliament was dissolved and pending bills expired at that time. This meant that a new Rome Statute implementation bill needed to be presented for consideration by Congo's elected parliament. Passing the bill would also pave the way to much-needed discussions concerning the appropriate mechanisms for addressing mass atrocity crimes committed between 1996 and June 2002.¹⁵⁴ The proposed draft Rome Statute implementation bill would primarily modify provisions of five Congolese laws: first, it would modify the Criminal Code to include genocide, war crimes, and crimes against humanity as defined in the Statute. It would also set life imprisonment as the maximum sentence for such crimes and enact provisions ensuring the independence of judges. The Criminal Procedure Code would be altered to include provisions enhancing the protection of defendants' and victims' rights, introduce procedures to facilitate cooperation between Congolese courts and the ICC, and strengthen due process standards and fair trial provisions. The Code on Judicial Organization and Jurisdiction would be changed to confer jurisdiction over international crimes to the appeals courts of the civil court system and would designate a panel of five judges for international crimes trials, with the possibility of creating mixed panels of judges from the Congolese civil and military justice systems. Finally, the Military Criminal Code would enact provisions removing genocide, war crimes, and crimes against humanity from the jurisdiction of military courts, and the Code of Military Criminal Procedure would remove the military court system's jurisdiction over international crimes.¹⁵⁵

Overall evaluation of the adequacy of Congolese criminal procedure:

The serious nature of the crimes committed in Ituri on the one hand, and the deficient operation of the Congolese legal system on the other, makes action by the ICC one of the rare international initiatives which can fight against impunity and respond to the growing need for justice on the part of the population of the DRC.¹⁵⁶ From the Kantian point of view, the ideals of universalism must take precedence over cultural sensitivity. While cultural awareness should not be the basis for ignoring violations of

¹⁵⁴ www.ictj.org/static/Factsheets/ICTJ_DRC_RomeStatuteBill_fs2010.pdf, April 2010 published [accessed on 10th September 2011]

¹⁵⁵ *Ibid.*,

¹⁵⁶ Amnesty International report, "Democratic Republic of Congo-Ituri: A Need for protection, a thirst for justice.", *Op. cit.*,

serious crimes in different parts of the world, neither should the international prosecutor adopt a strictly universal approach that ignores the unique circumstances underlying each situation, such as that of Ituri. However, this must in no way detract from the role which the DRC's own legal system has to play in fighting impunity. It is essential that the transitional government, with the support of the international community, sets up a global programme to rebuild the national legal system, so that the national courts have the resources required to take cognizance of the violations of international human rights law and international humanitarian law.¹⁵⁷

Although the constitution of 2006 recognised the power of the President of the Republic to replace civilian courts with military courts in times of war and under certain conditions, the constitution clearly restricted the personal jurisdiction of military courts to the members of the armed forces and police forces only. However, military courts continue to apply the provisions of the military code of justice, enshrining the jurisdiction of military courts over civilians under several different circumstances. For instance, military courts may bring proceedings against civilians for any offence that is included in the military criminal code. Military courts also have jurisdiction over civilians in the event of the criminal participation of members of the armed forces and civilians in committing military offences if it is an armed offence, and also where they have committed a continuous offence extending from a time when the person had military status to a time when they no longer had such status.¹⁵⁸

Although a lack of independence is an issue in both civil and military jurisdictions, the fact that military judges are subject to the military hierarchy presents special problems. For instance, no military judge can hear a case in which a superior in rank is an accused. This can cause obvious difficulties, particularly given the small number of military judges above the rank of major, almost all of whom are concentrated in the largest cities. Moreover, the fact that a military judge can only hear an accused of lower or equal rank is a problem in itself.¹⁵⁹ The military judiciary also experiences pressures from the military command. Acting either out of ignorance or with the deliberate intent of undermining the independence of military justice, certain officers take it upon themselves to forbid proceedings against any accused placed under their authority, or make such proceedings subject to their own prior authorisation. Such

¹⁵⁷ *Ibid.*,

¹⁵⁸ OSI report, *Op, cit.*,

¹⁵⁹ IBA report, *Op, cit.*,

interference may take the form of open written messages, such as the letter dated 24 July 2006 in which General Mbuyamba Nsona, commander of operations in Ituri, instructed the military prosecutor of the Bunia garrison that all summonses or warrants to appear in court issued by the latter must henceforth 'be imperatively approved by the Commander of Operations'.¹⁶⁰

There are also clearly problems with corruption and potentially criminal behaviour at the heart of power. In 2005, the government struck a deal with rebel leaders in the Ituri district, in which six were promoted to the rank of general in the newly integrated Congolese army and thirty-two others were installed as colonels.¹⁶¹ Among these were some of the 'most notorious human rights offenders in the country.'¹⁶² They included Jérôme Kakwavu, Floribert Kisembo, Bosco Taganda and Germain Katanga, all infamous military leaders who had allegedly personally ordered, tolerated or participated in the killing of civilians.¹⁶³ The most important ministries - interior, defense, foreign affairs, reconstruction, finance, and planning - are all occupied by former belligerents. More importantly, the President and his powerful followers have remained the same since they came to power. This raises doubts about the extent to which the government will be willing or able to crack down on the corruption.¹⁶⁴

The key to successful national prosecutions seems to be judicial capacity and political will.¹⁶⁵ As regards the political will of the DRC to prosecute, one major concern lies in the findings of a UN investigation that points fingers at the Movement for the Liberation of Congo (MLC). The MLC's leader is now in the government as part of a peace deal, making it politically difficult for the DRC government to bring the cases involving MLC members to trial.¹⁶⁶ In addition, the judiciary is still not independent, as evidenced by President Kabila's dismissal of 89 magistrates and the appointment of 28 others, including a new Chief Justice of the Supreme Court and

¹⁶⁰ OSI report, *Op, cit.*,

¹⁶¹ Goodman, J. "The Grease in the Gears: Impunity in the Democratic Republic of Congo and the Opportunity for Peace." works.bepress.com/cgi/viewcontent.cgi?article=1000&context=jacob_goodman [accessed on 10th September 2011].

¹⁶² *Ibid.*,

¹⁶³ HRW report, Arrest All Ituri Warlords from www.hrw.org/en/news/2005/03/11/arrest-all-ituri-warlords [assessed on 10th September 2011]

¹⁶⁴ Congo's Peace: Miracle or Mirage? www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/congos-peace-miracle-or-mirage.aspx [accessed on 10th September 2011]

¹⁶⁵ www.pambazuka.org/en/category/features/20274 [accessed on 10th September 2011]

¹⁶⁶ *Ibid.*,

Prosecutor General, by Presidential Ordinances in February 2008.¹⁶⁷ Political interference, or interference by the military command, which may already be present by the time a prosecution begins, continues during the investigation and becomes even stronger when judicial decisions are about to be taken.¹⁶⁸ Due to the absence of a clear government policy on crimes committed in Ituri, the prosecutors have not been prepared to investigate the serious crimes that have cast a shadow over Ituri since the conflict in this region began in 1998, during the years of judicial collapse in Bunia.¹⁶⁹ Until the beginning of May 2004, 300 cases were under investigation at the prosecutor's office, 45 had been referred for trial, and only 30 judgments had been handed down. There are insufficient personnel in the judicial police and the prosecutor's office to handle the high level of crime in Ituri, including for more minor crimes. The government, which is responsible for this, has not provided Bunia with any police force.¹⁷⁰

There has been a lack of a consistent prosecution strategy that has been compounded by the political pressure exercised on prosecutors to urge them to abandon proceedings that have already begun against former allies amongst the leaders of rebel or resistance movements. Among numerous examples, such pressures were exerted during the proceedings against the former Mayi-Mayi chief of North Katanga, Gédéon Kyungu Mutanga, which began on 12 May 2006 when he surrendered to MONUC and was handed over by the UN mission to the Congolese authorities. The protection he received from his former allies in the government in Kinshasa took the form of pressure to influence the investigation and the fact that he was held in pre-trial detention at the Armed Forces of the Democratic Republic of Congo (FARDC) officers' mess, rather than in a holding cell. Successive governments have made abandoning legal proceedings against the leaders of armed factions a cornerstone of their peace policy. Accordingly, in certain cases, they have exerted pressure to stop proceedings that have already begun. In one of the most recent examples of political pressure on independent justice, the government forbade military prosecutors from taking action against chiefs and combatants of armed factions based in North Kivu and South Kivu, particularly those belonging to the rebel

¹⁶⁷ Davis, *Op. cit.*,

¹⁶⁸ OSI report, *Op. cit.*,

¹⁶⁹ HRW report, "Making Justice Work: Restoration of the Legal System in Ituri, DRC A Human Rights Watch Briefing Paper ", *Op. cit.*,

¹⁷⁰ *Ibid.*,

movement *Congrès National pour la Défense du Peuple* (CNDP). A letter from the Minister of Justice dated 9 February 2009 instructed the State Attorney General and the Judge Advocate General of the FARDC ‘not to engage in proceedings against the members of the aforementioned armed factions and to stop all proceedings that have already been initiated’.¹⁷¹

Although Article 151 of the 2006 constitution provides for an independent judiciary, in reality the executive branch continues to issue instructions to judges and sometimes refuses the enforcement of court decisions.¹⁷² There are also reports of police and military commanders refusing to hand over police officers and soldiers for questioning or detention, even in cases of serious offences such as rape.¹⁷³ According to the UN Special Rapporteur, it is common for judges to give in to corruption or ask for money from the parties; for example, to be able to provide medical treatment to family members, meaning that ‘[j]ustice is thus for sale to those who can afford it’.¹⁷⁴ While the situation in the capital is better than in the rest of the country, only one serious prosecution for international crimes or human rights abuses has been undertaken since the transitional government came to power.¹⁷⁵ The first prosecutions for international crimes were undertaken in the DRC in 2004, in relation to two cases, the *Ankoro* case in Katanga and the *Songo Mboyo* case in the province of Équateur. While still in its early stages, recent military court case law has revealed that the *Code Penal Militaire* (Military Penal Code) is at odds with international law regarding the definition of serious crimes. The fact that such crimes are established solely under the *Code Pénal Militaire*, to the exclusion of the ordinary criminal code, also poses a fundamental problem.¹⁷⁶ In the *Songo Mboyo* case, the tribunal used the definition of rape as a crime against humanity as outlined in the Rome Statute, which is wider than the one found in the Military Penal Code.¹⁷⁷

Providing the military courts with jurisdiction over international crimes violates the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, by virtue of which ‘[t]he only purpose of Military Courts shall be to determine

¹⁷¹ OSI report, *Op, cit.*,

¹⁷² Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, at para 39.

¹⁷³ *Ibid.*, para 35.

¹⁷⁴ *Ibid.*, para 35.

¹⁷⁵ Burk-White, W. (2005). "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo." *Leiden Journal of International Law* 18: 557-590. p. 572.

¹⁷⁶ OSI report, *Op, cit.*,

¹⁷⁷ IBA report, *Op, cit.*,

offences of a purely military nature committed by military personnel’.¹⁷⁸ However, there have been some very successful trials in Bunia, especially during the first phase of reforms;¹⁷⁹ for instance, the case of Chief Mandro Panga Kahwa, a former member of the militia of Thomas Lubanga. Kawa split off from Lubanga to form his own group and was charged with crimes against humanity, including the murder of 14 people in the 2002 Zombe village massacre. He was sentenced in 2006 to 20 years in prison.¹⁸⁰ But the Kawa case also illustrates the difficulties of trying to reform one region when ‘the national judicial system is flawed.’¹⁸¹ The prosecution of Kahwa resulted in a decision of acquittal on appeal, pronounced in July 2007 by the military court of Kisangani. The judges of this court considered that the crimes of ‘participation in a rebel movement’ and ‘holding weapons and munitions of war without title or right’, for which Kawa had been sentenced in the first instance, were covered by the amnesty decreed by the laws of 2003 and 2005. This decision opened a debate on the principle and scope of the successive amnesty laws enacted as part of efforts to end the activities of armed groups in the east of the country.¹⁸² While Kawa was found guilty in Bunia, the verdict was then overturned at the military court in Kisangani in February 2008. The appeal judges claimed his crimes were covered by a 2005 amnesty law, even though that law specifically excludes crimes against humanity and war crimes.¹⁸³

The situation of vulnerable groups, particularly victims of sexual violence, remains very precarious. There are major obstacles preventing them from having access to justice, including geographic remoteness, poverty, ignorance of their rights, insecurity, fear of retaliation, customs, and the feeling of guilt that often haunts victims of sexual abuse; all of which encourage them to keep quiet, sometimes even preferring out-of-court settlements which are not in their favour. Only a small number of victims file complaints and, therefore, few cases are heard.¹⁸⁴ The absence of an effective criminal justice delivery system has led to an increase in the number of out-of-court settlements based on traditional justice and often leading to forced marriages, to the detriment of the victim’s rights and in violation of the various laws on sexual

¹⁷⁸ OSI report, *Op. cit.*,

¹⁷⁹ allafrica.com/stories/200910211106.html [accessed on 10th September 2011]

¹⁸⁰ *Ibid.*,

¹⁸¹ *Ibid.*,

¹⁸² OSI, report, *Op. cit.*,

¹⁸³ allafrica.com/stories/200910211106.html [accessed on 10th September 2011]

¹⁸⁴ Global Rights report, *Op. cit.*,

violence. The major difficulty encountered by the victims, and often leading to the perpetrators' impunity, is the difficulty to prove the crime in court, or even bring the matter to court – all the more difficult in the absence of any witness protection programme. But even if the victim can bring the matter to court and have the perpetrators arrested and convicted, there is no certainty that reparations will be paid.¹⁸⁵ This may be because victims are unable to afford to pay the legal fees required for judgment enforcement or because the perpetrator does not have sufficient resources to pay the reparation. Also, due to deficient security in most of the prisons, it is not uncommon that the perpetrators are able to escape and become a threat to victims and witnesses.¹⁸⁶ The inability of the justice system to handle such crimes has had the effect of creating a culture of impunity. Unfortunately, and as a direct result of the many crimes remaining unpunished and the general sense of impunity, rape and sexual violence in the DRC is increasing at an alarming rate and is now being committed by ordinary citizens, in addition to the armed and military groups.¹⁸⁷

The reformation of the Congolese judicial system has been assessed by the International Legal Assistance Consortium (ILAC) and the International Bar Association Human Rights Institute (IBAHRI), who conducted a joint mission in 2009. The mission focused on specific aspects of the justice system, including the independence and needs of the judiciary, legal issues related to crimes targeting women, the needs of lawyers and bar associations, access to legal aid, traditional justice and military justice. The delegation also looked at ongoing justice reform programs in the country.¹⁸⁸ They observed that the government and military should combat the functional immunity granted to lieutenant-generals and major-generals in the military justice system by abolishing the rule that prevents military judges handling cases where the accused has a higher rank than the judge, or alternatively by promoting the highest military judge to the rank of lieutenant-general.¹⁸⁹ The IBA noted that FARDC, the militarily ineffective national army, has repeatedly demonstrated its inability to suppress armed groups. In addition, much of the violence and sexual crime against the civilian population in the eastern DRC is carried out by

¹⁸⁵ IBA report, *Op. cit.*,

¹⁸⁶ *Ibid.*,

¹⁸⁷ *Ibid.*,

¹⁸⁸ *Ibid.*,

¹⁸⁹ *Ibid.*,

FARDC forces and members of the *Police Nationale Congolaise* (PNC).¹⁹⁰ An amnesty law, which went into effect on 7 May 2009, is a cause of concern in this context. The law provides amnesty for acts of war and insurrection committed between June 2003 and May 2009. Although the amnesty is not applicable for genocide, war crimes and crimes against humanity, the law will reinforce the impression of a culture of impunity for members of the police (PNC), the armed forces (FARDC), and the rebel groups with regard to the countless serious crimes to which the civilian population has been subjected.¹⁹¹

International efforts to reform the judiciary in the Ituri province of the north-eastern DRC have produced mixed results, according to local NGOs. Despite some initial improvements in infrastructure and training, extensive corruption and the lack of effective protection for witnesses mean that a fully functioning judicial system remains a distant hope.¹⁹² Van Woudenberg has pointed to a growing willingness among Congolese authorities to prosecute cases of serious crimes. Many of the improvements in the Congolese judiciary have occurred in the military courts, which have begun employing parts of the Rome Statute in their cases, even though the government hasn't yet passed legislation enacting the Rome Statute nationally. However, Van Woudenberg has argued that the military courts are also the most open to political interference and have often been used by the government to crack down on political opponents. Furthermore, the military courts have the capacity to impose the death penalty.¹⁹³ Although officials in the eastern provinces at all levels of government have expressed strong desires to enhance the capacity and effectiveness of the domestic judiciary, the Prosecutor General of Kisangani has reiterated the current weakness of the domestic judiciary.¹⁹⁴ The lack of investigative capacity remains another obstacle to a functioning criminal justice system. There is a serious lack of cooperation between the police, handling the technical aspects of a criminal investigation, and the prosecutor and the investigative judge. There is also a lack of knowledge among the judicial police of how to conduct a criminal investigation.¹⁹⁵ In addition, according to information released by the Ministry of Justice, there are

¹⁹⁰ *Ibid.*,

¹⁹¹ *Ibid.*,

¹⁹² allafrica.com/stories/200910211106.html [accessed on 10th September 2011]

¹⁹³ www.crisisstates.com/download/others/Peace,%20Justice%20and%20the%20ICC%20-%20series%20report.pdf [accessed on 10th September 2011]

¹⁹⁴ Burk-White, *Op. cit.*, p. 578.

¹⁹⁵ IBA report, *Op. cit.*,

currently 2,150 magistrates in total (both civil and military) which suggests a ratio of approximately one magistrate per 25,000 individuals. In order to put this in perspective, the minimum recommended ratio by the International Association of Judges is one magistrate per 3,000 to 5,000 individuals, which in the case of the DRC would mean a total of approximately 12,000 judges.¹⁹⁶

However, Clark has argued that senior judicial officials in Ituri – who are nominated by the President and elected by the Ministry of Justice – do not share the Kinshasa authorities' view regarding their unwillingness and inability to investigate and prosecute serious cases such as those of the Ituri suspects currently on trial in The Hague. In contrast to President Kabila and other Kinshasa-based officials, Chris Aberi, the State Prosecutor in Bunia, and John Penza, the Military Prosecutor, have claimed that the Bunia courts are capable of investigating and prosecuting serious cases, including those of Lubanga, Katanga and Ngudjolo.¹⁹⁷ Aberi, in interview with Clark, has stated that 'when the ICC first came here ... we showed them the dossiers we had already assembled on Lubanga and others. We were ready to try those cases here. We had the capacity to do this and it would have had a major impact for the people here, to see these [rebel] leaders standing trial in the local courthouse.' Penza has added, 'you only have to look at our record here to know what we are capable of. With MONUC's help, we prosecuted Kawa here – MONUC detained him and we prosecuted him...We found the mass grave at Bavi and we prosecuted [Congolese army Captain François Mulesa] Molobo and his men in connection with that...The ICC is certainly a necessary thing but it should be handling bigger cases than those [it is currently prosecuting].'¹⁹⁸ Clark has suggested that a state's claim that it is unwilling or unable to address serious crimes is insufficient, and further analysis of these statements must be undertaken. According to Clark, in the Ituri cases, the ICC's decisions on the basis of complementarity have been overly determined by President Kabila and the Congolese executive. The impact of these decisions domestically has been widespread disappointment among judicial actors in Ituri that, despite the major legal reforms of the last seven years, they have been barred from prosecuting major atrocity suspects in local courtrooms. Overall, in the DRC situation, the ICC's active

¹⁹⁶ *Ibid.*,

¹⁹⁷ Stahn, C. and M. E. Zeidy, Eds. (forthcoming). The International Criminal Court and Complementarity: From Theory to Practice. Phil Clark in *Chasing Cases: The International Criminal Court and the Politics of State Referral in the Democratic Republic of Congo and Uganda* Cambridge, Cambridge University Press.

