



**THE EXERCISE OF PROSECUTORIAL DISCRETION DURING PRELIMINARY
EXAMINATIONS AT THE INTERNATIONAL CRIMINAL COURT**

By

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Declaration

I declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted has not been previously submitted by me for a degree at this or any other university, that it is my work in design and execution, and that all the materials contained herein have been duly acknowledged.

Benson Chinedu Olugbuo

Date

Abstract

This study explores the exercise of prosecutorial discretion during preliminary examinations at the International Criminal Court. The key questions it investigates are whether there is a secure legal and theoretical basis upon which such discretion can and should be exercised and whether the Prosecutor of the International Criminal Court understands, develops and applies appropriate rules governing such discretion consistently. The study involves the analysis of various primary and secondary sources of law regulating the exercise of prosecutorial discretion. It begins by looking at the exercise of discretion at the national and international judicial systems to understand how their practices have informed and influenced the International Criminal Court Prosecutor, and then examines the provisions of the Rome Statute and its rules of evidence and procedure to determine the scope of the exercise of prosecutorial discretion. It also critically reviews the policy paper on preliminary examination adopted by the International Criminal Court Prosecutor.

The study argues that, although the International Criminal Court Statute does not provide clear guidance on the exercise of prosecutorial discretion during preliminary examinations, there is a sufficient legal and theoretical basis upon which to exercise this discretion during preliminary examinations at the International Criminal Court. Article 42 of the Statute of the International Criminal Court, which provides for the independence of the Office of the Prosecutor is one such legal and theoretical basis. Thus, the Rome Statute clearly endorses the theory of prosecutorial neutrality.

After expounding such a legal and theoretical basis, the thesis examines six case studies which represent six preliminary examinations conducted by the International Criminal Court Prosecutor in the conflicts in Uganda, Sudan, Côte d'Ivoire, Central African Republic, Kenya and Libya. The examination will answer the question whether the Prosecutor has exercised discretion in accordance with the spirit of the International Criminal Court Statute, and in a manner that would assuage claims that the Court is not neutral, especially in its dealing with African states. The analysis of these case studies shows that the Prosecutor has not exercised its discretion consistently and in a manner that can inspire public confidence in the administration of international criminal justice.

To remedy this situation, the study recommends, among other things, the need for clarity on the exact roles of the Prosecutor and Pre-Trial Chambers during preliminary examinations, beyond the current practice where the Pre-Trial Chamber can only authorise the opening of *proprio motu* investigations. Second, the study recommends the review of the policy on the gravity of crimes. Although the policy paper on preliminary examination has clarified the fact that gravity involves both quantitative and qualitative analysis of victims of international crimes, it is not yet clear how to carry out gravity analysis. Third, the study proposes enhancing positive complementarity during preliminary examinations in order to encourage national efforts in the investigation and prosecution of international crimes. Finally, the study recommends that the decision to suspend or defer investigations or prosecutions in the ‘interests of justice’ under article 53 of the Rome Statute should be a shared responsibility between the Court and the United Nations Security Council.

Dedication

To Udochukwu, the love of my life,
And to our children;
Chimeremeze, Mmesomachi and Mmerichukwu,
For your patience, perseverance and sacrifices during the journey.

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List of Abbreviations/ Acronyms

ACJHPR	African Court of Justice on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
AI	Amnesty International
AMIS	African Union Mission in Sudan
ASF	Avocats Sans Frontières
ASP	Assembly of States Parties of the International Criminal Court
AU	African Union
AUCEAJ	African Union Committee of Eminent African Jurists
AUHIP	African Union High Implementation Panel
AUHLPD	African Union High Level Panel on Darfur
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
CIPEV	Commission of Inquiry into Post-Elections Violence
CPA	Comprehensive Peace Agreement
DDDC	Darfur-Darfur Dialogue and Consultation
DDPD	Doha Document for Peace
DoP	Declaration of Principles
DPA	Darfur Peace Agreement
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
EAC	East Africa Community
EACJ	East Africa Court of Justice
EU	European Union
FIDH	International Federation for Human Rights

HRW	Human Rights Watch
ICC	International Criminal Court
ICC–EU	International Criminal Court – European Union
ICD	International Crimes Division
ICID	International Commission of Inquiry on Darfur
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
ILC	International Law Commission
JCM	Joint Chief Mediator
JEM	Justice and Equality Movement
KNDR	Kenya National Dialogue and Reconciliation
LJM	Liberation and Justice Movement
LMG	Like-Minded Group
LRA	Lord’s Resistance Army
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
ODM	Orange Democratic Movement
OTP	Office of the Prosecutor
PNU	Party of National Unity
PSC	Peace and Security Council
SCCED	Special Criminal Court for the Events in Darfur
SCD	Special Court for Darfur
SCSL	Special Court for Sierra Leone