¹⁹⁸ *Ibid.*,

pursuit of a referral by the Congolese state has afforded domestic political authorities considerable influence over the nature and scope of the Court's operations, to the detriment of complementarity and the long-term cause of justice in the DRC.¹⁹⁹

In September 2003, Joseph Kabila, asked the UN to establish a special criminal tribunal for the DRC. In his speech before the General Assembly, he stated:

‘[I]n the peace process now underway, an area which is of critical importance and imperative is that of independent justice, whose equitable administration would mark the end of impunity. On the domestic level, the Transition Government is working to conclude successfully the reform advocated here... On the international level we believe that the major objective is the establishment, with the assistance of the United Nations, of an international criminal tribunal for the DRC, to deal with crimes of genocide, crimes against humanity, including rape as a weapon of war, and mass violations of human rights...’.²⁰⁰

The ICC accepted the argument of the Congolese state that it was unwilling or unable to prosecute the cases of Lubanga, Katanga and Ngudjolo.²⁰¹ In June 2004, the Prosecutor opened the Court's first ever investigation in the DRC, initially focusing on the district of Ituri where some of the worst atrocities have taken place. The investigations to date have led to the arrest and transfer to The Hague of three senior Iturian militia leaders: Thomas Lubanga Dyilo on 17 March 2006; Germain Katanga on 17 October 2007; and Mathieu Ngudjolo on 6 February 2008.²⁰² These cases will be analyzed further in the next chapter.

¹⁹⁹ *Ibid.*,

²⁰⁰ 58th UN General Assembly, 23 September 2003, www.ods-ddsny.un.org/doc/UNDOC/GEN/N03/530/11/PDF/N0353011 [accessed on 10th September 2011]

²⁰¹ Clark, *Op. cit.*, also see Trial Chamber II, “Situation in the Democratic Republic of Congo in the Case of *The Prosecutor vs. Germain Katanga and Mathieu Ngudjolo Chui*: Reason for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)”, The Hague: ICC, 16 June 2009, p. 36.

²⁰² Courting Conflict, *Op. cit.*, p. 55.

Conclusion:

Since 1996, the DRC has experienced a horrific armed conflict in which impunity for war crimes and crimes against humanity have been, and continue to be, the norm.²⁰³ There has been widespread violence between ethnic groups over the last few years, often triggered by disputes over land.²⁰⁴ The absence of the rule of law, the extended period of dictatorship, massive human rights violations and impunity have negatively affected the human rights situation in the country.²⁰⁵ Therefore, justice is an essential element in the long-term work to rebuild the DRC.²⁰⁶ Impunity in the Ituri region of the DRC has boosted the cycles of violence and serious crimes there since 1998.²⁰⁷ This situation is another example where the Court needs to recognize the importance of cultural differences for the purpose of effective investigations and the prosecution of international crimes as the legitimacy of the Court depends on its acceptance by both the local communities - in which they seek to bring to justice those responsible- as well as the international community. In the Ituri region of the DRC, for instance, rape has been used 'as a weapon of war, as a tactic by armed forces to punish communities for supposed support to their enemies, to demonstrate control or to instill fear.'²⁰⁸ However, crimes of sexual violence are extremely difficult to prove because rape victims are stigmatised by their communities following an attack and are often reluctant to testify or unable to disclose details of the sexual violence they suffered. They could also be at risk of retributive violence from the militias or government troops against which they give evidence.²⁰⁹ Furthermore, the ICC has not fully worked out the relationship between national and international justice. An example of this problem might be the *Lubanga case* where the defendant was awaiting trial in the DRC for genocide and crimes against humanity. However, the case was admissible before the Court, as the national authorities were not trying him for recruitment of child soldiers.

²⁰³ HRW report, "Democratic Republic of the Congo: Confronting Impunity.", *Op, cit.*,

²⁰⁴ www.appggreatlakes.org/index.php/appg-reports-mainmenu-35/briefing-papers-mainmenu-34/17-ituri-province [accessed on 10th September 2011]

²⁰⁵ www.undp.org/execbrd/word/DRC%20Background%20Note.doc [accessed on 10th September 2011]

²⁰⁶ HRW report, "Making Justice Work: Restoration of the Legal System in Ituri, DRC A Human Rights Watch Briefing Paper ", *Op, cit.*,

²⁰⁷ *Ibid.*,

²⁰⁸ Sexual Violence in the Democratic Republic of Congo, (2008). Institute for War & Peace Reporting, www.iwpr.net

²⁰⁹ Institute for War & Peace Reporting, (2008). Sexual Violence in the Democratic Republic of Congo, p. 12.

The Secretary-General of the United Nations, in his report to the UNSC on the protection of civilians in armed conflict,²¹⁰ noted that justice is a fundamental requirement in this part of the country, both to assist the reconstruction of society and to ensure that those who have committed and continue to commit human rights abuses are no longer at liberty to do so.²¹¹ Impunity in the Congo continues to prevail both within government and in rebel areas. Human rights abusers have been included in the government such as the RCD and MLC, and in the case of the army, criminal behaviour has been rewarded with warlords being presented with promotions to general or colonel.²¹² The legal system and the fight against impunity do not currently seem to be a priority. Generally, the legal system is characterized by numerous shortcomings, including: the almost total lack of judicial independence; political interference and the non-existent spirit of independence among judges; the lack of transparency in recruiting and appointing judges at various levels; and corruption related to the poor treatment of judges.²¹³ Significant effort still needs to be made with regards to fighting impunity. Military courts have shown very limited effectiveness in the fight against impunity for serious crimes, committed for the most part by members of the armed forces and police or members of armed factions. Systematic violations of the rights of the defence and the right to a fair trial do not warrant the confidence that the public places in military justice.²¹⁴ While the new structure is designed ultimately to bring justice closer to the population and provide better access to legal institutions, the country is still struggling to implement structures that were introduced decades ago.²¹⁵

The most serious obstacle to ensuring effective prosecutions for serious human rights violations may be the lack of political will to make this happen. Although the President has referred the situation of the DRC to the Prosecutor, no serious debate on domestic prosecutions has been initiated.²¹⁶ As Galant, director of a Belgian NGO,

²¹⁰ Report of the secretary-general to the U.N. Security Council on the protection of civilians in armed conflicts, S/2004/431, May 28, 2004

²¹¹ HRW report, "Making Justice Work: Restoration of the Legal System in Ituri, DRC A Human Rights Watch Briefing Paper ", *Op, cit.*,

²¹² Moffett, L. (2009). "Ending the Cycle of Violence in the Congo: Is Peace Possible in the Heart of Darkness? ." *Journal of Peace, Conflict and Development* (13).

²¹³ Global Rights report, 2005, *Op, cit.*,

²¹⁴ OSI report, *Op, cit.*,

²¹⁵ IBA report, *Op, cit.*,

²¹⁶ ICTJ report, *Op, cit.*,

puts it, 'the corruption is still there, it's just more expensive to bribe a judge'.²¹⁷ In truth, delivering justice for the many violations of international law committed on the territory of the DRC is an immense task. The complexities of the various interwoven conflicts, the international aspects to these conflicts, as well as the lack of any clear demarcation between the 'good guys' and 'bad guys', means that seeking justice for the millions of victims in the DRC presents a daunting, seemingly impossible challenge. Nevertheless, alongside domestic proceedings including military tribunals, international justice has slowly begun to take up the challenge.²¹⁸ Furthermore, the cooperation of the Congolese authorities with the Prosecutor is as important as the willingness of the government's crack down on corruption in national legal system and both require careful consideration. The complex web of local, national, and regional conflicts in the Ituri region of the DRC makes it a highly fraught and volatile situation for the Prosecutor to execute the legal and moral duties which will be examined in the next chapter.

²¹⁷ allafrica.com/stories/200910211106.html [accessed on 10th September 2011]

²¹⁸ Justice in the Democratic Republic of Congo: A background, *Op, cit.*,

Chapter Seven: The Decision-Making Process in the DRC Situation

Introduction:

In 2003, the Prosecutor declared that complementarity as a managerial principle may serve to promote effective investigation and prosecution of crimes in order to ensure a division of labour between the ICC and domestic jurisdictions. The aim was to enable states to carry out proceedings and overcome dilemmas of inability or unwillingness.¹ This approach has made its entry into prosecutorial strategy under the label of 'positive complementarity'.² However, issues may arise from this policy which may cause an impunity gap to develop 'horizontally between situations that are investigated by the Court and situations that for legal and jurisdictional reasons are not, or vertically between those most responsible brought before the Court and other perpetrators who are not.'³ The General Assembly of States Parties (ASP), in its report to the first review conference of the ICC in May 2010, noted that 'actions under positive complementarity must not be misused to avoid justice.'⁴

A state referral is one of the three trigger mechanisms which can be a precondition for the exercise of jurisdiction.⁵ However, the submission of a situation by a state party to the Prosecutor⁶ has 'the potential of altering the adversarial relationship between the Prosecutor and the state concerned'.⁷ The purpose of this chapter is to discuss how issues concerning admissibility under the Rome Statute present themselves when a case relates to a situation that has been the object of a self-referral. State referrals can raise complex issues relating to the application of Article 17. Kleffner has claimed that at the stage of deciding whether or not to initiate an investigation in accordance with Article 53 (1), a self-referral has to be treated no differently than other state referrals. In other

¹ Stahn, C. (2010). "Perspectives on Katanga: An Introduction." Leiden Journal of International Law 23(2): 311-318. p. 312.

² Informal Expert Paper, the complementarity in practice, 2003, see also Paper of some policy issues before the OTP, 2003. www.icc-cpi.int

³ The ICC Assembly of States Parties, Eighth session, ICC-ASP/8/51, 18 March 2010, Report of the Bureau on stocktaking: Complementarity, at para 14.

⁴ *Ibid.*, at para 25.

⁵ Article 13 of the Rome Statute

⁶ Article 14 of the Rome Statute

⁷ Kress, C. (2004). "Self-Referrals and Waivers of Complementarity " Journal of International Criminal Justice 2: 944-948. p. 945, Stigen, *Op. cit.*, p. 247.

words, the Prosecutor's role in considering whether 'the case is or would be admissible is mandatory rather than discretionary.'⁸ The Prosecutor must determine whether the self-referring state is proceeding or has been proceeding genuinely with a given case before he or she decides to go ahead.⁹ Moreover, the Court may raise a question of admissibility on its own motion, as was done with regard to the arrest warrant for Lubanga.¹⁰ However, it is ambiguous whether the admissibility of the referral will be considered an indication of 'inaction' by the state or an indication of 'unwillingness' or 'inability' of the national system.¹¹

As mentioned in the previous chapter, in the course of different attacks in Ituri region of the DRC, almost all of the armed groups – governmental and rebel, national and foreign – have committed serious crimes. However, the perpetrators of these crimes are rarely punished.¹² The other important point that may arise here is that the striking feature in all the self-referrals is that in each case the referring state asked the Prosecutor to investigate crimes allegedly committed by rebels fighting against the central authorities.¹³ This raises the possibility that the practice of self-referral by states could result in states using the ICC for internal political reasons.¹⁴ It is unlikely that they will be fully cooperative in the investigation of crimes perpetrated by state agents. The Prosecutor 'should be keenly aware of these possible pitfalls; despite initial appearances, self-referral is not necessarily the most straightforward option.'¹⁵

⁸ Kleffner, J. (2009). Auto-referrals and the Complementarity Nature of the ICC. The Emerging Practice of the International Criminal Court. C. Stahn and G. Sluiter. Martinus, Nijhoff. 48: 49.

⁹ Stigen, *Op. cit.*, p. 248.

¹⁰ Gaja, G. (2008). Issues of Admissibility in Case of Self-referrals. The International Criminal Court and National Jurisdictions. M. Politi and F. Gioia. Aldershot, Ashgate, p. 51. See also Pre-Trial Chamber I, 'Decision on the Prosecutor's application for a warrant of arrest, article 58'. 10 February 2006, as amended by and annexed to pre-trial chamber I, Decision concerning Pre-Trial Chamber's I Decision of 10 February 2006 and the incorporation of documents into the record of the cases against Mr. Thomas Lubanga Dyilo (ICC-01/04-01/06-8), 24 February 2006, para. 17.

¹¹ Jurdi, N. N. (2010). "The Prosecutorial Interpretation of the Complementarity Principle: Does it Really Contribute to Ending Impunity on the National Level?" International Criminal Law Review 10(1): 73-96. p. 94.

¹² Military Justice and Human Rights: An urgent need to complete reforms www.afrimap.org/english/images/report/AfriMAP_DRC-MilitaryJustice_full_EN.pdf

¹³ Cassese, A. (2006). "Is the ICC Still Having Teething Problems?" Journal of International Criminal Justice 4(3): 434-441. p. 436.

¹⁴ Ms Anne Lagerwall, 25th Anniversary Symposium, 11 & 12 July 2008, Cambridge, UK, page 7, International Criminal Jurisdictions: Nuremberg to the Hague, Discussion Group

¹⁵ Gaeta, P. (2004). "Is the Practice of Self-Referrals a Sound for the ICC?" Journal of International Criminal Justice 2(4): 949-952. p. 952.

The atrocities that have taken place in the DRC are at the heart of the controversy over the effectiveness of international courts.¹⁶ Within the DRC situation, both Germain Katanga and Mathieu Ngudjolo Chui have been indicted for crimes against humanity and war crimes for the commission of sexual slavery, rape, and outrages upon personal dignity.¹⁷ Seeking justice for war crimes and crimes against humanity drew attention to the lack of a functioning legal system in the DRC at the time of its referral to the Prosecutor.¹⁸ However, it should be highlighted here that the work of the Prosecutor depends on close collaboration with the domestic justice system for the sake of those most affected by conflict in the region, and this requires a better understanding of cultural awareness to engage in complex criminal proceedings. For instance, the ICC investigators and prosecutors must be trained to approach a witness of sexual violence crime with cultural and gender awareness to avoid additional suffering and to accurately assess his or her credibility given the sensitive nature of the crime. The first section of this chapter will analyse the decision-making process in the DRC situation in terms of Prosecutorial policy, in order to explore how the decision regarding the admissibility of the situation and cases was made by the Prosecutor. Emphasis will be placed on the question of the legitimacy of self-referral, as well as an examination of the decisions which were made by the Pre-Trial Chamber. The second part of this chapter will evaluate the exercise of the discretionary power of the Prosecutor, focussing particularly on the preliminary examination and the practice of self-referral in the Congo.

1. Analysis of the decision-making process:

Under article 13 (1) and 14 of the Rome Statute, a state party may refer to the Prosecutor a ‘situation in which one or more crimes within the jurisdiction of the Court appear to have been committed’.¹⁹ However, Article 17 does not distinguish between various forms of referrals. Paragraph 1 simply provides that ‘the Court shall determine that a case is inadmissible’ in the described situations. Neither does article 53 indicate

¹⁶ Baylis, E. (2009). "Reassessing the Role of International Criminal Law: Rebuilding National Courts though Transnational Networks." *Boston College Law Review* 50(1): 1-85. p. 2.

¹⁷ *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges.

¹⁸ *Ibid.*, p. 5.

¹⁹ Gaja, *Op. cit.*, p. 49. See also Olasolo, H. (2005). "The Triggering Procedural of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor " *International Criminal Law Review* 5(1): 121-146.

that the admissibility criteria should not apply when there is a self-referral.²⁰ In short, the right of states to make self-referrals has been the subject of considerable debate among jurists,²¹ particularly since the Prosecutor takes the view that a state party can voluntarily relinquish its domestic jurisdiction over a situation.²² Furthermore, the criticism of self-referrals arises in large measure from ‘the suspicion that states are invariably pursuing narrow interests that are inconsistent with the common interest in the suppression of international crimes’.²³

1.1 Legitimacy of self-referral:

As stated, the legitimacy of self-referrals and the satisfaction of the Court’s complementarity regime has been the subject of debate. Arsanjani and Reisman have observed that ‘no one – neither states that were initially sceptical about the viability of an ICC nor states that supported it – assumed that government would want to invite the future court to investigate and prosecute crimes that had occurred on their territory.’²⁴ In other words, there is no indication that the drafters ever contemplated that the Statute would include voluntary state referrals to the Court of difficult cases arising in their own territory,²⁵ and Article 14 was envisaged solely as an inter-state complaint mechanism and not a basis for voluntary relinquishment of national jurisdiction.²⁶ It is worth mentioning that self-referral was discussed during the negotiating process of the establishment of the ICC, but NGOs claimed that states would be reluctant to make referrals of situations to the Court and that the prosecutor should therefore be granted *proprio motu* powers to initiate investigations. It was also mooted that states might abuse such an option by trying to send politically motivated referrals with regard to situations in the territory of a political adversary.²⁷ Schabas believes that a state-referral ‘flows from a creative interpretation of Article 14 of the Rome Statute that was not

²⁰ Stigen, *Op. cit.*, p. 248.

²¹ Akhavan, P. (2010). "Self-Referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities?" *Criminal Law Forum* **21**: 103-120. Arsanjani, M. and W. Reisman (2005). "Law-in-action of the International Criminal Court." *American Journal of International Law* **99**(3): 388. Akhavan, P. (2005). "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court." *The American Journal of International Law* **99**(2): 403-421. El-Zeidy, *Op. cit.*,

²² Akhavan, *Criminal Law Review*, *Op. cit.*, p. 413.

²³ *Ibid.*, p. 113.

²⁴ Arsanjani & Reisman, *Op. cit.*, p. 386.

²⁵ *Ibid.*,

²⁶ *Ibid.*,

²⁷ Gaeta, *Op. cit.*,

seriously contemplated by the 1998 Diplomatic Conference'²⁸, and that 'there is not a trace in the *travaux préparatoires*'.²⁹ In fact, he claims that self-referrals are an 'interpretative deviation' and an 'opportunistic construction'³⁰ of the Rome Statute driven by the desire to generate activity.³¹ He maintains that where national courts are able and willing to prosecute within the meaning of Article 17 of the Statute, 'relinquishment of jurisdiction is impermissible and inconsistent with the independence of the Court.'³²

Other commentators, however, have suggested that nothing in the admissibility requirements of Article 17 prohibits self-referrals where states parties have not initiated investigations or prosecutions, and that there may be compelling reasons why they may want to relinquish their jurisdiction in favour of international trials, even if they are able and willing to prosecute.³³ In particular, in relation to the purpose of the Rome Statute to end impunity, 'the territorial state should not be prevented from choosing a second option against impunity, namely to refer a situation to the ICC with a view to international investigation.'³⁴ Kress has stated that Article 14 of the Rome Statute appears to authorize states parties to refer situations to the Court without any restriction. Accordingly, the fact that a state holds a direct interest in the investigation of the crimes alleged to have been committed in a given situation does not seem to pose a procedural obstacle to a referral pursuant to Article 14.³⁵ However, a question might be raised about this interpretation because paragraph six of the Rome Statute speaks of 'the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.'³⁶ Kress has suggested that the territorial state's duty to exercise criminal jurisdiction should be broadly understood as the obligation to ensure that a genuine investigation be undertaken.³⁷ He also believes that the emerging practice of self-referral constitutes 'necessary refinements of the complementarity scheme' under

²⁸ Schabas, *Criminal Law Forum*, *Op. cit.*, p. 12.

²⁹ Schabas, *Journal of International Criminal Justice*, *Op. cit.*, p. 751.

³⁰ *Ibid.*, p. 760.

³¹ *Ibid.*, p. 761.

³² Akhavan, *Criminal Law Forum*, *Op. cit.*, p. 107. See also, Schabas, W. (2006). "First Prosecution at the International Criminal Court." *Human Rights Law Journal* 27(1): 25-40. Arsanjani & Reisman, *Op. cit.*, p. 385.

³³ Akhavan, *Criminal Law Forum*, *Op. cit.*, Akhavan, *AJIL*, *Op. cit.*, p. 403, Philippe Kirsch & Darryl Robinson, Referral by States Parties, in Antonio Cassese, Paola Gaeta & John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), p. 619.

³⁴ Kress, *Op. cit.*, pp. 945-46.

³⁵ *Ibid.*, p. 945.

³⁶ Preamble of the Rome Statute

³⁷ Kress, *Op. cit.*, p. 946.

the Rome Statute.³⁸ In addition, Stigen has noted that letting the admissibility criteria apply would be fully consistent with the Statute's purpose, which is to ensure that the perpetrators are brought to justice.³⁹ Akhavan has argued that an important aspect of 'self-referrals relates to the mutuality of interest between the Court and states parties'.⁴⁰

From the other side, however, Arsanjani and Reisman have claimed that the practice of such referrals has to be scrutinized to avoid a costly abuse of the Court, on the grounds that self-referrals allow states to shift the burden of prosecutions they are unwilling to carry out for financial or other reasons to the international community.⁴¹ Cassese has also suggested that the practice of self-referral by states involved in civil wars, who tend to accuse their rebel enemies, may cause misgivings.⁴² Three 'situations' have been referred so far by the state concerned to the Prosecutor. Stigen has claimed that referrals were made after what can best be described as 'mild pressure from the Prosecutor'.⁴³

In September 2003, the Office of the Prosecutor (OTP), announced in its policy paper that it will follow the positive approach to complementarity.⁴⁴ This encourages genuine national proceedings where possible, relies on national and international networks, and participates in a system of international cooperation.⁴⁵ An informal expert paper of the Prosecution declared, '[t]here may also be situations where OTP and the state concerned agree that a consensual division of labour is in the best interests of justice; for example, where a conflict-torn state is unable to carry out effective proceedings against persons most responsible'.⁴⁶ In other words, 'there may be cases where inaction by states is the appropriate course of action. For example, the Court and a territorial state incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. In such cases there will be no question of unwillingness or inability under article 17'.⁴⁷ It also mentions that where the Prosecutor receives a referral from the state in which a crime has been committed, the Prosecutor can be confident that the

³⁸ *Ibid.*, p. 947.

³⁹ Stigen, *Op. cit.*, p. 248.

⁴⁰ Akhavan, *Criminal Law Forum*, *Op. cit.*, p. 104.

⁴¹ 25th Anniversary Symposium, *Op. cit.*,

⁴² Cassese, *Op. cit.*, p. 1.

⁴³ Stigen, *Op. cit.*, p. 246.

⁴⁴ ICC, Office of the Prosecutor, Paper on Some Policy Issues before the Office of the Prosecutor, pt. I, at 3 (Sept. 2003). www.icc-cpi.int

⁴⁵ Office of the Prosecutor, Report on Prosecutorial Strategy (14 September 2006) 5.

⁴⁶ Schabas, *Criminal Law Forum*, *Op. cit.*, p. 7. see also Informal expert paper: The principle of complementarity in practice', p. 3. at www.icc-cpi.int

⁴⁷ Paper on Some Policy Issues before the Office of the Prosecutor, *Op. cit.*,

national authorities will assist the investigation.⁴⁸ This may, however, be somewhat over-optimistic;⁴⁹ Gaeta has claimed that the government authorities may be prepared to cooperate where the crimes investigated have been allegedly committed by the opposing side but it is unlikely that they will be fully cooperative in the investigation of crimes perpetrated by state agents.⁵⁰ As mentioned in Chapter three, in the case of a state-referral no authorisation for an investigation is needed;⁵¹ therefore, the Prosecutor will be rather more willing to follow up state-referrals from the countries that wish to hand over their own situations than to start proceedings *proprio motu*.⁵²

El Zeidy has claimed that nothing in the Statute or in the Rules explicitly spells out the power of the Prosecutor either to invite states to refer situations or even to encourage them to do so. Article 3 (a), in conjunction with Article 14 (1) and Rule 45 governing referrals, speak of a situation to be referred to the Prosecutor by a state party ‘requesting the Prosecutor to investigate’. Similarly, Articles 15 (1) and (2), together with Rule 46, trigger the *proprio motu* powers of the Prosecutor subject to his receipt of ‘information on crimes within the jurisdiction of the Court’.⁵³ The Prosecution, in its report on the activities of the Office during its first three years, pointed out that while *proprio motu* power is a critical aspect of the Office’s independence, the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court.⁵⁴ Robinson has argued that ‘the way to encourage state action is not through the admissibility test at all, but rather through a prosecutorial policy of trying to encourage states to carry out effective proceedings themselves’.⁵⁵ However, he admits that when the OTP finds itself dealing with state inaction, the Statute does not stipulate under what circumstances the Prosecutor should press for national action and under what circumstances a burden-sharing arrangement might be reached to ensure effective investigation and prosecution.⁵⁶

⁴⁸ Takemura, *Op, cit.*, p. 15. See also, Annex to the “Paper on some policy issues before the Office of the Prosecutor”: Referrals and Communications’ (September 2003). www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf

⁴⁹ Kleffner, *Op, cit.*, p. 44

⁵⁰ Gaeta, *Op, cit.*, p. 952

⁵¹ Razesberger, F. (2006). *The International Criminal Court: The Principle of Complementarity* Frankfurt, Peterlang, p. 59.

⁵² *Ibid.*, p. 60.

⁵³ Zeidy, *Op, cit.*, p. 216.

⁵⁴ Report on the Activities performed during the first three years (June 2003- June 2006), p. 7 from www.icc-cpi.int

⁵⁵ Robinson, responding Schabas criticism, *Op, cit.*, p. 28.

⁵⁶ *Ibid.*, p. 29.

But this cooperative achievement may have a political dark side, and may '[amount] to something of a hybrid between the power of self-referral and the prosecutor's *proprio motu* powers under Article 15 of the Rome Statute.'⁵⁷ Scharf has argued that the policy could be seen as an unwarranted circumvention by the Prosecutor of the authorization he is required to obtain from the Pre-Trial Chamber to start an investigation *proprio motu* under Article 15,⁵⁸ and an abuse of the automatic investigation mandated by a state party referral under Article 53.⁵⁹ He has claimed that the Prosecutor must take transparent action in order to encourage states to refer the situation to the Court.⁶⁰

1.2 Referral of the DRC situation to the Prosecutor:

In September 2003, the Prosecutor informed the Assembly of States Parties (ASP) that he was ready to request authorization from the Pre-Trial Chamber to use his own *proprio motu* powers to investigate large-scale atrocities in the DRC, but that a referral and active support from the DRC would assist his work.⁶¹ Following the initiative of the Prosecutor, Joseph Kabila, the President of the DRC, in a letter in March 2004, referred the entire territory of the DRC to the Court as regards events occurring after July 1, 2002.⁶²

Some scholars have criticized the DRC referral and the selectivity of prosecution in this situation. Gaeta, among others, has noted that the DRC referral was not voluntary and it appears that the Prosecutor himself requested it, even though he had declared that he was ready to use his *proprio motu* powers and start an investigation after being duly authorized by the Pre-Trial Chamber.⁶³ He suggested that the Prosecutor had a political motive, on the grounds that he 'could have started the investigation in the DRC on his own initiative, but he pushed for a self-referral.'⁶⁴ Thus, according to Gaeta, the Court has made its first steps 'in the guise of an institution that can assist states to obtain

⁵⁷ Scharf, M. and P. Dowd (2008). No Way Out? The Question of Unilateral Withdrawals of Referrals to the ICC and other Human Rights Courts, Case Western Reserve University, p. 8. See also Article 15 of the Rome Statute.

⁵⁸ Article 15 (3) of the Rome Statute

⁵⁹ Scharf, *Op. cit.*, See further Article 53 (1) of the Rome Statute, Gaeta, *Op. cit.*, p. 949.

⁶⁰ Scharf, *Ibid.*,

⁶¹ Roper, *Op. cit.*, p. 469.

⁶² Arsanjani and Reisman, *Op. cit.*, See also Statement of the delegate of the Democratic Republic of the Congo in the Sixth Committee, UN Doc. A/59/C.6/SR.6, para. 14 (2004)

⁶³ Gaeta, *Op. cit.*, p. 949.

⁶⁴ *Ibid.*, p. 950.

justice in the face of mass atrocities committed within their boundaries, rather than as an interfering international watchdog against which states have to defend themselves'.⁶⁵

On 6 October 2004, the ICC and the DRC signed an agreement regarding the protection of investigators and their access to the governmental archives.⁶⁶ In addition, the Prosecutor entered into a dialogue on a 'consensual division of labour' with the DRC, whereby he would target leaders who bore the greatest responsibility for crimes within the jurisdiction of the Court and national authorities would deal with 'others in appropriate ways'.⁶⁷ Accordingly, the Prosecutor announced that the situation in Ituri be selected as the most urgent for investigation,⁶⁸ and a formal investigation in the Ituri region was subsequently initiated following a preliminary examination of the crimes committed in the country since July 2002.⁶⁹ However, adopting a strict Kantian approach, the Prosecutor in the Congo situation erred on the side of universalism by ignoring the legitimate needs of the local people.

In June 2004, the Prosecutor opened the first two ICC cases concerning the situation in Ituri. The first investigation of the crimes committed by the UPC led to the arrest of Thomas Lubanga, who was charged with enlisting and using child soldiers. The Lubanga trial, the first case before the ICC, opened on 29 January 2009. The ICC issued a second arrest warrant, relating to the same incidents, against Bosco Ntaganda on 22 August 2006. It is worth mentioning that Ntaganda, appointed general in December 2004 as part of the peace negotiations held in Ituri, remains at large and plays an important role in the *Forces Armees de la Republique Democratique du Congo* (FARDC) operations against the *Forces Decmocratiques de Liberation du Rwanda* (FDLR) in the Kivus. The DRC government has publicly stated on several occasions that it has no intention of arresting Bosco Ntaganda, at least for the moment, despite many objections.⁷⁰

⁶⁵ *Ibid.*,

⁶⁶ Arsanjani & Reisman, *American Journal of International Law*, *Op, cit*, p. 398.

⁶⁷ 'The Prosecutor's statement to the Diplomatic Corps in The Hague, Netherlands', 12 February 2004: www.icc-cpi.int/library/organs/otp/OTP.SM20040212-EN.pdf (4 February 2005).

⁶⁸ ICC Press Release No. pids.009.2003-EN, Communications Received by the Office of the Prosecutor of the ICC (July 16, 2003).

⁶⁹ Ropper, *Op, cit.*, p. 470.

⁷⁰ "UN Office of the High Commissioner for Human Rights, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, page 423, at para.1017." from www.unhcr.org/refworld/docid/4ca99bc22.html [accessed 10th September 2011]

In the second investigation into the situation in Ituri, against the *Fron des Nationalists et Integrationnistes – Front de Resistance Patriotique d'Ituri* (FNI/FRPI), Germain Katanga and Mathieu Ngudjolo were transferred to the ICC on 17 October 2007 and 6 February 2008 respectively, and charged in September 2008 with war crimes and crimes against humanity, committed principally during the Bogoro massacre in February 2003.⁷¹ The third investigation opened in the Kivus, announced by the Prosecutor in 2008.⁷² On 11 October 2010, Callixte Mbarushimana, a leader of the FDLR was arrested in Paris by the French authorities following a sealed arrest warrant issued by the ICC. He was charged with 11 counts of crimes against humanity and war crimes, including killings, rape, persecution based on gender and extensive destruction of property committed by the FDLR during most of 2009.⁷³

1.3 Pre-Trial Chamber decision on the DRC cases:

Case of the Prosecutor v. Thomas Lubanga Dyilo

In February 2005, ‘nine Bangladeshi UN peacekeepers were killed, causing the DRC government to increase its efforts to arrest militia leaders. In March 2005, Floribert Ndjabu, of the Lendu Nationalist and Integrationist Front, and Lubanga of the UPC were arrested’ on domestic charges of murder.⁷⁴ On 13 January 2006, the Pre-Trial Chamber granted the Prosecutor’s application for an arrest warrant directed at Thomas Lubanga Dyilo, who had been in custody in the DRC since March 2005.⁷⁵ However, the Lubanga arrest warrant remained under seal while the Prosecutor worked with the authorities of the DRC in order to ensure the accused person’s transfer to The Hague.⁷⁶ His detention was well-known to international NGOs so it seems reasonable to assume that the Prosecutor was also aware of the situation. The Prosecutor only proceeded to seek an arrest warrant when it appeared that the detention was coming to an end, and that there was the possibility that Lubanga would be released. This was specifically

⁷¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07, 30 September 2008.

⁷² ICC Press Release, “ICC Prosecutor recalls that ICC has jurisdiction over crimes against the civilian population in the Kivus,” 4 November 2008. www.icc-cpi.int/menus/ICC/situations [accessed on 10th September 2011]

⁷³ www.icc-cpi.int/NR/exeres/769E2333-D2AE-46B8-BDCD-651BF5A67CD3.htm [accessed on 25th May 2011]

⁷⁴ Ropper, *Op. cit.*, p. 470.

⁷⁵ Schabas, W. (2008). *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability* London, Cameron May Ltd, p. 398.

⁷⁶ *Ibid.*, p. 404.

invoked in the application for the arrest warrant, and helped to persuade the Pre-Trial Chamber.⁷⁷ He was charged with three counts of war crimes, including ‘enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities’.⁷⁸

Pre-Trial Chamber I noted that in deciding whether to issue the arrest warrant, it would assess both the jurisdiction and the admissibility of the case *ex officio* and *ex parte*. For the Pre-Trial Chamber, the ‘Congo situation’ was in the course of being transformed into the *Lubanga case*, and this required a separate and distinct assessment of issues of jurisdiction and admissibility.⁷⁹ Because Lubanga was charged by the DRC with crimes other than war crimes relating to the recruitment and use of child soldiers, the Chamber reasoned, the DRC was not in fact conducting any proceedings relating to the case presented by the Prosecution; Article 17 was, therefore, not a bar to admissibility.⁸⁰ With respect to the admissibility of the case against Lubanga, the Pre-Trial Chamber noted that ‘it appears that the DRC is indeed unable to undertake the investigation and prosecution ... In the Chamber’s view, this is why the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime, according to which the Court by no means replaces national criminal jurisdictions, but it is complementary to them.’⁸¹ Furthermore, Pre-Trial Chamber I, in the Lubanga arrest warrant decision, noted that the case at the time of the self-referral was a result of inability, not unwillingness. However, the situation in the national justice system had evolved in the nearly 2 years since the self-referral, and the Congolese courts might well now be in a position to undertake prosecution.⁸² In this context, Schabas has suggested that a state that refers a case to the ICC is indirectly answering one of the prongs of the complementarity text; namely, that it is willing to prosecute, at least in the sense that it is willing to see the alleged perpetrators brought to justice. It may, however, find itself unable to proceed because of a breakdown in its own justice system or because of a

⁷⁷ *Ibid.*, p. 405

⁷⁸ Roper, *Op. cit.*,

⁷⁹ Schabas *Op. cit.*, p. 401. See also *Prosecutor v Lubanga* (Case No. ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para 21.

⁸⁰ Sacouto, S. and K. Cleary (2010). “The Katanga Complementarity Decisions: Sound Law but Flawed Policy.” *Leiden Journal of International Law* 23: 363-374. p. 365. See also *Prosecutor v. Thomas Lubanga Dyilo*, Under Seal Decision of the Prosecutor’s Application for a Warrant of Arrest, Article 58, Annex 1, Case No. ICC-01/04-01/06-8, Pre-Trial Chamber I, 10 February 2006. paras 38-39.

⁸¹ *Prosecutor v Lubanga* (Case No. ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para 35.

⁸² Schabas, *Op. cit.*, Criminal Law Forum, p. 18, See also *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06-8), Prosecutor’s Application for Warrant of Arrest, para. 36.

serious legal impediment, such as an amnesty.⁸³ Therefore, he has claimed that in the DRC situation there is unwillingness not inability.⁸⁴

It is also worth mentioning that Pre-Trial Chamber I considered that the Congolese justice system was not suffering from ‘a total or substantial collapse or unavailability of its national judicial system’, to borrow the words of article 17.⁸⁵ With regard to the admissibility analysis of the *Lubanga* case, the Chamber observed that ‘since March 2004 the DRC national judicial system has undergone certain changes, particularly in the region of Ituri where a *Tribunal de Grande Instance* has been re-opened in Bunia.’⁸⁶ This resulted in the issuance of two warrants of arrest by the competent DRC authorities for Lubanga in March 2005, for several crimes committed in connection with military attacks from May 2003 onwards.⁸⁷ The DRC authorities issued an arrest warrant on 19 March 2005 against Lubanga charging him with the crime of genocide (art 164 of the DRC Military Criminal Code) and crimes against humanity (arts 166-169 of the DRC Military Criminal Code), in addition to the ordinary crimes of murder and illegal detention.⁸⁸ Examining these, the PTC found that the DRC arrest warrants contained no reference to Lubanga’s alleged criminal responsibility for *the Union des Patriotes – the Forces Patriotiques pour la Liberation du Congo* (UPC/FPLC)’s policy and practice of enlisting and using children under fifteen years of age to participate actively in hostilities.⁸⁹

The fact that Lubanga was in custody in the Congo at the time the Prosecutor took an interest in him might suggest that the national justice system was actually working, and that the state was meeting its international obligations in terms of addressing impunity.⁹⁰ The PTC found the case against Lubanga admissible because he was being charged by the ICC based on separate facts, with crimes distinct from those alleged in the domestic Congolese warrant against him. Specifically, the Congolese warrant addressed Lubanga’s role in the MONUC killings, whereas the ICC warrant focused on his

⁸³ Schabas, *Op, cit.*, Criminal Law Review, p. 17

⁸⁴ *Ibid.*, p. 18

⁸⁵ *Ibid.*, p. 25

⁸⁶ *Prosecutor v Lubanga* (Case No. ICC-01/04-01/06-8) , Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para. 36

⁸⁷ *Ibid.*,

⁸⁸ *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06) Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Pre-Trial Chamber (10 February 2006) par 33.

⁸⁹ *Ibid.*, para 38.

⁹⁰ Schabas, *Op, cit.*, Criminal Law Forum p. 25

conscription of children into his militia group.⁹¹ The Pre-Trial Chamber noted that in order for a case to be inadmissible, ‘national proceedings must encompass both the person and the conduct which is the subject of the case before the Court.’ Having confirmed that no domestic case against Lubanga for the same charges had been initiated, the Chamber declined to make a formal analysis of ‘unwillingness or inability’ beyond its earlier reference.⁹² The Pre-Trial Chamber wrote, ‘the DRC cannot be considered to be acting in relation to the specific case before the Court...’⁹³ and therefore it held that the complementarity test was satisfied.⁹⁴

On 29 January 2007, Pre-Trial Chamber I issued the decision on the confirmation of charges in the *Lubanga case*,⁹⁵ committing the suspect for trial for the war crime of conscripting and enlisting children under the age of 15 years.⁹⁶ The trial of Lubanga, which opened in 2009 after a seven-month delay over disputed confidential evidence, has been plagued by legal challenges. The OTP was found to have not identified a key witness. The first witness at the trial retracted his testimony after first saying he had been recruited by Lubanga's fighters on his way home from school. Judge Adrian Fulford has stated that Lubanga should be ‘freed without condition’, since his detention was ‘no longer fair’ after the trial was suspended.⁹⁷ On 8 July 2010, Trial Chamber I ordered the release of the accused, as the Chamber found that it would be impossible to secure a fair trial for him due to non-implementation of the Chamber’s orders by the prosecution and non-disclosure of exculpatory materials covered by Article 54 (3) (e) of the Statute.⁹⁸ According to the judges, an accused cannot be held in preventative

⁹¹ Burke-White, W. and S. Kaplan (2008). Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation. Scholarship at Penn Law, Paper 215, p. 26. See also *Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest 4. For an interesting account of the issues facing the Court in its first prosecution, see Janet Anderson, Institute for War and Peace Reporting, ICC Enters Uncharted Territory (Mar. 24, 2006) globalpolicy.igc.org/intljustice/icc/2006/0324uncharted.htm [accessed on 10th September 2011]

⁹² Burke-White and Kaplan, *Op. cit.*, p. 27. See also *Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, ICC-01/04-01/06-06-37, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58 (Feb. 24, 2006). para 40.

⁹³ Schabas, *Op. cit.*, Criminal Law Forum, p. 25. See also *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para. 39.

⁹⁴ *Ibid.*, p. 25

⁹⁵ *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06), De’cision sur la confirmation des charges, 29 January 2007.

⁹⁶ Miraglia, M. (2008). "Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga." Journal of International Criminal Justice 6: 489-503. p.490.