SLM/A	Sudan Liberation Movement/Army
SPLM/A	Sudan Peoples' Liberation Movement/Army
SRF	Sudan Revolutionary Front
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMID	United Nations African Union Mission in Darfur
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNSC	United Nations Security Council
USA	United States of America

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Chapter One

Prosecutorial Discretion at the International Criminal Court

1.0 Background to the study

When the International Criminal Court (ICC) opened its doors in July 2002 to investigate and prosecute crimes that fall within its jurisdiction, it was generally welcomed with optimism.¹ A key person in the administration of international criminal justice is the Prosecutor, who has enormous powers under the Rome Statute. One of the methods the Rome Statute provides for the ICC Prosecutor to exercise powers is through granting prosecutorial discretion, which is subject to varying legal interpretations. The discretion exercised by the ICC Prosecutor in the investigation and prosecution of crimes within its jurisdiction has been under intense scrutiny for various reasons and the debate generated is not likely to abate anytime soon. In relation to the powers of the ICC Prosecutor, a key question is what guides the prosecutor in the exercise of discretion to ensure that he or she operates within the ambit of the law. This study attempts an answer to that question, by examining and reviewing the exercise of prosecutorial discretion relating to preliminary examinations at the ICC.

The ICC is a permanent international judicial institution established by the Treaty of Rome. It has the power to hold individuals responsible for serious international crimes. Such crimes include genocide, war crimes, crimes against humanity and the crime of aggression.² The ICC established the Office of the Prosecutor, which has the responsibility to investigate and prosecute such crimes.³ The jurisdiction of the ICC can be activated by a State party to the

¹ The ICC came into existence on 1 July 2002 when the treaty establishing the Court entered into force. See the Statute of the ICC A/CONF.183/9 (1998) 37 *International Legal Materials* 1002 - 1069 (Rome Statute).

² See Article 5 of the Rome Statute for crimes within the jurisdiction of the Court.

³ See Article 34 of the Rome Statute which provides for the organs of the Court including (a) The Presidency; (b) An Appeals Division, a Trial Division and a Pre-Trial Division; (c) The Office of the Prosecutor; (d) The Registry. As will be seen later in the study, the Pre-Trial Division plays an important role during preliminary examinations.

Rome Statute,⁴ by the United Nations Security Council (UNSC) acting under Chapter VII of the UN Charter,⁵ or by the Prosecutor.⁶

The manner of triggering the ICC jurisdiction is very important, since the Court does not have universal jurisdiction and can therefore not conduct investigations in all places.⁷ The Prosecutor is mandated by the Rome Statute to investigate crimes committed within the territory of States party to the Statute, or by citizens of States that are party to the ICC, or when a State not party to the Statute accepts the jurisdiction of the Court.⁸ However, when crimes are committed in the territories of States not party to the Statute and by their citizens, the ICC does not have jurisdiction, unless the UNSC refers the situation to the Prosecutor.

Irrespective of who triggers the jurisdiction of the ICC, the Prosecutor has a mandate to conduct a preliminary examination to decide whether there is a reasonable basis to proceed with an investigation.⁹ The UNSC may suspend the decision to open an investigation after a preliminary examination, acting under Chapter VII of the UN Charter.¹⁰ The power of the

⁴ Articles 13 (a) and 14 of the Rome Statute; Nabil Elaraby ‘The Role of the Security Council and the Independence of the International Criminal Court’ in Mauro Politi and Giuseppe Nesi eds *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 43.

⁵ Article 13 (b) of the Rome Statute.

⁶ Articles 13(c) and 15 of the Rome Statute.

⁷ Universal Jurisdiction is defined as ‘the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.’ See Roger O’Keefe ‘Universal Jurisdiction’ (2004) 2 *Journal of International Criminal Justice* 735–760. See also Kenneth Randall, ‘Universal jurisdiction under international law’ (1988) 66 *Texas Law Review* 785 – 841; Xavier Philippe ‘The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?’ (2006) 88 *International Review of the Red Cross* 375 – 398.

⁸ Article 12 of the Rome Statute; Dapo Akande ‘The Jurisdiction of the International Criminal over Nationals of Non-Parties: Legal Basis and Limit’ (2003) 1 *Journal of International Criminal Justice* 618 – 650; Eve La Haye ‘The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising Its Jurisdiction’ (1999) 46 *Netherlands International Law Review* 1 – 25.