⁹⁷ www.kbc.co.ke/story.asp?ID=65305 [accessed on 10th September 2011]

⁹⁸ *The Prosecutor v Thomas Lubanga Dyilo* ICC-CPI-20080702-PR334-ENG ‘Trial Chamber I ordered the release of Thomas Lubanga Dyilo – Implementation of the decision is pending’ (2 July 2008).

custody on a speculative basis, in this case the speculation that at some stage in the future the proceedings might be resurrected.⁹⁹

The Appeal Chamber, with its decision on 8 October 2010, reversed the decision of the Trial Chamber to stay the proceedings for abuse of process by the Prosecutor.¹⁰⁰ However, it stated that the Prosecutor is obliged to comply with the orders of the Chamber even if there is a conflict between the orders of a Chamber and the Prosecutor's perception of his duties.¹⁰¹ The Appeal Chamber added that a Trial Chamber should impose sanctions under Article 71 before ordering a stay of proceedings because of a party's refusal to comply with its orders.¹⁰² The Appeal Chamber determined that the Prosecutor's refusal to comply with the orders of the Trial Chamber 'extended to a significant part of the trial and concerned issues of the trial's fundamental fairness.'¹⁰³ Furthermore, the abuse of process in the Prosecutor's evinced intention not to implement the Chamber's orders¹⁰⁴ threatened not only Lubanga's right to be tried without undue delay but also the fairness of the proceedings as a whole.¹⁰⁵ If a Trial Chamber loses control of such a fundamental part of proceedings because of the Prosecutor's refusal to comply with its orders, it would indeed be impossible to ensure a fair trial, and a stay of proceedings would then be justified.¹⁰⁶ However, the Appeal Chamber found that the Trial Chamber had not yet lost control of the proceedings in this case and noted that Article 71 of the Statute provides Trial Chambers with a specific tool to maintain control of proceedings and to ensure a fair trial when faced with the deliberate refusal of a party to comply with its directions. The purpose of such sanctions is not merely to punish the offending party, but also to bring about compliance.¹⁰⁷ Using these tools thereby allows the trial to proceed speedily to a conclusion on its merit, which is in the interests of not only victims and the international community as a whole who wish to see justice done, but also of the accused who is awaiting a decision on the merits of the case against him by the ICC.¹⁰⁸

⁹⁹ Trial Chamber I decision, ICC-01/04-01/06-2517-Red 08-07-2010, 8 July 2010,

¹⁰⁰ Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010, ICC-01/04-01/06 OA 18, Date 8th October 2010 at para 2.

¹⁰¹ *Ibid.*,

¹⁰² *Ibid.*, para 3.

¹⁰³ *Ibid.*, para 58.

¹⁰⁴ *Ibid.*, para 13.

¹⁰⁵ *Ibid.*, para 58

¹⁰⁶ *Ibid.*,

¹⁰⁷ *Ibid.*, para 59.

¹⁰⁸ *Ibid.*, para 60.

Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

Germain Katanga is alleged to have been the commander of the FRPI. He is accused of committing war crimes and crimes against humanity under Articles 7 and 8 of the Rome Statute, in relation to an attack conducted against the village of Bogoro on or about 24 February 2003.¹⁰⁹ In particular, it is alleged that Katanga, acting jointly with Ngudjolo Chui, committed the offences of murder, rape, sexual slavery, using children under 15 years to take an active part in hostilities, targeting the civilian population, pillage and targeting civilian property.¹¹⁰ In early 2004, the President of the DRC, Joseph Kabila, appointed Germain Katanga Brigadier-General of the FARDC, a post which he held at the time of his arrest by the DRC authorities, on or about 10 March 2005.¹¹¹ Katanga was in custody in the DRC from 19 March 2005 pursuant to a domestic warrant 'which include[d] charges of crimes against humanity'.¹¹² The proceedings against Katanga in the DRC were terminated on 17 October 2007¹¹³ so as to facilitate proceedings before the ICC. Pre-Trial Chamber I had conducted a preliminary investigation of admissibility, but concluded that the charges in the DRC warrant did not 'encompass the same conduct' for which he was sought by the ICC.¹¹⁴ On 2 July 2007, Pre-Trial Chamber I issued an arrest warrant for Germain Katanga; on 6 July 2007, the Chamber issued an arrest warrant for Mathieu Ngudjolo Chui. On 17 October 2007, Germain Katanga was surrendered by the Congolese authorities and transferred to the seat of the Court in The Hague, making his first appearance before the Chamber on 22 October 2007. On 6 February 2008, Mathieu Ngudjolo Chui was arrested, surrendered by the Congolese authorities and transferred to the seat of the Court in The Hague the following day; he made his first appearance before the Chamber

¹⁰⁹ Morgan, A. (2009). "ICC upholds charges against accused DRC rebel leader." from jurist.org/paperchase/2009/09/icc-upholds-charges-against-accused-drc.php [accessed on 10th September 2011].

¹¹⁰ Cross, M. and S. Williams (2010). "Recent Developments at the ICC: Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui- A Boost for 'Co-operative Complementarity'?" *Human Rights Law Review* **10**(2): p. 337.

¹¹¹ DRC Situation, case information sheet, from www.icc-cpi.int

¹¹² *Prosecutor v Germain Katanga*, Decision on the Evidence and Information provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, ICC-01/04-01/07 (2007) at para.18

¹¹³ *Prosecutor v Mr Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8 (2009). Para 80

¹¹⁴ *Prosecutor v Germain Katanga*, Decision on the Evidence and Information provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, ICC-01/04-01/07 (2007) at para 18 and 20.

on 11 February 2008. On 26 September 2008, the judges of Pre-Trial Chamber I confirmed charges of war crimes and crimes against humanity against Germain Katanga and Mathieu Ngudjolo Chui.¹¹⁵

On 10 February 2009, Katanga filed a challenge to the admissibility of his case,¹¹⁶ articulating two main challenges.¹¹⁷ First, he criticised the ‘same conduct’ test used by Pre-Trial Chamber I in making its preliminary assessment, arguing that its approach lacked legal foundation and that an alternative standard should be applied. Second, he challenged the interpretation of the terms ‘unwilling’ and ‘unable’ found in Article 17(1) (a) of the Rome Statute.¹¹⁸ The defence criticized the ICC’s treatment of complementarity in the case, arguing that even under the ‘same-conduct test’ *Katanga’s case* is inadmissible given that he was charged with crimes against humanity arising out of the attack on Bogoro, and there is no evidence that the DRC is unwilling or unable to pursue a corresponding investigation and possible prosecution.¹¹⁹ The DRC government, in response to a question as to whether the DRC genuinely carried out investigations directed against Germain Katanga, asserted that a file was opened against Germain Katanga and seven other persons following the murder of nine Bangladeshi MONUC peacekeepers. The investigations into these crimes are proceeding with difficulty: more than a year after the arrest of the above individuals, the file is still not ready to be forwarded to the trial court.¹²⁰

The DRC noted that there is no record of any investigations or any significant procedural act by the judicial authorities relating to the events at Bogoro.¹²¹ Moreover, regarding the ability of the DRC to carry out investigation into these allegations, the DRC admitted that at the time of the crimes in February 2003, the ‘country [was] ravaged by rebel groups and armed gangs; [there was] generalised insecurity in Ituri, making victims and witnesses inaccessible; [in addition] the unavailability of judicial

¹¹⁵ DRC Situation, case information sheet, from www.icc-cpi.int

¹¹⁶ Cross and Williams, *Op. cit.*, p. 340. See also *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga (Public Redacted Version), ICC-01/04-01/07 (2009).

¹¹⁷ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, ICC-0104-01/07 (2009) at para. 6 (Trial Chamber Reasons).

¹¹⁸ *Ibid.*, paras 59-73

¹¹⁹ intlawgrls.blogspot.com/2009/05/icc-complementarity-to-be-revisited.html [accessed on 10th September 2011]

¹²⁰ ICC-01/04-01/07-1189-Anx-tENG 16-07-2009, p. 3, Observations of the DRC on the Challenge to Admissibility made by the Defence for Germain Katanga in the case of *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*

¹²¹ *Ibid.*,

structures, aggravated by the inadequacy of operational capacities; the uncertainties of the peace process, with a variety of politico-military agreements between ex-belligerents; the lack of expertise in dealing with mass crimes and in the collection and preservation of evidence of such crimes' taken together show that the DRC was unable genuinely to investigate the crimes at Bogoro.¹²²

The Trial Chamber held that it need not look at whether or not the test was valid or even at whether it had been satisfied in the case of Katanga. Regardless of whether Katanga was being tried for the same or different conduct by the DRC, the Congolese authorities had willingly surrendered him to the ICC and therefore the national system must be deemed 'unwilling' to try the case within the meaning of Article 17.¹²³ In rejecting Katanga's challenge, the Trial Chamber emphasised the 'clear and explicit expression of unwillingness of the DRC to prosecute this case' and the DRC's manifest desire to see the prosecution proceed before the Court.¹²⁴ Notwithstanding the definition in Article 17(2), the Trial Chamber determined a 'second form of unwillingness', not expressly provided in the Statute, which 'aims to see . . . person[s] brought to justice, but not before national courts'.¹²⁵ It considered this interpretation 'designed to protect the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so.'¹²⁶ On this analysis, the decision to waive jurisdiction in favour of the ICC thus lies within the State's sovereign discretion, foreclosing the accused's ability to bring challenges under Article 17(1)(a) and (b).¹²⁷ In other words, the Chamber considers that a state which chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must be considered as lacking the will referred to in Article 17.¹²⁸ In making its decision, the

¹²² *Ibid.*,

¹²³ Sacouto, *Op. cit.*, p. 367.

¹²⁴ Cross and Williams, *Op. cit.*, p. 341. See also *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, ICC-0104-01/07 (2009) at para. 6 (Trial Chamber Reasons). Paras 90-5

¹²⁵ *Ibid.*, Trial Chamber Reasons, para 77.

¹²⁶ *Ibid.*, para 78.

¹²⁷ *Ibid.*, paras 86-9 and See further *Prosecutor v Mr Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8 (2009) (AdmissibilityAppeal Decision). paras 111-3

¹²⁸ Sacouto, *Op. cit.*, See also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, ICC-01/04-01/07, Trial Chamber II, 16 June 2009, para 77.

Trial Chamber noted the extent of the DRC's co-operation and statements made by DRC representatives.¹²⁹

Katanga filed his appeal on 22 June 2009,¹³⁰ challenging the Trial Chamber's construction of Article 17(1) (a) and (b) of the Rome Statute (complementarity test),¹³¹ alleging that it had 'erroneously enlarged the definition of unwillingness in a manner (1) not intended by the drafters of the Statute and not in compliance with its objective and purpose; and (2) contrary to the fundamental values underlying the complementarity principle.'¹³² On 25 September 2009, the Appeals Chamber¹³³ rejected Katanga's appeal against the Chambers' decision,¹³⁴ confirming the admissibility of the case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.¹³⁵ The Appeals Chamber set forth the following test for admissibility under Article 17(1)(a) and (b): '[T]he initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned.'¹³⁶ Only when these questions are answered in the affirmative is it necessary to look to the second halves of subparagraphs (a) and (b) and move to the question of unwillingness and inability. It follows that, 'in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a state having jurisdiction . . . renders a case admissible before the Court, subject to Article 17(1)(d) of the Statute.'¹³⁷

Furthermore, the Appeals Chamber considered that national decisions to halt investigations or to decline to proceed with prosecutions in the interests of facilitating prosecutions before the ICC do not amount to a decision 'not to prosecute' for the purposes of Article 17(1)(b).¹³⁸ It held that the decision of the DRC authorities to close

¹²⁹ Cross and Williams, *Op. cit.*, page 342. See also Trial Chamber Reasons, *Op. cit.*, para 91-4

¹³⁰ Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber, 'Motifs de la decision orale relative al'exception d'irrecevabilite de l'affaire', ICC-01/04-01/07 (2009).

¹³¹ Williams and Schabas, 'Article 17: Issues of Admissibility', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Munchen/Oxford/Baden-Baden: C.H.Beck/Hart/Nomos, 2008) at 606 and 613.

¹³² *Prosecutor v Mr Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8 (2009) (Admissibility Appeal Decision). para 61.

¹³³ ICC-01/04-01/07-1497, www.icc-cpi.int/iccdocs/doc/doc746819.pdf

¹³⁴ ICC-01/04-01/07-1234, www.icc-cpi.int/iccdocs/doc/doc701552.pdf , and ICC-01/04-01/07-1279, www.iccpi.int/iccdocs/doc/doc703949.pdf

¹³⁵ *Prosecutor v Mr Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8 (2009)

¹³⁶ *Ibid.*, paras 78- 97.

¹³⁷ *Ibid.*,

¹³⁸ *Ibid.*, paras 82-3

domestic proceedings against the accused was not a decision not to prosecute, but rather a decision to surrender the accused to the ICC, and thus necessarily to terminate domestic proceedings. This reflected the conviction of the DRC that the accused should be tried, but that the trial should take place before the ICC and not national authorities. As such, Katanga's appeal could be disposed of on the basis of the DRC's legal inactivity.¹³⁹ The Appeals Chamber considered that Article 17(1)(a) provides no basis to examine the reasons why the state was not investigating or prosecuting the case.¹⁴⁰ This means that the motives for the state to decline to exercise its power or duty to provide accountability at the national level are not relevant to the admissibility of a case which has been initiated before the ICC.¹⁴¹ The DRC had closed its investigation on the transfer of Katanga to the ICC. There were thus no domestic proceedings taking place at the time of the challenge. The question whether the DRC was willing or unwilling to prosecute him, whether it was able or unable to prosecute him, therefore simply did not arise.¹⁴²

Therefore, the Appeals Chamber reached the same result as the Trial Chamber and noted that as long as a state is willing to surrender a suspect to the ICC, it is irrelevant whether that person was being genuinely prosecuted in a domestic jurisdiction prior to the Court's intervention.¹⁴³ However, the Appeal Chamber did not affirm the admissibility of the case on the same basis as the Trial Chamber (that the DRC was unwilling); rather, it looked at the plain language of Article 17, and found that at the time of the challenge the DRC was not investigating or prosecuting Katanga and thus it rejected Katanga's appeal.¹⁴⁴ Susana has argued that the Appeals Chamber's decision on complementarity in the *Katanga* case means that any time a state chooses to co-operate with a request from the ICC to surrender an individual sought by the Court's Prosecutor, the Court will be able to try a person who was, prior to the ICC's intervention, being prosecuted in a domestic system. Importantly, this will be the case even if the domestic

¹³⁹ Cross and Williams, *Op, cit.*, p. 343.

¹⁴⁰ *Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497 OA 8, 25 September 2009. paras. 78, 79, 112.

¹⁴¹ Batros, B. (2010). "The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC." *Leiden Journal of International Law* 23: p. 354.

¹⁴² *Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497 OA 8, 25 September 2009. paras 80-97.

¹⁴³ Sacouto, *Op, cit.*, p. 368

¹⁴⁴ Batros, *Op, cit.*, p. 343.

system was trying the person for the same crimes as the ICC, and even where the domestic case involved a broader range of serious crimes.¹⁴⁵

2. Evaluation of the exercise of discretionary power by the Prosecutor:

In addition to the fact that the Court cannot force a state to investigate or prosecute a case, the Court is also faced with the reality that in most situations of mass atrocity it will be unable to investigate and prosecute all the alleged perpetrators itself. This has led to discussion of the concept of 'positive complementarity'.¹⁴⁶ The complementarity principle was introduced in the Rome Statute to preserve the rights of the states to prosecute core crime¹⁴⁷ but the positive approach to this principle takes a more interactive view of the Court and the state, seeing them not in a competitive relationship but jointly pursuing shared objectives.¹⁴⁸ It envisages the Court encouraging and facilitating domestic investigations and prosecutions where possible, in addition to conducting international proceedings where necessary.¹⁴⁹ Furthermore, by being always alive to cultural differences, the operation of the Court should be more meaningful to victims populations, and more effective at rebuilding local justice systems.

2.1 Assessment of the preliminary examination:

Some scholars have criticized the validity of the ICC's strategy in the Ituri region on the grounds that Ituri is the most isolated from the political arena in Kinshasa. Clark has argued that there is less clear evidence to connect President Kabila to atrocities committed in Ituri, although it is suspected that he has previously supported various rebel groups in the province, including Germain Katanga's FRPI. This differs from

¹⁴⁵ Sacouto, *Op, cit.*, p. 368.

¹⁴⁶ Batros, *Op, cit.*, p. 358.

¹⁴⁷ Benzing, M. (2003). "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity." Max Planck Yearbook of United Nationals Law 7: p. 630.

¹⁴⁸ Batros, *Op, cit.*, p. 358

¹⁴⁹ *Ibid.*, p. 359. See further, Gioia, F. (2006). "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court." Leiden Journal of International Law 19, p. 1114. Burke-White, W. (2008). "Implementing A Policy of Positive Complementarity in the Rome System of Justice." Criminal Law Forum 19: p. 66. Stahn, C. (2008). "Complementarity: A Tale of Two Notions." Criminal Law Forum 19: pp.90-92. Seils, P. (2007). "Justice Should be Done, But Where? The Relationship Between National and International Courts." American Society of International Law Proceedings 101: p. 293.

violence in other provinces, particularly North and South Kivu and Katanga province, where government forces and Mai Mai militias backed by Kabila are directly implicated in serious crimes. Therefore, investigations and prosecutions in Ituri are those with the least capacity to destabilise the current government.¹⁵⁰ In addition, Pascal and Rotman have claimed that the ICC is addressing a part of the DRC's war that is still very much alive and in which at least two of the transitional government's vice-presidents have probably been involved in some capacity.¹⁵¹ According to Burke-White, self-referral was somewhat surprising considering that Kabila himself may have been responsible for some of these crimes and could be subject to investigation. Kabila's decision, while signalling the government's willingness to work with international authorities to end the violence, was intended to summon the ICC's assistance and have the ICC pay the political and economic costs of trying the perpetrators.¹⁵² Roach and Leonard have suggested that Kabila probably has less to worry about in terms of being investigated and prosecuted since 'any crimes against humanity committed by Kabila likely occurred before July 1, 2002, and as yet, there is little evidence that he has been directly involved in any of the major issues in the Congo within the Court's temporal jurisdiction.'¹⁵³

Clark has suggested that the ICC considered its relations with Kinshasa to ensure the security of ICC investigators and MONUC's major peacekeeping mission, which were working in the unstable eastern provinces. The ICC also wanted to avoid implicating government officials in the lead-up to Congo's first post-independence elections, held in July 2006. However, this sends a message to major perpetrators that their senior political or military status will insulate them from prosecution. For the Congolese population, this implies continued impunity for the leaders most responsible for the immense harm they have suffered.¹⁵⁴ As discussed in Chapter six, since July 2003 the EU and the UN have invested more than US\$40m in order to reform the Congolese

¹⁵⁰ Clark, P., Ed. (2008). Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda. Courting Conflict? Justice, Peace and the ICC in Africa, p. 40.

¹⁵¹ Kambale, P. and A. Rotman (2004). "The International Criminal Court and Congo: Examining the Possibilities." From www.crimesofwar.org/africa-mag/afr_05_kambale.html [accessed 10th September 2011]

¹⁵² Burke-White, Leiden Journal of International Law, *Op, cit.*, p. 565.

¹⁵³ Roach, S. and L. Eric, Eds. (2009). From Realism to Legalization: A Rationalist Assessment of the International Criminal Court in the Democratic Republic of Congo. Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court. Oxford, Oxford Scholarship Online Monographs, p. 7.

¹⁵⁴ Clark, Courting Conflict, *Op, cit.*, p. 40.

judiciary, and considerable progress has been made in local capacity.¹⁵⁵ Ituri provided the ICC with a simpler legal task than other provinces; of the conflict-affected provinces of the DRC, Ituri has the best-functioning local judiciary, which has already shown adeptness at investigating serious crimes, including those committed by Lubanga, Katanga and Ngudjolo. It is therefore unclear whether the ICC can adequately justify its involvement in Ituri, given the capacity of domestic institutions to investigate and prosecute major crimes. The OTP benefited from the fact that when its investigations were opened into the *Lubanga* and *Katanga* cases, the major militia leaders were already in custody and important evidence had been collected by the local civilian and military courts, in conjunction with MONUC.¹⁵⁶ Therefore, Clark has claimed that ‘Ituri is easy for the ICC’ since ‘MONUC have all the information on cases there’. The dossiers are ready to go but the question may be raised as to why the ICC wanted to try the easiest cases.¹⁵⁷ The Prosecutor, for his part, has announced that Ituri represents only ‘the beginning not the end’ of the ICC’s work in the DRC and the third investigation was opened in the Kivus during 2008.¹⁵⁸

2.2 Critiques of the practice of self-referral:

Burke-White has conceded that a ‘division of labour’ approach ‘can be an efficient and effective way to end impunity.’ However, positive complementarity does not amount to a ‘uniform strategy’ likely to be effective in all circumstances.¹⁵⁹ Other commentators have reframed¹⁶⁰ positive complementarity - a new form of complementarity - as ‘a forum for managerial interaction between the Court and States’, which permits ‘flexibility’ in the nature of the response.¹⁶¹ This approach has some merit, yet the underlying conclusion that sometimes the ICC should do one thing, sometimes another, underlines the importance of pragmatism rather than the slavish application of principle. In its cautious elucidation of a test permitting ‘co-operative complementarity’, this is a lesson that the Katanga Appeals Chamber has clearly learned well.¹⁶²

¹⁵⁵ *Ibid.*,

¹⁵⁶ *Ibid.*,

¹⁵⁷ *Ibid.*,

¹⁵⁸ *Ibid.*,

¹⁵⁹ Burke-White, *Criminal Law Forum* *Op. cit.*, pp. 84-5.