⁹ Article 53(1) provides that ‘[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. See also Situation in Cote d’Ivoire - Judge Fernandez de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, paragraph 24, ICC-02/11, 3 October 2011.

¹⁰ Article 16 of the Rome Statute provides, ‘[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under

UNSC to suspend an investigation or prosecution does not, however, interfere with the discretion granted to the Prosecutor to conduct preliminary examinations.¹¹

The Chambers of the ICC are the Appeal, Trial and Pre-Trial Divisions.¹² However, it is only the Pre-Trial Chamber of the ICC that may intervene during preliminary examinations. By August 2016, the ICC Prosecutor had made public preliminary examinations of several situations. In three situations, the Prosecutor decided not to proceed with an investigation,¹³ while deciding to proceed in eleven.¹⁴ The process is still continuing in the remaining situations.¹⁵

Primarily, this study looks at the preliminary examinations concluded by the Prosecutor in the Central African Republic, Côte d'Ivoire, Kenya, Libya, Sudan and Uganda. These case studies reflect different means through which cases are referred to the ICC Prosecutor. The cases of Uganda and Central African Republic were self-referrals; those of Sudan and Libya were UNSC referrals, while those of Kenya and Côte d'Ivoire were initiated through *proprio motu* powers of the Prosecutor.¹⁶ These situations are discussed extensively in Chapters six to eight of the thesis.

Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.⁶

¹¹ Ibid.

¹² See Article 34 of the Rome Statute

¹³ Comoros, Republic of Korea and Venezuela

¹⁴ Central African Republic (I and II); Cote d'Ivoire; Darfur (Sudan); Democratic Republic of the Congo; Georgia; Kenya; Libya; Mali and Uganda.

¹⁵ Afghanistan; Columbia; Guinea; Honduras; Iraq; Nigeria; Palestine and Ukraine. See also ICC 'Preliminary Examinations' available at https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/Pages/default.aspx, accessed 12 March 2016. In addition, there has been the opening of other preliminary examinations into the situation in Burundi on 25 April 2016 (*proprio motu*) and into the situation in Gabon on 21 September 2016 (States Party referral).

¹⁶ *Proprio motu* refers to the inherent power of the Prosecutor to initiate proceedings without a referral from a State party to the Statute or from the UNSC. See Article 15 of the Rome Statute for the steps to be taken by the Prosecutor during *proprio motu* proceedings. The Prosecutor will only proceed with the approval of the Pre-Trial Chamber of the ICC. See Articles 13(c) and 15 of the Rome Statute. See also Dan Sarooshi 'Prosecutorial Policy and the ICC: Prosecutor's *Proprio Motu* Action or Self-Denial' (2004) 2 *Journal of International Criminal Justice* 940 – 943.

1.2 Statement of the problem

As already noted, the Prosecutor has the sole discretion to decide whether to conduct a preliminary examination or not. However, this discretion is subject to the oversight functions of the Pre-Trial Chamber, once the Prosecutor decides to open an investigation *proprio motu*. Although the Rome Statute provides some principles governing the conduct of preliminary examinations,¹⁷ other provisions of the treaty in relation to the exercise of discretion are subject to different interpretations.¹⁸

The first Prosecutor, Luis Moreno Ocampo, of Argentina, has been accused of making political, rather than legal decisions, in conducting some preliminary investigations.¹⁹ Some observers argue that he has made some decisions regarding the outcome of preliminary examinations which lack consistency or objectivity.²⁰ For example, the Prosecutor has been criticised regarding the manner in which preliminary examinations were carried out in the situations of Uganda and Kenya.²¹ He was also accused of not showing a clear procedure regarding his decision not to open an investigation in the Gaza Strip, Palestine. His conduct of on-going preliminary examination in Columbia has also attracted some criticisms.²²

¹⁷ See generally Article's 1, 15, 17 and 53 of the Rome Statute.

¹⁸ Darryl Robinson 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67 – 102, discussing conflicting interpretations of article 17 of the Rome Statute.

¹⁹ Kamari Clarke *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009) 237; Sarah Nouwen and Wouter Werner 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 *European Journal of International Criminal Law* 941 – 965.

²⁰ Margaret M. deGuzman 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265 – 320.

²¹ William Schabas 'Prosecutorial Discretion v. Judicial Atavism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice*, 731-761; William Schabas 'Complicity before the International Criminal Tribunals and Jurisdiction over Iraq' in Phil Shiner and Andrews Williams (eds) *The Iraq War and International Law* (2008) Hart Publishing: Oxford and Portland, Oregon, 157.