¹⁶⁰ *Ibid.*, p. 64, See also Stahn, *Criminal Law Forum*, *Op. cit.*, pp. 101-104.

¹⁶¹ Stahn, *Criminal Law Forum*, *Op. cit.*, p. 88.

¹⁶² Cross and Williams, *HRLR*, *Op. cit.*, p. 345.

Susana Sacouto has argued that there are potential concerns about the approach of the Prosecution towards complementarity.¹⁶³ According to a policy paper of the OTP, the ICC may step in where '[g]roups [that are] bitterly divided by conflict' agree that a prosecution by the ICC would be 'neutral and impartial', or where 'a third State has extra-territorial jurisdiction, but all interested parties agree that the Court has developed superior evidence and expertise relating to that situation, making the Court the more effective forum'.¹⁶⁴ According to Sacouto, the Prosecutor may find it necessary to take over cases from national judicial systems, due to issues such as the national system's inability to protect witnesses or judges effectively, where a state is not genuinely pursuing a supposedly ongoing investigation.¹⁶⁵ However, in practice, two of the five individuals for whom the prosecution has sought arrest warrants in the situation in the DRC to date – Thomas Lubanga Dyilo and Germain Katanga – were the subjects of domestic proceedings at the time that the ICC issued the arrest warrant, and there is no evidence that the Court took over these cases due to the types of scenario described in the prosecution's policy paper.¹⁶⁶ Moreover, the Congolese judicial system, at least in certain areas of the DRC (including Kinshasa) was 'able and willing.' Only Mathieu Ngudjolo Chui was not in custody when the ICC issued his arrest warrant,¹⁶⁷ but he was arrested and surrendered to the ICC by 'the (willing and relatively able) Congolese judicial system.'¹⁶⁸

Susana Sacouto claims that the practice of pursuing individuals who could have been prosecuted domestically not only seems to run contrary to the principles underlying the Rome Statute's drafters' desire for the ICC to act as a court of last resort, but may carry additional unintended negative consequences. For example, the Prosecutor's decision to take the cases against Lubanga and Katanga out of the DRC 'undermines the confidence of domestic judiciaries; it sends a message that they might be trying to reform themselves and might be trying to deal with very complicated justice questions, but

¹⁶³ Sacouto, *Op, cit.*, p. 374.

¹⁶⁴ Office of the Prosecutor, Paper on Some Policy Issues at 5. www.icc-cpi.int

¹⁶⁵ Sacouto, *Op, cit.*, p. 374, See also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public Redacted Version of the 19 March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), ICC-01/04-01/07-1007, Office of the Prosecutor, 2009, 27, at 39.

¹⁶⁶ Sacouto, *Op, cit.*, p. 372

¹⁶⁷ Jurdi, N. N. (2010). "The Prosecutorial Interpretation of the Complementarity Principle: Does it Really Contribute to Ending Impunity on the National Level?" *International Criminal Law Review* 10(1): 73-96. p. 81.

¹⁶⁸ *Ibid.*,

that's not necessarily going to stop an international body from intervening'.¹⁶⁹ Susana Sacouto has suggested that, in such cases, the Prosecutor should clearly communicate the reasons behind its decision to take over the cases that were being prosecuted domestically.¹⁷⁰ Jurdi has claimed that current prosecutorial policy, rather than encouraging national systems to prosecute, has in a number of cases encouraged states to defer the cases to the ICC for reasons other than unwillingness or inability as defined by article 17. For instance, lessons from cases in the DRC show that states have used the ICC forum for political and other reasons that are only tangentially related to legal and judicial incapacity, or for shielding possible perpetrators.¹⁷¹ Jurdi claims that under such a policy states may refrain from meeting their primary duty to prosecute, and then render their own referrals admissible by taking no action even though they are willing and able to do so. This has been noted in the Katanga case where, when the admissibility of the case was challenged, the DRC hastened to inform the court that it did not intend investigating the conduct that formed the basis for Katanga's prosecution.¹⁷² It seems that prosecutions of only one side in the conflict may be the price of the self-referral strategy of the Prosecutor.¹⁷³ It is also claimed that state referral appears to be the favoured option amongst states, as it shifts the burden without incurring criticism for not fighting impunity.¹⁷⁴ A state referral to the ICC has considerable financial and logistical advantages for the referring state and can develop their international image as a state that believes in the rule of law and international justice, while in reality it is doing nothing to fulfil its duty to combat impunity.¹⁷⁵

Jurdi believes that for a court promoting positive complementarity it would have been understandable if the ICC had become involved in bilateral discussions with the Congolese judicial system, which was already willing (and at least able regarding Lubanga and Katanga – they were captured and detained in Kinshasa) to amend the national indictments to cover the conducts that were under investigation by the ICC.¹⁷⁶ In his view, the ICC could have made a more effective contribution to the Congolese

¹⁶⁹ Sacouto, *Op, cit.*, p. 374

¹⁷⁰ *Ibid.*,

¹⁷¹ Jurdi, *South Africa Yearbook of International Law, Op, cit.*, p. 5.

¹⁷² *Prosecutor v Germain Katanga and Mathiue Ngudjolo Chui* (ICC-01/04-01/07) Observations Of The Democratic Republic Of The Congo On The Challenge Of Admissibility Made By the Defence For Germain Katanga In the Case of *Prosecutor Versus Germain Katanga And Mathiue Ngudjolo Chui* (16 July 2009).

¹⁷³ Schabas, *Journal of International Criminal Justice, Op, cit.*, p. 753

¹⁷⁴ Jurdi, *Op, cit.*, p. 18.

¹⁷⁵ *Ibid.*, p. 19.

¹⁷⁶ Jurdi, *International Criminal Law review, Op, cit.*, p. 95

judicial system if it encouraged the judiciary to take primary responsibility, with the ICC functioning to monitor the trial for the degree of conformity with human rights standards.¹⁷⁷

2.3 Legitimacy of the Prosecutorial policy in the DRC cases:

It has been argued here that the Prosecutor should always take into account local cultural norms before taking action and exercising his or her power within the complementarity regime. The trial of Lubanga has taken nearly three years and has suffered many setbacks and delays. Although Lubanga was arrested in March 2006, it was not until late January 2007 that the ICC confirmed the charges against him and ordered a trial. However, ICC judges were unable to set a trial date in 2007 because of unresolved issues over procedures, the roles and rights of victims in the trial, and how evidence should be handled. The issue of evidence was a severe challenge to the credibility of the ICC. The case was initially due to begin on March 31 2008, but was delayed until late June in a dispute over how the evidence was gathered and subsequently handled by the Prosecutor. In this regard, the trial Judge Adrian Fulford has revealed, ‘I will make no secret of the fact of my real frustration, already expressed in no uncertain terms in open court, about delays in getting our first trial up and running’.¹⁷⁸

The conflict arose over the failure by the Prosecutor to disclose to the defence all of its evidence and the identities of witnesses testifying against Lubanga. The evidence was supposed to be provided to the defence by mid-December 2007, but by mid-February it had received the identities of less than half the witnesses.¹⁷⁹ Other crucial evidence had been provided only in redacted or summary form. Although the trial was due to begin on June 23 2008, on June 13 judges called for an indefinite halt to the case and discussed releasing Lubanga after more than two years in custody. The judges accused the Prosecutor of abusing his power and noted that the Lubanga trial ‘has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial’. The judges' decision in the case was appealed, which also delayed the release of Lubanga, and allowed the evidence problems to be resolved. Finally, on November 18 2008, ICC judges lifted the formal ‘stay of proceedings’ and set the Lubanga trial for

¹⁷⁷ *Ibid.*,

¹⁷⁸ Lubanga trial a landmark case, from www.isn.ethz.ch/isn/Current-Affairs/Security-Watch-Archive/Detail/?lng=en&id=95893 [accessed on 10th September 2011]

¹⁷⁹ *Ibid.*,

January 26 2009.¹⁸⁰ The Prosecutor faces a two-fold obligation related to the disclosure of evidence: on the one hand disclosing the evidence in the Prosecution's possession, but also communicating every piece of exculpatory material of which he is aware to the Defence. Given this understanding of disclosure, the obligation to disclose information in the case is clearly an 'obligation of result': the accused must receive the information.¹⁸¹ In this case, the Prosecutor's refusal to disclose evidence was characterised by two errors. Firstly, the Prosecutor seems to have used Article 54(3) indiscriminately in his investigations, without bothering to use subsequent confidential evidence to collect other evidence that could have been disclosed. The Statute was never intended to be used to allow a trial where the accused would not have access to evidence. If Article 54(3) is employed in a rational manner, the new evidence discovered using the agreements would be sufficient for the accused to understand the charges against him and adequately defend himself. The confidential character of the information provided under Article 54(3) is not intended to disadvantage the accused. The accused does not need to know how the Prosecutor obtained the evidence; so long as the accused receives the information his rights are not undermined, in particular the right to understand the case against him and the evidence that has been used to support the allegations.¹⁸²

Therefore, on 13 June 2008, the Trial Chamber judges established that the Prosecutor had abused Article 54(3) of the Statute and acknowledged that they were now in a situation where it would be difficult to guarantee a fair trial.¹⁸³ This has also been admitted by the Deputy-Prosecutor, who declared at a status conference hearing, '[o]f course, there was never any intention on the side of the Prosecutor, and it was also understood as such by the United Nations, that these materials were received only for lead purposes. The point was to obtain these materials as quickly as possible for the sake of the ongoing investigation and then to allow the Office of the Prosecutor to identify the materials it wishes to use as evidence and then seek permission.'¹⁸⁴ In this regard, Stuart has argued that the decision of the Trial Chamber to order the stay of the

¹⁸⁰ *Ibid.*,

¹⁸¹ Anonymous author on Lubanga case, *the Hague Justice Portal*, p. 3.

¹⁸² *Ibid.*, p. 4.

¹⁸³ Decision of 13 June 2008, paras. 71-73. Decision on the consequences of nondisclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (Trial Chamber I) 13 June 2008, Document No. ICC-01/04-01/06-1401

¹⁸⁴ Transcript of the hearing on 6 May 2008, Lubanga (ICC-01/04-01/06-T-86-ENG), Trial Chamber I, at 23.

proceedings and the release of the defendant constitute a reaction to the Prosecutor's investigative methods.¹⁸⁵

In fact, the Prosecutor had been unable to carry out independent investigation and had relied on documents provided by the UN, NGOs or other agencies.¹⁸⁶ As mentioned earlier in Chapter six, the UN peacekeeping mission and the European Union began work to stabilize the Ituri region in 2003.¹⁸⁷ MONUC's Human Rights Division has been a central player at both international and domestic levels, governmental and nongovernmental, influencing the DRC legal process, and has been involved in the investigation and prosecution of international crimes in the DRC.¹⁸⁸ The European Union paid for a prosecutor to come to Ituri from Kinshasa, financing his salary and bringing him in from outside the region in an effort to ensure his impartiality and honesty. MONUC investigators facilitated the work of prosecutors by sharing factual information, meeting jointly with witnesses whom they had already interviewed in their investigation, and providing security for victims and witnesses. For a long while, they worked with the prosecutors on a daily basis.¹⁸⁹

The defendants and the victims needed lawyers, and so the NGO *Advocats sans Frontieres* found, coordinated, and paid local attorneys to represent both sides. Another UN agency began providing witness protection. As the cases moved toward trial, everything had to be rebuilt from the ground up; the EU repaired the courtroom, while an NGO repaired the prisons. The judges were paid by the EU but lived inside the MONUC military camp for their protection. All this time, MONUC and others were pressing for arrests and then for prosecutions.¹⁹⁰ Notably absent in all of this was any participation by the ICC. Indeed, while MONUC investigators made a point of getting victims' and witnesses' permission to share their statements with the ICC, and while they did eventually share some of this information pursuant to a Memorandum of Understanding between MONUC and the ICC, this was a one way street. The ICC did not provide any resources for the investigations or prosecutions, nor did it play any other role in the process whatsoever.¹⁹¹

¹⁸⁵ Stuart, H. V. (2008). "The ICC in Trouble " *Journal of International Criminal Justice* 6: p. 409.

¹⁸⁶ *Ibid.*,

¹⁸⁷ Baylis, *Op, cit.*, p. 35

¹⁸⁸ *Ibid.*, p. 34.

¹⁸⁹ *Ibid.*, p. 35.

¹⁹⁰ *Ibid.*,

¹⁹¹ *Ibid.*, p. 36.

In terms of prosecutorial discretion in filing charges, it should be noted here that the Prosecutor brought only minimal charges against Lubanga, although he has been more expansive in charging Katanga and Ngudjolo. Lubanga was accused of three counts of war crimes involving children, leaving out other serious crimes in which he has been implicated.¹⁹² Phil Clark has written that the focus of the charges against Lubanga on child soldiers, while ‘highlight[ing] the plight of the thousands of child soldiers in Congo,’ has led ‘many Congolese [to be] angry that the ICC has not charged Lubanga with more serious crimes, including the mass murder, rape, mutilation, and torture for which the UPC is notorious.’¹⁹³ This has also been criticized by Kleffer, who has argued that the ICC charges against Lubanga Dyilo could be amended to include conduct in relation to which the DRC had initiated criminal proceedings in their domestic courts, most notably the killing of UN peacekeepers on 25 February 2005.¹⁹⁴ Schabas has pointed out that ‘the justice system of the Democratic Republic of Congo was doing a *better* job than the Court itself’, since Lubanga was being prosecuted in Congo for genocide and crimes against humanity that are more serious than those for which he is being prosecuted in The Hague.¹⁹⁵ In fact, the Prosecutor could bridge the gap between universalism and cultural sensitivity concerns by ‘working with local government to get their system in shape rather than merely fighting off their efforts to resist ICC jurisdiction.’¹⁹⁶ A group of international organizations has also observed that although conscripting and using children as soldiers in armed conflict are serious crimes, the failure to include additional charges in the case against Lubanga could undercut the credibility of the ICC in the DRC, both for the victims of these crimes and in terms of ending the culture of impunity.¹⁹⁷ For an example of Lubanga’s potentially more serious crimes, in February-March 2003 UPC militias carried out a large-scale military operation called *Chikana Namukono* against the villages located between Lipri and

¹⁹² Clark, P. “Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda”, in N Waddell and P Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, 2008, p. 41.

¹⁹³ Drumble, M. (2007). "Prosecutor v. Thomas Lubanga Dyilo. Decision sur la confirmation des charges. Case No. ICC-01/04-01/06." *The American Journal of International Law* 101(4): p. 846.

¹⁹⁴ Kleffner, *Op cit.*, p. 48, on the DRC domestic proceedings, see Prosecutor’s Submission of Further Information and Materials, Reclassified as public on 23-03-2006 pursuant to decision ICC-01/04-01/06-46, ICC-01/04-01/06-32-AnxC, 25 January 2006, 8-10, 22.

¹⁹⁵ Schabas, *Op. cit.*, *Criminal Law Forum* (2009), pp. 25-26

¹⁹⁶ Wald, P. (2004). "Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals? ." *American Society of International Law Proceedings*(98). p. 194.

Patricia M. Wald, *Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals?*, 98 AM. SOC’Y INT’L L. PROC. 192, 192 (2004); p. 194.

¹⁹⁷ Human Rights Watch report (2006). "DR Congo: ICC Charges Charges Concern" from www.hrw.org/en/news/2006/07/31/dr-congo-icc-charges-raise-concern

Nyangaraye. The operation, a veritable manhunt, resulted in the killing of at least 350 persons and the complete destruction of 26 localities.¹⁹⁸

In addition, the Prosecutor has resisted investigating the wider dimensions of Lubanga's crimes, notably the alleged training and financing of Lubanga's UPC by the Ugandan and Rwandan governments, which could implicate key figures in these countries.¹⁹⁹ It is important to mention here that although the Prosecution argued that its decision was dictated by the evidence, charging Lubanga on the basis that the conflict in Ituri was internal in character also had political benefits. The uncharitable might conclude that the Prosecutor's decision was influenced by a desire to maintain good relations with the Ugandan Government, given the ongoing investigation into the situation in northern Uganda, which has resulted in the issuing of arrest warrants for five leaders of the Lord's Resistance Army (LRA), all as yet unapprehended.²⁰⁰ Having examined the evidence, the Chamber concluded that between July 2002 and June 2003 an international armed conflict had existed in Ituri owing to the direct involvement of the Uganda People's Defence Force (UPDF). Relying heavily on the findings of the International Court of Justice (ICJ) in its judgment in the *Armed Activities on the Territory of the Congo* case,²⁰¹ the Chamber concluded that until the withdrawal of its forces on 2 June 2003, Uganda had been in occupation of Ituri.²⁰² In confirming charges under two separate provisions of the Rome Statute, Pre-trial Chamber I departed from the Prosecutor's assessment that the Ituri conflict was, at all relevant times, a conflict not of an international character.²⁰³ The Prosecutor had charged Lubanga as a co-perpetrator under Article 8(2) (e) (vii) alone. The Pre-Trial chamber ruled, however, that from July 2002 to June 2 2003 the conflict could be seen as an international armed conflict involving Uganda and that from then until late December 2003, the conflict in Ituri was not of an international character.²⁰⁴

¹⁹⁸ *Ibid.*,

¹⁹⁹ Clark, *Op, cit.*, p 41.

²⁰⁰ Happold, M. (2007). "Current Developments International Criminal Court: Prosecutor v. Thomas Lubanga, Decision of Pre-Trial Chamber I of The International Criminal Court." International and Comparative Law Quarterly **56**: p. 718.

²⁰¹ *Armed Activities in the Territory of the Democratic Republic of Congo (DRC v Uganda)*, judgment of 19 Dec 2005, [2005] ICJ Rep 59.

²⁰² *Prosecutor v Lubanga*, Décision sur la confirmation de charges, Pre-Trial Chamber I, 29 Jan 2007, ICC-01/04-012/06-803, para 212-220.

²⁰³ Drumble, *Op, cit.*, p. 843.

²⁰⁴ *Ibid.*,

Conclusion:

The essence of the Rome Statute and the aims of the complementarity mechanism are 'to encourage and facilitate the compliance of states with their primary responsibility to investigate and prosecute core crimes'.²⁰⁵ However, the practice of Prosecutorial policy in self-referral situations has led to a number of negative repercussions.²⁰⁶ Although the OTP highlighted positive complementarity in its policy paper and on many other occasions, the current prosecutorial policy in the DRC²⁰⁷ seems to be at variance with the positive complementarity approach.²⁰⁸ As Jurdi has suggested, the Prosecutor's policy on the admissibility of inactions could in theory encourage national systems to prosecute core crimes; however, in reality it could lead to the opposite. The admissibility of all inaction scenarios regardless of inability or unwillingness could encourage states to be lazy in prosecuting core international crimes. A state that is willing and able can still relieve itself of the burden of prosecuting international crimes under the Rome Statute by refraining from taking any action. In such a situation, states will pass off the financial burden and the political difficulties inherent to trials of those most responsible for international crimes.²⁰⁹

Baylis has claimed that the ICC has not involved itself in the promotion or support of domestic cases in the DRC. Instead, the ICC has been involved in its own investigations. In addition, the ICC outreach activities intend to publicize its work, but not by supporting or participating in domestic efforts at achieving justice.²¹⁰ A reference to the ICC may in various cases be favoured for political motives since states may

²⁰⁵ Informal Expert Paper 'The Principle of Complementarity in Practice' ICC-OTP 2003 1 -38, 7 from www.icc-cpi.int/library/organs/otp/complementarity.pdf at para. 3.