²² William Schabas, 'Gravity and the International Criminal Court' in Chile Eboe-Osuji (ed.), *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (2010) 702; William Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43 *John Marshall Law Review* 535 – 522.

It should be noted that prosecutorial discretion is a major source of the current tension between the African Union (AU) and the ICC concerning frequent investigations, and prosecutions of crimes and the indictment of (mostly) Africans by the Court.²³ In fact, there is a perception, especially among African politicians, that the ICC Prosecutor is targeting African leaders while ignoring crimes committed in other parts of the world.²⁴ Hence, the AU, during a Summit meeting in July 2009, decided not to cooperate with the ICC in the arrest and surrender of President Al-Bashir of Sudan.²⁵ Furthermore, the continental body contemplated a mass withdrawal from the ICC aimed at weakening its global reach.²⁶

More recently, the AU, at a decision taken at the 26th Ordinary Session held in Addis Ababa in January 2016, gave the Open-ended Ministerial Committee a mandate to urgently develop a comprehensive strategy, including a collective withdrawal from the ICC to inform the next action of AU Member States that are also States party to the Rome Statute. The Ministerial Committee was required to submit this strategy to an Extraordinary Session of the Executive Council.²⁷

The problem with prosecutorial discretion, however, goes beyond the perception of bias against Africa. Some of these criticisms have arisen from the apparent contradictions in the legal criteria, the policies, principles and practices adopted by the Prosecutor in conducting

²³ The African Union (AU) is a continental body made up of 54 member states. It replaced the Organisation of the African Unity (OAU) through the Constitutive Act of the African Union, adopted in 2000 at the Lome Summit in Togo and entered into force in 2001. More information on the AU is available at <http://www.au.int/en/>, accessed 11 January 2016.

²⁴ Kurt Mills "'Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34 *Human Rights Quarterly*, 404 - 447; Chikeziri Igwe 'The ICC's favourite customer: Africa and international criminal law' (2008) 41 *Comparative and International Law Journal of Southern Africa*, 294-323; Anthony Kariuki 'War Crimes and Punishment: Why Is The ICC Targeting Africa?' 12 March 2015, <http://www.brownpoliticalreview.org/2015/03/war-crimes-and-punishment-why-is-the-icc-targeting-africa/>, accessed 17 August 2016.

²⁵ Assembly/AU/Dec.245(XIII) Rev.1 Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) – Doc. Assembly/AU/13 (XIII) 3.

²⁶ British Broadcasting Commission 'African Union summit on ICC pullout over Ruto trial' 20 September, 2013, available online at <http://www.bbc.com/news/world-africa-24173557>, accessed 27 July 2015.

²⁷ See African Union 'Decision on the International Criminal Court Doc. EX.CL/952(XXVIII) adopted 31st January 2016.

preliminary examinations.²⁸ These criticisms hint at a major legal problem concerning the nature of the discretion of the Prosecutor, and the principles that should govern how that discretion is exercised. For the ICC to operate effectively and command the respect of states and the international community, the Prosecutor has to act independently, and be totally free from any external control.²⁹ Perceptions of bias, inconsistent application of the Rome Statute, and political manipulation undermine the credibility of the Court and jeopardise the capability to administer international justice.³⁰

From the foregoing remarks, one can see that the exercise of prosecutorial discretion during preliminary examinations is an important building block of an independent and credible ICC. As the Prosecutor is the face of the ICC, the failure to discharge the responsibilities of the office effectively, as provided for in the Statute, weakens the pursuit of international justice by this global institution.

1.3 Research questions and aims of the study

As the preceding section makes clear, the power of the Prosecutor to conduct preliminary examinations is an important one for the effective functioning of the ICC. However, this power remains poorly understood or developed. Therefore, this study explores the extent and scope of prosecutorial discretion regarding the conduct of preliminary examinations. In particular, it seeks to answer the following sub-questions:

- a) What is the legal and theoretical basis of this discretion?
- b) Does the Rome Statute provide sufficient guidance on the exercise of this prosecutorial discretion?
- c) How has the Prosecutor understood and applied his or her prosecutorial discretion consistently during preliminary examinations?
- d) Is the Prosecutor's understanding and practice of his or her prosecutorial discretion during preliminary examinations legally defensible?

²⁸ See the case studies in Chapters six to eight for details.

²⁹ Article 42 of the Rome Statute.