²⁰⁶ Jurdi, N. N. (2010). "Some Lessons on Complementarity for the International Criminal Court Review Conference." *South Africa Yearbook of International Law* 34: p. 22. See also *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07 OA 8) Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (25 September 2009) par 83.

²⁰⁷ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07 OA8) *Prosecution's Response to Documents in Support of Appeal of the Defence for Germain Katanga against The Decision of The Trial Chamber 'Motifs De La Décision Oral Relative À L'exception D'irrecevabilité De L'affaire'* (31 July 2009). See also, *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06) *Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, Pre-Trial Chamber* (10 February 2006). However, on 2 July 2008 Trial Chamber I ordered Lubanga's release as the Chamber found that it would be impossible to secure a fair trial for him due to non-disclosure of exculpatory materials covered by art 54(3)(e). See *The Prosecutor v Thomas Lubanga Dyilo* ICC-CPI-20080702-PR334-ENG 'Trial Chamber I ordered the release of Thomas Lubanga Dyilo – Implementation of the decision is pending' (2 July 2008) from www.icc-cpi.int/press/pressreleases/394.html.

²⁰⁸ Jurdi, *SAYIL Op, cit.*, , p. 6

²⁰⁹ Jurdi, *International Criminal Law review Op, cit.*, , p. 96

²¹⁰ Baylis, *Op, cit.*, p. 33.

prefer to ease certain pressures by passing on the burden of international justice.²¹¹ Therefore, the prosecutorial policy of the ICC should prevent the ICC from becoming a 'judicial shopping forum for states able and willing to prosecute, but reluctant to exercise their duties under the Rome Statute.'²¹²

In the DRC, the Court focused on easier targets in the form of Lubanga, Germain Katanga and Mathieu Ngudjolo.²¹³ In the Lubanga, Katanga and Ngudjolo cases, domestic authorities and MONUC had done most of the hard work of capturing the suspects and investigating their crimes. The *Lubanga* case, while addressing grave crimes, does not relate to the gravest of Lubanga's crimes for fear these would greatly complicate the judicial process. The *Lubanga*, *Katanga* and *Ngudjolo* cases also represent the ICC's attempts to maintain good working relations with the Congolese government in order to facilitate ICC investigations during ongoing conflict and to maintain the support of the Court's principal donors in the context of the Congolese elections. This highlights a fundamental dilemma for the ICC, which often operates in fraught political and military environments. However, the ICC's responses to this dilemma so far in the DRC have significantly undermined the Court's legitimacy among affected populations, who had hoped it would finally hold accountable those most responsible for mass atrocities.²¹⁴

Schabas has claimed that that ICC investigations have focused unduly on non-state actors rather than agents of referring states, and asserts that this is because self-referrals entail an 'implied compact with governments'²¹⁵ and hence 'prosecutions of only one side in the conflict seem to be the price of the self-referral strategy' of the Prosecutor.²¹⁶ In addition, he has argued that both the Prosecutor and the Pre-Trial Chamber 'seem to have been a bit impetuous in [the Lubanga] case, perhaps anxious to have a real defendant before the Court.'²¹⁷ He adds that the offered interpretation of the Rome Statute is 'more intrusive with respect to the criminal justice system of states than was ever intended.'²¹⁸ This may also have an impact on many other states, encouraging them to ratify the Rome Statute in such a way that the Court will respect its promise to defer

²¹¹ Jurdi, *International Criminal Law review Op, cit.*, , p. 96.

²¹² *Ibid.*,

²¹³ Clark, *Op, cit.*, p 44.

²¹⁴ *Ibid.*, p.42.

²¹⁵ Schabas, *Journal of International Criminal Justice Op, cit.*, p. 751

²¹⁶ *Ibid.*, p. 753. See also, Schabas, *Criminal Law Forum Op, cit.*, p. 33.

²¹⁷ Schabas, *War Crimes and Human Rights, Op, cit.*, p. 402.

²¹⁸ *Ibid.*,

to national proceedings.²¹⁹ In the *Lubanga* case, the Pre-Trial Chamber did not discuss the crimes for which the accused had been charged in the DRC, despite the fact that he was awaiting trial on charges of genocide and crimes against humanity.²²⁰ Schabas has asserted that in such a context, where an accused person is also being prosecuted by national authorities for serious crimes, the determination of admissibility 'should not be reduced to a mechanistic comparison of charges in the national and the international jurisdiction, in order to see whether a specific crime contemplated by the Rome Statute is being prosecuted directly or even indirectly.'²²¹

The performance of the Prosecutor has been explored in terms of the practical application of the complementarity regime through a set of linked case studies, the Darfur region of Sudan and the DRC. These two contrasting situations have produced different procedural mechanisms in order to satisfy the requirements of Article 17 of the Rome Statute. However, the way in which the Prosecutor executed his international legal and moral obligations has been criticised in both of these situations, although in different ways. Taking into account the necessity of cultural sensitivity in achieving justice, the Prosecutor must be able to reconcile the contradictions between the legal traditions that underpin the world's major cultures and societies.

Since independence, the Sudanese government has continually fluctuated between military and civilian rule. As a result of the government's Islamization programme, Sudan represents an extreme example of an Islamic state under *Shari'a*. The current military government has control over the judiciary and has imposed Islamic law on the criminal justice system and the conduct of the courts. In addition, the government strongly supports *Shari'a* as an important part of its agenda to gain ideological influence in other African states with substantial Muslim populations.

As noted in Chapter Four, since the UNSC referral of the Darfur situation to the Prosecutor, the Sudanese government has taken some action in response to violations of human rights in Darfur in order to demonstrate its ability to handle proceedings domestically. However, the observations of the UNCOI and other international organizations suggested that most cases before the special courts concern ordinary crimes and that the Sudanese authorities failed to process international crimes committed in Darfur. Moreover, concerns over the compatibility of *Shari'a* with

²¹⁹ *Ibid.*,

²²⁰ *Ibid.*,

²²¹ *Ibid.*,

international human rights treaties binding on Sudan, and the lack of a formal definition of international crimes within the Sudanese legal system, seem to indicate a degree of uncertainty about genuine criminal proceedings. In other words, these criminal courts were designed to shield the accused from the ICC. For instance, Kushayb appeared to be under investigation in respect of a number of allegations, but no charges have yet been brought and no trial has been held.

As far as prosecutor's actions are concerned, following the receipt of the referral the ICC Prosecution initiated its own investigation in Darfur and the Sudanese government began to cooperate with the Prosecutor in his investigation of the matter. However, this cooperation ended when the Prosecutor requested that a senior government official be summoned to appear before the Court and the government refused to comply with the arrest warrants. In refusing to cooperate with the Prosecutor, the Sudanese government 'painted the ICC investigation as a Western-inspired plot to punish the regime and perhaps seek a regime change.'²²² In the second case, the Prosecutor requested an arrest warrant against Sudanese President Al-Bashir, which has provoked critical reactions from African and Middle Eastern governments. The Al-Bashir administration accused the Court of 'being part of a neo-colonialist plot against sovereign African and Muslim states.'²²³ The African Union also reacted negatively towards the ICC warrant against Al-Bashir and even African contracting parties to the Rome Statute considered a mass withdrawal from the work of the ICC.²²⁴ Finally, African Union suggested that a special hybrid court consisting of Sudanese and international judges should work alongside traditional justice mechanisms and bring to justice the perpetrators of the serious crimes committed in Darfur. Therefore, they decided not to enforce the ICC arrest warrant and Al-Bashir has since travelled to many countries in the region.

The situation in the DRC has a completely different background and context, illustrating the diversity of prosecutorial strategies and the different ways in which the prosecutor's discretion has been exercised. Given the fact that when the civil war had ended in 2003, the DRC government lacked legitimacy, the Prosecutor encouraged the government to refer the situation to the Court to investigate and try crimes, particularly those committed in the eastern region. As a result of this investigation, in 2006 the Prosecutor charged Thomas Lubanga with conscripting and using child soldiers, despite

²²² Nick Grono, *Future of the World Court in Balance*, YaleGlobal March 7, 2007

²²³ International Criminal Court Cases in Africa: Status and Policy Issues from fpc.state.gov/documents/organization/158489.pdf [accessed on 10th September 2011]

²²⁴ www.asil.org/rio/africanunion_sum09.html [accessed on 10th September 2011]

the fact that people in Ituri expected the ICC to bring charges for his widespread killing of civilians, torture, rape and forced displacements.

As in the Darfur situation, in the brutal conflicts in the DRC both rebel groups and armed forces under the control of the government carried out serious crimes. During the wars, there were serious problems in the Congolese criminal justice system, such as a lack of independence, a lack of personnel, corruption, etc. However, in contrast to the Darfur situation, the Prosecutor has ignored the Congolese government's involvement in the country's worst human rights abuses, including arbitrary executions and raping, robbing or extorting civilians. The Prosecutor has shown little interest in investigating or prosecuting any government officials in the DRC. This demonstrates the absence of an effective code of ethics, although the Prosecutor has claimed that his investigative decisions are based on four principles: independence, impartiality, objectivity, and non-discrimination. In practice, however, the Prosecutor has focused on rebel groups in the DRC, something which has also been seen in other self-referral situations, leading to skepticism toward self-referrals. On the other hand, the Prosecutor has been accused of pursuing regime change in Sudan when seeking arrest warrants for Sudanese government officials. The Prosecutor's functions have been seen as a neocolonial, anti-Muslim assault on Muslim and African sovereignty. The AU Commission Chairperson also 'reiterated assertions that the Hague tribunal is bullying Africa.'²²⁵ Moreover, Islamic states have made it clear in their response to the recent attempt by the ICC officials, late May 2011 in Doha, that many Islamic leaders 'are deeply suspicious of the court's impartiality'.²²⁶

The Prosecutor started criminal proceedings in the DRC with the *Lubanga case*, which saw both achievements and near-disasters for international justice and, after six years of proceedings, is entering its final phase. What is more, the Prosecutor ignored the tension between Western and traditional African ideas of justice, which give importance to social harmony.²²⁷ In fact, the Prosecutor has been overly focused on his own cases instead of aiding domestic efforts based on positive complementarity to achieve justice. In the two case studies, the Prosecutor has not carefully enough

²²⁵ www.sudantribune.com/spip.php?page=imprimable&id_article=35786 [accessed on 10th September 2011]

²²⁶ www.gulfinthemedias.com/index.php?m=banners4&id=564636&lim=51&lang=en&tblpost=2011_06&PHPSESSID=8 [accessed on 10th September 2011]

²²⁷ Sarkin, J. and E. Daly (2004). "Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies." *Columbia Human Rights Law Review* 35: 661-728.

considered the principle of equality and the presumption of innocence, and has not investigated incriminating and exonerating circumstances sufficiently.

Therefore, it is suggested that the Prosecutor's strategies in the selection of cases has had a negative impact on the legitimacy and impartiality of the ICC. This is due to the fact that ICC Prosecution has not been clear on what basis some 'individuals have been the subject of warrants and of particular charges, while those of apparently equal culpability have not.'²²⁸ In addition, it could be suggested that the Prosecutor's actions in opening cases against 26 individuals (13 of these are from the Darfur and DRC situations) in connection with five African countries has painted the ICC as a form of imperialism, prioritizing Africa over other regions.

²²⁸ DeWaal, A. (2008) "Darfur, the Court and Khartoum: The Politics of State Non- Cooperation," in Nicholas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa*, London: The Royal Africa Society.

Conclusion

‘The greatest problem for the human species, the solution of which nature compels him to seek, is that of attaining a civil society which can administer justice universally.’

Immanuel Kant

Prior to the establishment of the International Criminal Court, the international community could act through the UN Security Council to create *ad hoc* international tribunals when states failed to fulfil their duties to either extradite or prosecute those responsible for international crimes. However, the problem of selectivity and the delivery of justice dependent on the will of the Security Council¹ paved the way for a permanent international criminal court, focused on the rights and obligations of individuals² and with an independent Prosecutor to investigate and prosecute alleged perpetrators of serious international crimes based on the complementarity regime. The uniqueness of the ICC, as Brown has noted, arises because it is an independent Court with global jurisdiction over crimes of concern to the entire international community, and has the power to prosecute those accused of violating fundamental international crimes regardless of their nationality.³ As Maget has suggested, the Rome Statute ‘might well one day precipitate a revolution of Westphalian proportions which, although it may not do away with the state system, would certainly rest its legitimacy on an entirely different footing’.⁴

My research set out to explore the moral and legal legitimacy of the prosecutorial decision-making process over whether to intervene when national jurisdictions are unwilling or unable to investigate and prosecute international crimes. Based upon a Kantian interpretation of the Rome Statute, setting up a judicial system that is complementary to the national jurisdictions and giving the power to the Prosecutor to intervene when desired, this process ‘promises to encourage evolutionary change as much as it threatens to transcend [the society of states]’.⁵ The ICC as a judicial institution is given a mandate to intervene in situations where heinous crimes are taking

¹ Ralph, *Review of International Studies*, *Op. cit.*, p. 28.

² Greenwalt, *International Law and Politics*, *Op. cit.*, p. 584.

³ Brown, *Yale Journal of International Law*, *Op. cit.*, p. 386.

⁴ Mégret, *European Journal of International Law*, *Op. cit.*, p. 258.

⁵ Ralph, *Op. cit.*, p. 43

place. The Court discharges its mandate through the Prosecutor via his or her preliminary examinations and investigations, which may cover a broad range of situations.⁶ As Olasolo has pointed out, the ICC's well-timed intervention can play an important role in exercising the international community's responsibility.⁷ In Chapter Two I noted that the ICC is an example of a global institution that is designed to prosecute and punish violations of cosmopolitan morality.⁸ The Court aims to secure justice for individuals⁹ and the intent of the drafters was to create a court that is acceptable to the nations of the world, since every country has a different policy and ideology to govern its criminal justice system.¹⁰ These issues are explored in Chapter Two from two possible ethical perspectives: that of Kant's moral philosophy and that of Islamic law. I argued in Chapters Two and Three that moral obligations and political responsibilities do not end at national borders¹¹ and that the Prosecutor's moral duty to intervene in national jurisdictions pursuant to the complementarity regime is a crucial issue. In addition, as Roach has asserted, the cosmopolitan intent of the Court needs to be considered as key to its moral progress and such progress requires consistency in the use of Prosecutorial discretion.¹² As such, one of the most important roles of the complementarity regime of the Rome Statute is to regulate the relationship between the Court and national jurisdictions in order to reduce the tension between the demands of states and those of world society.¹³ The ICC must therefore always give priority to the exercise of national jurisdiction. However, as Ross Cranston has observed, 'states with well-developed criminal justice systems that have the ability and the capacity to investigate and prosecute international crimes would benefit more from this.'¹⁴ That is

⁶ Olasolo (2009), *The Role of the ICC in Preventing Atrocity Crimes through Timely Intervention* from www.unifr.ch/ddp1/derechopenal/articulos/a_20101207_02.pdf [accessed on 10th September 2011]

⁷ *Ibid.*,

⁸ Hayden, *Theoria: A Journal of Social and Political Theory*, *Op, cit*

⁹ Gastil, 2010, *deliberation and ICC Global justice*, p. 77. For a discussion of this criticism, see Catherine Lu, "The ICC as an Institution of Moral Regeneration," in Michael Milde, Richard Vernon, and Joanna Harrington, eds., *Bringing Power to Justice? The Prospects of the International Criminal Court* (Montreal: McGill-Queen's University Press, 2006), p. 195.

¹⁰ Karadsheh, *Dickinson Journal of International Law*, *Op, cit.*,

¹¹ Voice, *Theoria: A Journal of Social and Political Theory*, *Op, cit.*,

¹² Roach, *Review of International Studies*, *Op, cit.*, p. 32.

¹³ *Ibid.*, p. 39.

¹⁴ See comments of Ross Cranston, The Solicitor-General, on the UK International Criminal Law Bill at the House of Commons, from www.parliament.the-stationery-office.com/pa/cm200001/cmstand/d/st010503/pm/10503s04.htm [accessed on 10th September 2011]

to say, as Michael Akehurst has also noted, that ‘third World states often feel that international law sacrifices their interests to the interests of Western states.’¹⁵

I applied Kantian moral philosophy as a mode of thinking in order to explore a potentially legitimate authority for the complementarity principle of the Court. The Court should focus on individual responsibility¹⁶ and deliver justice impartially, on behalf of the international community, for serious crimes committed against humanity.¹⁷ As has been noted in Chapter Two, from a Kantian point of view, ‘a violation of rights in one place on earth is felt in all,’¹⁸ with the result that universal law (moral cosmopolitanism) ‘must form a supplement to the unwritten code of both state law and international law if the public rights of human beings are to be secured.’¹⁹ In this sense, states are no longer the privileged agent, but rather individuals are privileged ‘through the inception of complementary sovereignty in the emerging global society.’²⁰ Therefore, the principles of international justice should be compatible with the principles of internal justice based upon the Kantian categorical imperative,²¹ moral principles that need to be recognized universally. Kantian cosmopolitan law provides an appropriate setting within which to regulate global interactions, doing so in line with reason and the requirement of a civil condition of global public right.²² As such, I argued that a new form of sovereignty has emerged and the ICC is an example of the changing nature of sovereignty from one agent to another based upon the principle of complementarity.²³ Furthermore, the chapter noted that this would be the result of ‘a slow-going evolutionary process’ for the purpose of the transformation of all kinds of power into one generally accepted or at least acceptable legal order.²⁴ Thus, for Kant, there should be a cosmopolitan legal system in order to focus on the rightful condition of human beings regardless of their national origin or state citizenship.²⁵ This leads, in a Kantian analysis, to perpetual peace which can be secured through a consistent

¹⁵ Akehurst, M. (1987) *A Modern Introduction to International Law*, 6th ed. London: Unwin Hyman, p. 21.

¹⁶ Megret, *Op, cit.*,

¹⁷ Cassese, *Op, cit.*,

¹⁸ Tinnevelt, *Op, cit.*,

¹⁹ Dyzenhaaus, *The Unity of Public Law*, *Op, cit.*, p. 431.

²⁰ Leonard, *Op, cit.*,

²¹ Teson, *Op, cit.*,

²² Brown, *Op, cit.*,

²³ Leonard, *Op, cit.*,

²⁴ Lienemann, *Op, cit.*,

²⁵ Brown, *Op, cit.*,

commitment to universal law²⁶ and through a republican form of world government. For Kant, a democratic world government should be dedicated to ‘peace, justice, and well-being for all people everywhere.’²⁷

In addition to the Kantian approach, I also take an Islamic law perspective in my research in order to explore the universal morality asserted by the ICC. As I wrote in Chapter Two, during the twentieth century a greater sense of a morality shared by the entire international community was observable both in the Islamic world, based upon classical Islamic knowledge, and in non-Muslim countries in attitudes towards cruel and inhumane treatments. Justice is a core value of Islamic law and an aspiration of all Muslims, having its roots in the principles and dictates of the primary sources of *Shari’a* (*Qur’an* and *Sunnah*).²⁸ In general, the primacy of ethics over metaphysics is shared by both the Islamic and Western Kantian moral approaches; although in Islamic philosophy ethics are religious, whereas with Kant they are based on rationality.²⁹ Highlighting this focal point, Islamic perspectives are explored in Chapter Two to analyse the compatibility of the values and principles of *Shari’a* with the existing norms of international criminal law. According to the Islamic philosophy of law, all human beings are subjects of divine law³⁰ and the individual is considered as a member of a community of believers (*ummah*) regardless of the territory they reside in.³¹ Defenders of Islamic law have claimed that the world wide application of the *Shari’a* would result in universal freedom and justice,³² based on the will of God rather than the will of the moral majority or the will of a human lawmaker.³³

I concluded that although there is a similarity in substance with Western human rights norms which are aimed at the establishment of universal justice, there are some difficulties that make the Islamic approach unlikely to provide justice to victims (on the Western idea of justice) unless global legal norms are interpreted with a liberal understanding of the non-Western norms of Islam. As I argued in Chapter Two, there are different categories of crimes in classic *Shari’a* criminal law and the range of punishments set out in the Islamic penal code differ from those under Western criminal law. In addition, different forms of discrimination can be found in the penal code of

²⁶ *Ibid.*,

²⁷ Pojman, *Op, cit.*,

²⁸ Maget, *Op, cit.*, p. 480.

²⁹ Abdullah, *Op, cit.*, p. 4.

³⁰ Malekian, *The Concept of Islamic International Criminal Law, Op, cit.* p. 7.

³¹ Tibi, *Op, cit.*, p. 289.

³² Schriimacher, *Op, cit.*,

³³ Susselan, *Op, cit.*,

Islamic countries, with men and women treated differently with regard to evidence and blood money. These rules are now included in most recent Islamic penal codes. For instance, one situation which puts women in an inferior legal position is that the pregnancy of an unmarried woman is regarded as conclusive proof of unlawful sexual intercourse. This approach has been adopted in Sudan, and if women want to report the incident to authorities, such a report constitutes a confession and they will face strict Islamic punishment.³⁴ Furthermore, under classic Islamic criminal law, Muslims and non-Muslims do not always have the same rights. Here, different treatment exists in the fields of evidence, the law of retaliation and blood money, and with regard to the application of certain fixed penalties. As an example, under classical Islamic law the testimonies of non-Muslim witnesses are not admissible in *Shari'a* courts.³⁵

Most Islamic countries contributed to the negotiation process of the Rome Statute and demonstrated their interest in the creation of an international criminal court.³⁶ However, the low level of ratification of the Rome Statute by Islamic countries shows that the practice of the Court has enjoyed little support from Islamic states, particularly in Africa and the Middle East. By taking an Islamic approach in analysing the moral legitimacy of the ICC intervention in national jurisdictions, I attempted to evaluate Islamic states' concerns with respect to the global system of justice. Some Islamic states have complained that their sovereignty has not been protected by the ICC, and that Western states have used the principle of complementarity to preserve their own exercise of jurisdiction.³⁷

Above all, the main concern of Islamic states is that the ICC focuses only on them (Islamic states), or on less developed countries. In fact, as Maged has noted, Islamic states believe that Western countries apply double standards and that decisions to resort to international criminal justice are only made against weak and developing countries,³⁸ while they '[turn] a blind eye to the violations of human rights norms committed by friendly nations.'³⁹ Islamic officials' fears are mainly based on allegations of selectivity of cases and political interference from the Security Council or other major powers, leading to mistrust toward the current system of international criminal justice.⁴⁰

³⁴ Peters, *Op, cit.*, p. 177

³⁵ *Ibid.*, p. 178

³⁶ Roach, *Op, cit.*, p. 139, See also Maged, *Op, cit.*, p. 478.

³⁷ Maged, *Op, cit.* p. 486.

³⁸ *Ibid.*, p. 493.

³⁹ Peters, *Op, cit.*, p. 182.

⁴⁰ Maged, *Op, cit.*, p. 478.

The Prosecutor, as a primary guardian of the complementarity regime of the ICC in exercising his or her power to initiate investigations and prosecutions, should aim to improve trust and encourage states to pursue cases. Complementarity, as Perrin has observed, seems ‘intellectually [a] simple concept . . . [however it] masks deep philosophical and political difficulties’⁴¹ that the Prosecutor must overcome to guide the ICC.⁴² As discussed in Chapters Three and Seven, in 2006 the Prosecutor adopted a positive approach to complementarity as one of the essential principles of the Prosecutorial strategy,⁴³ seeking to encourage ‘genuine national proceedings where possible; [to rely] on national and international networks; and [to participate] in a system of international cooperation.’⁴⁴ This positive approach aimed to promote national authorities by encouraging them to comply with their duties to investigate and prosecute those crimes which had already occurred.⁴⁵ However, as Carsten has observed, ‘the nuances and limits of a ‘positive’ reading of complementarity are still unclear’⁴⁶ and it has become ‘a paper exercise’.⁴⁷ I argued in Chapter Seven that the practice of Prosecutorial policy in self-referral situations has led to a number of negative effects. In the DRC situation there has been a lack of a strategy for complementarity programming which could build domestic capacity, tap into existing rule-of-law programming, and deliver justice for atrocities.⁴⁸ In Chapter Six I examined the fact that, in the Ituri cases, the result of the ICC decisions on the basis of complementarity has been widespread disappointment among judicial actors in Ituri. Despite the major legal reforms of the last seven years, they have been banned from prosecuting major atrocity suspects in local courtrooms.⁴⁹ The Congolese judicial system, at least in certain areas of the DRC (including Kinshasa) was ‘able and willing’ to pursue cases;⁵⁰

⁴¹ Laplanted, *Op, cit.* p. 642

⁴² *Ibid.*,

⁴³ ICC-Office of the Prosecutor, *Report on Prosecutorial Strategy* (2006).
www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf

⁴⁴ ICC-Office of the Prosecutor, *Report on Prosecutorial Strategy* (2006). page 5. www.icc-cpi.int

⁴⁵ Olasolo, *Op, cit.*,

⁴⁶ Laplanted, *Op, cit.*, p. 647.

⁴⁷ Bergsmo, *Op, cit.*, p. 796.

⁴⁸ Putting complementarity in practice, from
www.soros.org/initiatives/justice/articles_publications/publications/complementarity-in-practice-20110119 [accessed on 10th September 2011]

⁴⁹ See Chapter six for further details. Also, see Phil Clark in *Chasing Cases: The International Criminal Court and the Politics of State Referral in the Democratic Republic of Congo and Uganda* Cambridge, Cambridge University Press.

⁵⁰ Jurdi, *International Criminal Law Review* , *Op, cit.*, p.94

however, the Prosecutor indicated that the Ituri region of the DRC was his first priority to initiate investigation and prosecution.⁵¹

As Jurdi has asserted, the ICC could have made a more effective contribution to the Congolese judicial system if it had encouraged the judiciary to take primary responsibility, with the ICC's function being to monitor the trial for the degree of conformity with human rights standards.⁵² However, the ICC has pursued its own investigations instead of promoting or supporting domestic cases in the DRC.⁵³ Moreover, according to Clark, the Court has focused on easier targets in the form of Lubanga, Germain Katanga and Mathieu Ngudjolo.⁵⁴ I analyzed these cases in Chapter Seven and highlighted the fact that two of the five individuals for whom the prosecution has sought arrest warrants in the situation in the DRC to date – Thomas Lubanga Dyilo and Germain Katanga – were the subject of domestic proceedings at the time that the ICC issued the arrest warrant. There is no evidence that the Court took these cases over due to the types of scenario described in the prosecution's policy paper.⁵⁵ More importantly, the DRC authorities had issued an arrest warrant for Lubanga in 2005 charging him with the crime of genocide, crimes against humanity and the ordinary crimes of murder and illegal detention.⁵⁶ However, in 2006 the Prosecutor charged him with the recruitment and use of child soldiers to participate actively in hostilities,⁵⁷ rather than the more serious crimes which were being prosecuted by the Congolese justice system. I critically discussed this instance of prosecutorial discretion in Chapter Seven, arguing that it has affected the legitimacy and credibility of the ICC in the DRC, both for the victims and in terms of ending the culture of impunity in this situation.

Although positive complementarity was announced as a pragmatic approach to the division of labour and burden sharing, the practice of this strategy has carried negative effects, especially undermining the confidence of domestic judiciaries.⁵⁸ In addition, Schabas has asserted that ICC investigations have focused unduly on non-state actors

⁵¹ Mollel, A. (2009). A Human Rights Approach to Conflict Prevention, Management and Resolution in the Africa's Great Lakes Region: A Focus on the DRC Conflict.

⁵² Jurdi, *Op, cit.*, p. 95

⁵³ Baylis, *Op, cit.*, p. 33.

⁵⁴ Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda", *Op, cit.*, p 44.

⁵⁵ Sacouto, *Op, cit.*, p. 372

⁵⁶ *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06) *Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, Pre-Trial Chamber* (10 February 2006) par 33.

⁵⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Under Seal Decision of the Prosecutor's Application for a Warrant of Arrest, Article 58, Annex 1, Case No. ICC-01/04-01/06-8, Pre-Trial Chamber I, 10 February 2006. para 38-39

⁵⁸ Sacouta, *Op, cit.*, p. 374

rather than agents of referring states,⁵⁹ and hence ‘prosecutions of only one side in the conflict seem to be the price of the self-referral strategy’ of the Prosecutor.⁶⁰ According to Greenwalt, the selection prosecution in the ICC needs focus only on the select group of suspects who merit the attention of the ICC.⁶¹ As a result, the Prosecutor has been seen as biased and politically motivated in his selection of situations and cases.⁶² This conflicts with the principle that there must be an impartial, reliable, and depoliticized process for identifying the most important cases of international concern, evaluating the action of national justice systems with regard to those cases, and triggering the jurisdiction of the ICC when it is truly necessary.⁶³ In this sense, the intervention of the Prosecutor in domestic jurisdictions, in accordance with the complementarity regime, should be exceptional and should only occur in situations where there is a failure of national authorities to conduct investigations and prosecutions, or where they claim to do so but in reality are unwilling or unable to genuinely carry out proceedings.⁶⁴

The first Review Conference on the Rome Statute, that took place in Kampala, Uganda, from 31 May to 11 June 2010, provided an opportunity to reflect on some key aspects of the Court’s regimes, such as complementarity. The complementarity regime was an important area of discussion because of the uniqueness of the ICC, which places a primary obligation on states to investigate and prosecute international crimes.⁶⁵ The Assembly of State Parties (ASP) also noted in its report that focusing on this regime is crucial, as ‘it is imperative to further the fight against impunity both at the international and at the national level to ensure that any impunity gaps are closed.’⁶⁶ A significant shift in the meaning of the term positive complementarity was proposed at the Conference, contrasting with that used by the Prosecutor, to the involvement of the Court in national proceedings. Instead, the emphasis was placed on strengthening national capacity and the involvement of states, international organizations, and civil society in capacity building activities,⁶⁷ enabling the state to deal with other perpetrators and victims while the Court is investigating and prosecuting those bearing the greatest

⁵⁹ Schabas, *Journal of International Criminal Justice* *Op. cit.*, p. 751

⁶⁰ *Ibid.*, p. 753.

⁶¹ Greenwalt, *Op. cit.*, p. 627.

⁶² Glasius, M. (2008), What is global justice and who is it for? The ICC’s first five years, http://www.opendemocracy.net/article/globalisation/international_justice/the-iccs-first-five-years

⁶³ Brown, *Op. cit.*, p. 386.

⁶⁴ Bergsmo, *Op. cit.*, p. 796.

⁶⁵ *Ibid.*, p. 793.

⁶⁶ Assembly of States Parties (ASP), Report of the Bureau on Stocktaking: Complementarity – Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap, para 3.

⁶⁷ Recommendation of the ASP, p.10.

responsibility for the most serious crimes.⁶⁸ It was emphasized that 'the role of the Court in positive complementarity should be limited so as to ensure that the construction of national capacity would not interfere with the ICC's judicial function or divert funds from investigations and prosecutions being carried out by the Court.'⁶⁹ Furthermore, it was stated that the judicial and prosecutorial independence of the Court must be taken into consideration in all situations, and actions under positive complementarity must not be misused to avoid justice.⁷⁰ Finally, the application of positive complementarity can be useful not only in practice but also through its 'catalytic effect'.⁷¹

The Prosecutor, based on his or her discretion, clearly has to make critical decisions such as in the selection of situations and cases.⁷² As Neresko has written, '... a wrong decision to prosecute, as well as a wrong decision not to prosecute, has the potential to undermine public confidence in the criminal process.'⁷³ I detailed criticisms of the exercise of Prosecutorial discretion in the main body of my thesis by examining two different situations before the Court, the DRC and Darfur. As Stahn has observed, 'the Prosecutor made himself vulnerable to criticism by using quantitative assessments of the crime scale or comparisons between groups or individual perpetrators to justify choices of selection'.⁷⁴ Other criticisms include the suggestion that the Prosecutorial decision-making process has been subject to political guidance, something not helped by the fact that the Prosecutor does not consider for prosecution all admissible situations that fall within the jurisdiction of the Court.⁷⁵ Chapters Five and Seven showed that, in the context of a self-referral or Security Council referral, it is crucial 'to demonstrate objectivity in the investigation and selection of cases, in order to avoid the impression that ICC prosecutions appear politically motivated.'⁷⁶

Like the DRC, the referral of the Darfur situation to the Prosecutor - the first Security Council referral - has provided another good example of the 'shadow side of

⁶⁸ Report of the Bureau on Stocktaking, *Op, cit.*,

⁶⁹ Informal event on complementarity, organized by the Coalition for the International Criminal Court (CICC) in advance of the plenary session, held on 1 June 2010.

⁷⁰ Report of the Bureau on Stocktaking, *Op, cit.*, para 25.

⁷¹ See generally, J .K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), pp. 309-339.

⁷² Neresko, *Op, cit.*, p. 125.

⁷³ *Ibid.*,

⁷⁴ Stahn, *Criminal Law Forum*, *Op, cit.*, p. 8.

⁷⁵ Schabas, W. A. (2010). "Victor's Justice: Selecting 'Situations' at the International Criminal Court." *The John Marshall Law Review* **43**: 535- 552. p.549.

⁷⁶ Stahn, *Op, cit.*,

complementarity’;⁷⁷ the exercise of Prosecutorial decision in this situation was examined in Chapters Four and Five. I analyzed the complexity of the Darfur crisis and the impact of the Islamization process in the Sudanese criminal justice system. I highlighted the fact that in the Sudanese legal system, political and legal processes are woven together in such a way that the courts are influenced by political power. The adequacy of the Sudanese criminal justice system in relation to the Darfur situation, and in the context of the complementarity regime, was the main theme of this case study. I argued that national authorities, in response to grave human rights breaches that have occurred in Darfur, took some actions to promote the national proceedings, such as the establishment of Sudanese special courts.⁷⁸ In particular, after the announcement of the initiation of the investigation by the Prosecutor, they created the new Special Criminal Court on the Event in Darfur (SCCED) to demonstrate the government’s ability to pursue cases domestically.⁷⁹

Although Sudan is party to some Human Rights treaties such as the ICCPR and the Genocide Convention, and has signed the Rome Statute, Sudanese criminal law needs to be reformed to ensure human rights protection, particularly for the most vulnerable members of society, and in order to bring to justice the alleged perpetrators of the atrocities in Darfur.⁸⁰ Many serious gaps remain between international standards and Sudan’s laws governing criminal matters and procedure, and ‘some gaps in due process are cited as cause for political grievances.’⁸¹ Importantly, Sudan’s legal system and the compatibility between Islamic law and human rights law may raise particular controversies.⁸² For instance, the Criminal Act of 1991 lays down many Islamic penalties which are inconsistent with the provisions of relevant international human rights treaties to which the Sudan is party. Such penalties include limb amputations for theft or robbery, public flogging for consumption or possession of alcohol, stoning to death for adultery, and the death penalty for apostasy and waging war against the state.⁸³

The findings of different international and national bodies have demonstrated that the Sudanese government continues to exercise its political will over the justice system. The local mechanisms in Darfur have failed to produce any transparent findings and charges

⁷⁷ Heller, *Criminal Law Forum*, *Op, cit*,

⁷⁸ Generally see UNCOI Report

⁷⁹ *Ibid.*,

⁸⁰ Babiker, *Op, cit.*, p. 195.

⁸¹ Confidential source.

⁸² Babiker, *Op, cit.*, p. 250.

⁸³ *Ibid.*,

brought before the special Court did not reflect international crimes.⁸⁴ For instance, Ali Kushyab, who is the subject of an outstanding ICC arrest warrant, has been charged with criminal offences but these have not yet come before a court.⁸⁵ The importance of the Darfur situation is that it represents a challenge in the context of the complementarity principle to determine whether national proceedings were initiated for the ‘purposes of shielding the person from criminal responsibility,’ or were not conducted ‘independently or impartially.’⁸⁶ In the case of *the Prosecutor v. Thomas Lubanga Dyilo*, the Court decided that in order for a case to be inadmissible before the ICC under the complementarity principle as a result of concurrent national court proceedings, these proceedings must ‘encompass both the person and the conduct which is the subject of the case before the Court.’⁸⁷ As I observed in Chapter Four, the SCCED completed thirteen cases, all of which were against low-level suspects, none of whom were charged with crimes of the same order as those in the Prosecutor’s Application against Harun or Kushaby.⁸⁸

As I discussed in Chapters Three and Five, bringing criminals to justice before any court requires a complex body of procedural law and the Prosecutor must address the issue of how to detect national failure in order to proceed, considering at what stage, how and by whom, the admissibility and prosecutorial discretion are to be settled.⁸⁹ In the Darfur situation, I explored the Prosecutorial decision-making process on the admissibility assessment of the situation and cases. In this situation, although the Prosecution highlighted that admissibility assessment is an ongoing process that relates to the specific cases to be prosecuted by the Court, it was clear that the continuing insecurities in Darfur represented a serious obstacle to the conduct of effective investigation into alleged crimes even by national judicial bodies seeking to bring to justice those responsible.⁹⁰ Therefore, investigation activities by the ICC have taken place outside Sudan in attempting to identify those individuals with greatest responsibility for the most serious crimes in Darfur.⁹¹ As the Prosecutor should not

⁸⁴ ICJ and AUDP reports, *Op. cit.*,

⁸⁵ AUPD report, *Op. cit.*, para. 223.

⁸⁶ The Rome Statute of the ICC, Articles 17 (2)(c)

⁸⁷ Prosecutor’s Application, Prosecutor’s Application under Article 58(7), ICC-02/05-56 (Feb. 27, 2007), from www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf. para. 256.

⁸⁸ *Ibid.*,

⁸⁹ *Ibid.*,

⁹⁰ Second report of the Prosecutor to the UNSC, *Op. cit.*, p. 6.

⁹¹ *Ibid.*, p. 4.

make a decision for the purposes of satisfying popular opinion,⁹² the sensible approach is to clarify the criteria on the basis of which inability and unwillingness to prosecute should be determined.⁹³ Based on my observations and analysis in the field, it is not clear upon what criteria the Prosecutor's discretion is being based. As Danner has suggested, the articulation of public prosecutorial guidelines can assist the Prosecutor in establishing the legitimacy and transparency of his or her policies and discretionary decision-making.⁹⁴ However, inconsistency of prosecutorial policy, based only on the governing principles of case strategy, challenges the legitimacy of prosecutorial discretion and ultimately the work of the ICC.⁹⁵ The Darfur cases, particularly the *Al-Bashir* case, pose challenges for the ICC in relation to the efficacy of the prosecutions of international crimes, which could undermine the legitimacy of the ICC.⁹⁶ The Prosecutor was supposed to deal with legal cases, and as Kastner has pointed out, although political considerations must not be disregarded, rushing into indictments is not advisable. The question of the right timing in order to exercise a genuine threat while minimizing potential political risks will always be crucial.⁹⁷ Otherwise, an arrest warrant issued for a sitting head of state (such as Al-Bashir) can be assumed to be 'a demand for regime-change'⁹⁸ or, as Peskin has asserted, the Prosecutor's move can be seen as a strategic attempt to persuade Al-Bashir to hand over the suspects, something that is 'emblematic of the Prosecutor's propensity to play the politics of conciliation with a defiant state.'⁹⁹ According to Rozenberg, targeting Al-Bashir was intended to demonstrate the ICC's willingness to tackle difficult cases of high-ranking officials and to reestablish some of the legitimacy that the Court lost in Uganda and the DRC.¹⁰⁰

We can see, therefore, that impartial and effective investigation should be guaranteed and the judicial system should be independent in its work. The exercise of discretionary power by the Prosecutor must be based on a set of criteria such as transparency, independence, and freedom from political interference in prosecutorial policy. Ethical principles should be used to formulate a comprehensive policy to guide the Prosecutor

⁹² Stigen, *Op, cit.*, p. 411.

⁹³ Elagab, *Op, cit.*,

⁹⁴ Danner, *Op, cit.*,

⁹⁵ Cayley, *Op, cit.*,

⁹⁶ Oette, *Op, cit.*,

⁹⁷ Kastner, *Op, cit.*,

⁹⁸ Danner, *Op, cit.*,

⁹⁹ Peskin, *Op, cit.*,

¹⁰⁰ Rozenberg, www.telegraph.co.uk/news/newstoppers/lawreports/joshuarozenberg/2700862/Why-the-worlds-most-powerful-prosecutor-should-resign-Part-3.html [accessed on 10th September 2011]

in determining which situations to investigate and which cases to prosecute. These ethical principles are particularly relevant to the exercise of prosecutorial discretion 'when the ordinary meaning of statutory provisions pertaining to the Prosecutor's functions is indeterminate'.¹⁰¹ Lepard has suggested that fundamental ethical principles are logically related to 'a pre-eminent ethical principle of unity in diversity'. The principle of unity in diversity maintains that all human beings should seek to be unified as members of one human family while respecting one another's right to diversity of language, religion, and culture, and individual freedom of thought, conscience, belief, and expression.¹⁰²

The ICC as a global Court should also set national standards in order to develop appropriate domestic criminal justice for adjudicating crimes against humanity, genocide, and war crimes. This is a consequence of the principle of complementarity and the fact that it allows the ICC to proceed with a case only when a state is not genuinely doing so itself.¹⁰³ Given that there is considerable diversity among states and their conceptions of justice, the ICC as a global institution would be wise to respect these differences to the fullest extent compatible with its mission. This respect is what underlies the 'margin of appreciation' that the European Court of Human Rights provides to its constituent states in judging their disparate human rights practices.¹⁰⁴ Blumenson writes, 'the ICC cannot expect to escape severe constraints and complex moral dilemmas, but it can expect to be an integral part of the movement towards international justice'.¹⁰⁵ In particular, the Prosecutor should endeavour to explain his or her decisions by reference to ethics, and not solely on the basis of juridical criteria, which, as we have seen, the Rome Statute often leaves vague.¹⁰⁶ As Goodale and Clarke have stated, simply holding a criminal trial does not guarantee the 'societal shift of perceptions and consciousness that must accompany the building of a culture of rights'.¹⁰⁷ Moreover, creating a global commitment to combating impunity entails the 'construction of a complete worldview' that includes the evolution of subjective meaning.¹⁰⁸

¹⁰¹ Dana, S. (2010). "Law, Justice & Politics: A Reckoning of the International Criminal Court " The John Marshall Law Review **43**: xxiii-xxxvi.

¹⁰² Lepard, *Op, cit.*, p. 553.

¹⁰³ Blumenson, *Op, cit.*, 805.

¹⁰⁴ *Ibid.*, 854.

¹⁰⁵ *Ibid.*, 874.

¹⁰⁶ Lepard, *Op, cit.*, p. 567

¹⁰⁷ *Ibid.*, p. 678.

¹⁰⁸ *Ibid.*, p. 679.

An understanding of cultural diversity would have a great impact on the efficiency of the ICC as an international criminal tribunal and it would also affect those who are supposed to benefit from the Court, i.e. actual participants (accused, witnesses and victims) and affected populations.¹⁰⁹ Thereafter, national courts could offer more appropriate sites of adjudication.¹¹⁰ A shared understanding of justice enables the national judicial authorities to deliberate and to resolve disputes involving citizens in a way that is reasonable in the eyes of all citizens. From this point of view, the adjudication of disputes among citizens in the national courts serves to secure legitimacy in judgment in the eyes of the disputing parties and others whose rights or interests are affected.¹¹¹

Given the fact that the ICC will be able to deal with only a few situations at a time - and only a few cases within those situations - the Court should consider the development and action of effective national justice. The Rome Statute's complementarity provisions are designed to assure a decentralized system responsive to municipal norms and interests by limiting ICC jurisdiction to cases where the state has failed to prosecute.¹¹² Laplanted has suggested this be implemented in the form of the admissibility examination set out in Articles 17-20 of the Rome Statute. However, this leads to two notable consequences that could undermine the wider effectiveness of the ICC in attaining its broader mission. First, the ICC will remain completely removed from many local efforts to harmonize national systems with international norms. At the same time, the ICC will be removed from many important domestic criminal proceedings despite the fact that these trials involve a significant number of the world's worst offenders, whose trials constitute important contributions to international jurisprudence and directly impact upon the ICC's own work to assure uniformity in prosecutions of international crimes.¹¹³ Secondly, this strict interpretation of the ICC's mandate also means that it will miss the opportunity to offer the subtler forms of international support that can often create a 'moral suasion'.¹¹⁴

The power of complementarity should be understood to be much more than a simple last-resort court for failed domestic prosecutions.¹¹⁵ The Court can take on a monitoring

¹⁰⁹ Almqvist, *Op, cit.*, p. 745.

¹¹⁰ *Ibid.*, p. 747.

¹¹¹ *Ibid.*, p.760.

¹¹² Blumenson, *Op, cit.*, p. 856.

¹¹³ Laplanted, *Op, cit.*, p. 637

¹¹⁴ *Ibid.*, p. 638.

¹¹⁵ *Ibid.*, p.676.

function, with states parties themselves undertaking criminal investigations, by providing outreach, technical assistance, and guidance¹¹⁶ to assure the more effective and efficient functioning of national criminal prosecution. Such strategies could help 'shift the burden of prosecution back to states,'¹¹⁷ whilst the Prosecutor 'must give significant weight to the ethical principle that crimes morally must be punished in some fashion and that violators must be held to account'.¹¹⁸ In fact, 'a less hierarchical international criminal justice system that relies on national governments is likely to be better informed by diverse perspectives, more acceptable to local populations, and more effective in accomplishing its ultimate goals.'¹¹⁹ This is in line with the horizontal power of the ICC and decentralizing its power to make it acceptable and justifiable to all nations.

Akhavan has suggested that the success of the ICC is inherently linked to the exercise of national jurisdiction and that positive complementarity is an incentive for domestic trials, although it may not be enough.¹²⁰ As Bassiouni has claimed, 'the experience of the ICC thus far illustrates an international court requires an exorbitant economic and administration infrastructure.'¹²¹ Therefore, a shift from supranational criminal courts to national courts will be more successful in prosecuting the guilty. The transformation of international criminal justice will essentially be an incremental evolution of complementarity, an evolution that will require national criminal justice to assume the roles and functions of that complementarity.¹²²

¹¹⁶ *Ibid.*, p. 637.

¹¹⁷ *Ibid.*, p. 647.,

¹¹⁸ Lepard, *Op, cit.*, p. 567.

¹¹⁹ Turner, J. I. (2005). "Nationalizing International Criminal Law." Stanford Journal of International Law **41**: 1-51 p. 1.

¹²⁰ Akhavan, *Journal of International Criminal Justice*, *Op, cit.*, p. 1266.

¹²¹ Bassiouni , www.insidejustice.com/law/index.php/intl/2010/03/31/p256

¹²² *Ibid.*,

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APPENDIX

Methodology

Socio-legal approach:

This doctoral thesis employed socio-legal approach in order to explore the operation of the ICC in two different situations, the DRC and the Darfur region of Sudan. By using the socio-legal approach, this thesis attempted to examine the actual practice of the legal procedures that are used within the Court with regard to the complementarity regime. The socio-legal perspective covers the social and political dimensions of human activity in different situations and is concerned with the analysis of social phenomena with an emphasis on the exercise of power.¹ The need to study what is actually taking place in practice rather than focus on the law in the books led me to adopt this approach to my research. This type of research investigates law in action and the actions of legal officials within different circumstances, which are simply beyond the scope of doctrinal analysis.² In other words, the socio-legal approach examines the social and political considerations which influence the operation of procedures. It investigates law in society and gathers data wherever it is appropriate to the problem, rather than focusing on case laws and statutes.³ In addition, socio-legal research focuses on ‘the various cultural, economic and political consequences of the selective enforcement of different laws by officials, including the basis on which discretion is being exercised in practice.’⁴

Choice of methods:

The qualitative method of conducting research is one of the major techniques in the socio-legal approach to research. The reason for choosing a qualitative research method was to explore and build up an understanding of the complex factors that affect legal proceedings. The flexibility of qualitative methods can develop further insights as they emerge through work in the field.⁵ As Creswell has noted, the purpose of qualitative

¹ Jupp, V. and P. Davies (2000). Doing Criminological Research. London, Sage. p. 173.

² Salter, M. and J. Mason (2007). Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research. Harlow, Pearson Education Limited. p. 126.

³ Thomas, P. A., Ed. (1997). Socio-Legal Studies. Socio-Legal Studies. Aldershot, Dartmouth Publishing Company. p. 99.

⁴ Salter, *Op. cit.*, p. 152.

⁵ Sieber, J. E., Ed. (1982). The Ethics of Social Research: Surveys and Experiments. New York, Springer-Verlag. p. 182.

research is 'to understand a particular social situation, event, role, group or intention'.⁶ A variety of methods of data collection can be used to conduct this style of research. In-depth interviews and participant observation are the two most commonly used.⁷ In this thesis, these methods were used in combination with other data gathering strategies, such as: analysis of published statements by professionals, the reports of international and national organizations, and internal professional conduct regulations. Documents and secondary sources provide an initial overview of the issue under examination, whilst interviews with key players can produce new data that will advance the research process as well as providing a better understanding of the particular issue.⁸

Participant observation and interview:

Participant observation, as Burgess has declared, allows the researcher to work with individuals in their natural settings.⁹ By using this strategy, I could join in with everyday activities and talk informally with group members, building mutual trust and gaining a deeper knowledge and understanding in my research topic than an outsider would be able to. Field research is a learning situation and enables the researcher to study actions and activities as they occur in real situations.¹⁰ Going into the field to conduct research and confronting the real world is very different from theoretical expectations.¹¹ There are no rules that can be applied to the field setting,¹² and as Halliday has written, 'we should not expect the prescriptions of research methods found in the text books to be perfectly mirrored in the research process.'¹³ Conducting fieldwork interviews is one of the major techniques in the qualitative research method,¹⁴ which explores specific topics, events or happenings.¹⁵ The qualitative interview explains the importance of the views and interpretations of certain social actors

⁶ Creswell, J. (2003). Research Design: Qualitative, Quantitative, and Mixed Methods. London, Sage. p. 198.

⁷ Henn, M., M. Weinstein, et al. (2006). A Short Introduction to Social Research London, Sage. p. 160.
⁸ www.lse.ac.uk/collections/EPIC/events/Interviewing.pdf [Accessed on 5th September 2011]

⁹ Burgess, R. G., Ed. (1991). Field Research: A Sourcebook and Field Manual. Cambridge, Routledge. p. 2.

¹⁰ *Ibid.*, p. 1.

¹¹ Halliday, S. (2009). Conducting Law and Society Research : Reflections on Methods and Practices. Cambridge, Cambridge University Press. p. 4.

¹² Burgess, *Op. cit.*, p. 16.

¹³ Halliday, *Op. cit.*, p. 2.

¹⁴ Richards, D. (1996). "Elite Interviewing: Approaches and Pitfalls." *Politics* 16(3): 199-204. p. 201.

¹⁵ Rubin, H. and I. Rubin (1995). Qualitative Interviewing: The Art of Hearing Data. London, Sage. p. 3.

regarding the research questions.¹⁶ Through this process, knowledge is constructed based on conversation between research interviewer and interviewee,¹⁷ in order to obtain a realistic description of a situation.¹⁸

Field research in The Hague:

I have always been fascinated by criminal justice and exploring how it operates and impacts upon societies. I decided to conduct my doctoral research into criminal justice in an international context for practical trial experience. I chose the ICC because it is a completely new type of institution, the first permanent international criminal court. I decided to focus on ICC prosecution and to conduct my fieldwork in The Hague.

The main means of undertaking my research was an Internship programme at the ICC. This helped me greatly to conduct my research into the prosecutorial decision-making process of the complementarity regime. My research was unusual for a PhD in that I prepared to go into the field at an early stage of my research project. During the preparation for the fieldwork, I spent much time in the library reading as widely as possible around my research topic. I also read textbooks about interviewing elites and started to identify some potential interviewees. In addition, I prepared the interview protocol and informed consent letters for my interviewees.

There were a few problems at the outset of the field research. In particular, I felt that I did not have complete control of my project while I was working as an intern. But gradually, working in the Court gave me confidence and I tried to learn as much as I could about my research subject. I kept my research journal from the earliest day of my research project, particularly when I entered the field. I recorded my experience of conducting my research, most importantly, what others and I thought and felt about what was happening and key moments where I thought there was a shift in the way things were happening. Keeping a log of personal responses towards the research process allowed me to become more conscious of how my ideas and feelings about my research subject may influence the way I collect and analyse data, and helped me to keep an open mind, and challenge my personal assumptions and beliefs. It was often useful for me to go over the notes at later points to add further insights and think about

¹⁶ Dunne, M. and P. Yates (2005). Becoming a researcher: A Research Companion for the Social Sciences. Berkshire, Open University Press. p. 27.

¹⁷ Kvale, S. (1996). InterView: An Introduction to Qualitative Research Interviewing London, Sage. p. 14.

¹⁸ Rubin, *Op. cit.*, p. 81.

the kinds of support and the actions I needed to take in order for the research to progress. Therefore, although I did not refer to my research journal specifically in the thesis, my field notes initially informed my understanding of two case studies, the Darfur and Ituri situations. In fact, it was the basis of my understanding of the importance of cultural sensitivity in relation to the operation of the complementarity regime of the Court, in a manner which would be legitimate and relevant to local culture. Also my field notes often led to informal, conversational interviews about a code of prosecutorial ethics and guidelines.

Semi-structured and in-depth interviews:

Semi-structured interviews are a way of capturing the point of view of a person and getting inside information. Using this technique, the researcher may ask some questions which are structured and some that are open-ended.¹⁹ Unstructured questions allow the researcher to collect a lot of information from a few people about the different dimensions of a concept,²⁰ and encourage interviewees to respond in their own terms. As Burgess has pointed out, the researcher can obtain a lot of rich materials and become aware of new dimensions to a problem through a natural conversation, allowing people to speak freely in relation to the research problem.²¹ This flexible method is a particularly good choice in situations where there is only one chance to interview someone - for instance, when the researcher is dealing with elite members of a community, institution, etc.²² As elites have an important role in the structure and context of judicial institutions, data collection techniques for interviewing elites about the 'politics of law and order' are key to understanding the political-social context of the policy-making process.²³ Another major advantage of conducting semi-structured interviews is that they can enable the researcher to move beyond written accounts and collect first hand information about the underlying context.

In-depth interviews are much less formal than the semi-structured interview and the researcher may ask only a few thoughtful questions to collect complex information and personal experiences. In other words, in-depth interviews allow 'interviewees to talk

¹⁹ May, T. (2001). Social Research: Issues, Method and Process. Buckingham, Open University Press. p. 123.

²⁰ Bernard, H. R. (2000). Social Research Methods: Qualitative and Quantitative Approaches. London, Sage. p. 191.

²¹ Burgess, *Op. cit.*, p. 108.

²² Bernard, *Op. cit.*,

²³ Jupp, *Op. cit.*, p. 176.

about the subject in terms of their own frames of reference and enable [the] interviewer to maximize her or his understanding of the respondent's point of view.²⁴ In-depth interviews may provide a more relaxed atmosphere and may offer a more complete picture of what happened and why. However, the researcher should always come back to the point and keep the discussion moving in a direction relevant to the research problem.²⁵

Conducting interviews in the early stages of the data collection phase, I tried to be open and sensitive to new ideas and new suggestions in what respondents were saying. I developed several strategies to choose my interviewees. I knew that I needed people who were familiar with the Court proceedings and those who were dealing with cases before the ICC. Prior to the interview, I emailed people who were willing to be interviewed and explained about my research, giving them a general idea about our discussion in advance. I began my interviews with open-ended questions. Most of the time, when I started to talk about my research project they would become interested in the project, which was a great help. The legal officers and trial lawyers I interviewed were particularly informative. Their insights gave me further questions to pose to people who played different roles in different divisions of the Court. At the end of every interview, I asked who had experience and knowledge relevant to my research subject. In this way, one contact led to another as they introduced me to other legal officers. Furthermore, I could develop a research network and conducted interviews with people outside the ICC, who have specialised competence in the relevant field. It should be reiterated here that confidential information from anonymous sources with third parties helped me in some stages of the research process. However, as ethical considerations were of importance in the collection and use of data, before using their materials, I gave promises to the participants that their identity and details of their information would not be disclosed in the thesis and would be completely protected. On a couple of occasions, I sent them my ideas and they gave me very helpful feedback about the points that I had made.

The recording of data is an important issue during interview research, particularly in unstructured or semi-structured interviews.²⁶ I found that my interviewees did not agree to being recorded as we were discussing Court practices. Therefore, in order to manage

²⁴ Henn, *Op, cit.*, p. 161.

²⁵ Burgess, *Op, cit.*, p. 107.

²⁶ *Ibid.*, p. 45.

and organize my data, I decided to rely on my notes. As Henn has pointed out, the purpose of note taking is to make sense of what is observed and discussed for future reference.²⁷ I recorded my interview data by writing down brief notes, a few key phrases or sentences so that I could rework and reconstruct my notes later in the same day and come very close to what people had said. On a few occasions I had the chance to conduct a second interview and could thus double-check my understanding and my notes.

After I left the field, I had clear ideas about the significant issues that had emerged in the fieldwork and about the way in which I needed to present and analyze them. I started by reviewing the literature and organizing my field notes. In this, both of my doctoral supervisors were extremely supportive, especially Dr. Vogler who was very helpful to me in devising the structure of my argument based on my fieldwork findings.

Ethical issues in qualitative research:

Empirical socio-legal research may have a range of possible ethical issues. By caring about ethics and by acting on that concern the researcher can promote the integrity of their research.²⁸ As Salter has pointed out, potential ethical conflicts exist with regard to ‘protecting confidentiality with respect to how data is both used and published, obtaining fully informed consent from research participants, and avoiding interventions that damage the welfare of such participants.’²⁹ I explained the purpose of the interview and I was truthful and straightforward about the study objectives in order to earn their trust for addressing sensitive issues in relation to my research topic. I committed myself to guarantee promises of confidentiality made to my research participants. I attempted to enhance the protection of confidentiality for participants who had contributed personal information by the anonymisation of data which would have identified real names, and personal information. My data was coded.

To a large extent, discussion about ethics in social research tends to focus on these issues of consent, privacy, harm, confidentiality, and anonymity.³⁰ Informed consent is central to ethical discussions. Participants should have given their informed consent to

²⁷ Henn, *Op, cit.*, p. 194.

²⁸ Israel, M. and I. Hay (2006). Research Ethics for Social Scientists: Between Ethical Conduct and Regulatory Compliance. London, Sage. p. 5.

²⁹ Salter, *Op, cit.*, p. 164.

³⁰ Henn, *Op, cit.*, p. 69.

take part in a research study before being involved in any research activities.³¹ Discussion of confidentiality is also part of the informed consent process.³² However, there may be difficulties with informed consent in situations where participants are part of a hierarchical work structure. In these situations, the anonymity of participants can encourage them to take part and ensures that data cannot be identified with even a specific department.³³ As Henn has noted, having granted anonymity to the research participants, the researcher must protect their identity and ensure that they can not be identified on publication of the research.³⁴ One of the advantages of anonymity is that it allows participants to feel free and confident to express their true feelings in an objective manner.³⁵ Anonymity is also a key method that the researcher may use as the starting point for a discussion of confidentiality and as a way to explore sensitive issues.³⁶ It is important to note that as part of the informed consent process, participants should be told that participation is voluntary and they have the right to refuse or withdraw from the interview at any time without giving any notice or any explanation.³⁷

Limitations:

Despite the aforementioned advantages of qualitative data collection techniques, there were also some disadvantages or limitations. The main disadvantage of participant observation was that it was time-consuming and circumstances could be difficult for my research. It was also hard to decide which observations were significant and who to observe at various stages of my research. With regard to interviews, it was difficult to strike a balance between having control of the interview and leaving space for the participant to take control. It was also difficult to compare answers and identify unnecessary information in addition to transcribing and analyzing the data. Confidentiality issues were another limiting factor during the field research. In fact, it was sometimes difficult to have productive conversations due to the confidential nature of the procedures regarding the application of the complementarity regime in different situations. It was also difficult to discuss ongoing proceedings before the ICC.

³¹ Oliver, P. (2003). The Student's Guide to Research Ethics. Maidenhead, Open University Press. p. 28.

³² *Ibid.*, p. 82.

³³ *Ibid.*, p. 29.

³⁴ Henn, *Op. cit.*, p. 85.

³⁵ Oliver, *Op. cit.*, p. 78.

³⁶ *Ibid.*, p. 81.

³⁷ *Ibid.*, p. 47.

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