³⁰ See the Preamble to the Rome Statute.

Responses to these questions will go a long way towards clarifying the role of the Prosecutor in the dispensation of international criminal justice. A legal analysis of the exercise of prosecutorial discretion during preliminary examinations is needed to find out whether the ICC Prosecutors have developed a defensible approach to the exercise of this power, or whether they adhere to or deviate from their approach. Much of this study therefore analyses and criticises the provisions of the Rome Statute, policy objectives, general principles and practices adopted by the Prosecutors during the conduct of preliminary examinations.

In order to carry out such a critical analysis, a discussion of the theoretical framework adopted for the study i.e. prosecutorial neutrality, as well as principles and policies regulating the exercise of prosecutorial discretion is necessary.³¹ The research aims to reveal whether the Prosecutor has developed appropriate procedures, principles and practices so that the exercise of discretion can inspire public confidence. If the ICC Prosecutor has not done so, this study will consider how to ensure that the Prosecutor's discretion is exercised as envisaged by the Rome Statute.

Thus, a critical aim of this study is to understand how the ICC's Prosecutor exercises prosecutorial discretion during preliminary examinations and whether the policies and principles adopted by the Prosecutor in carrying out the task is consonant with provisions of the Rome Statute. The premise upon which this study is based is that a lack of neutrality and objectivity in the process of conducting preliminary examination by the ICC Prosecutor has partly contributed to the criticisms currently trailing the activities of the Court. This has also diminished the effectiveness of the ICC as a Court of last resort whose judicial activities are expected to complement national judicial systems.

1.4 Literature review and significance of the study

Several studies have been conducted on the exercise of prosecutorial discretion. Some authors have discussed the provisions of the Rome Statute that grant discretionary powers to the Prosecutor of the ICC.³² Others have suggested that the Prosecutor should develop

³¹ See Chapters two and five for details.

³² See e.g., Kenneth Rodman 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court' (2009) 22 *Leiden Journal of International Law* 99 – 126; Eric Blumenson 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal

publicly available guidelines that will determine the exercise of prosecutorial discretion.³³ However, other opinions doubt the efficacy of guidelines and their possible contribution to the exercise of prosecutorial discretion.³⁴ In other words, there are those who advocate the

Court' (2006) 44 *Columbia Journal of Transnational Law* 801 – 874 arguing that 'there are procedural, substantive, and pragmatic reasons why the ICC would do well to adopt a pluralist philosophy in its interests-of-justice and complementarity assessments.' See also Avocats Sans Frontières 'Africa and the International Criminal Court: Mending Fences' (2012) 12, available at http://www.asf.be/wp-content/uploads/2012/08/ASF_UG_Africa-and-the-ICC.pdf, accessed 17 September 2016.

³³See eg Luc Côté 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 162–186 ; Brian D. Lepard 'How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles' (2010) 43 *John Marshall Law Review* 553–567 at 558; Mireille Delmas-Marty 'Interactions Between National and International Criminal Law in the Preliminary Phase of Trial at the ICC' (2006) 4 *Journal of International Criminal Justice* 2–11; Nsereko op cit note 18 at 143; Allison Danner 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510 – 552; Rod Rastan 'Comment on Victor's Justice & the Viability of Ex Ante Standards' (2010) 43 *John Marshall Law Review* 569–602; Jo Stigen *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008) 411–12; Susana SáCouto & Katherine A. Cleary 'The Gravity Threshold of the International Criminal Court' (2008) 23 *American University International Law Review* 807–854; Geert-Jan A. Knoops 'Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective' (2004) 15 *Criminal Law Forum* 365 – 390; Morten Bergsmo, 'The Theme of Selection and Prioritization Criteria and Why it Is Relevant', in Morten Bergsmo *Criteria for Prioritizing and Selecting Core International Crimes Cases* (ed), 2nd ed. (2010) 9; James A. Goldston, 'More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court', (2010) 8 *Journal of International Criminal Justice* 383 - 406; Claudia Angermaier, 'Essential Qualities of Prioritization Criteria: Clarity and Precision; Public Access; Non-Political and Confidence-Generating Formulations; Equal and Transparent Application; and Effective Enforcement' in Morten Bergsmo, *Criteria for Prioritizing and Selecting Core International Crimes Cases* (ed), 2nd edition (2010) 201; Philippa Webb 'The International Criminal Court Prosecutor's Discretion Not to Proceed in the "Interests of Justice"' (2005) 50 *Criminal Law Quarterly* 305-348; Avril McDonald and Roelof Haveman 'Prosecutorial Discretion--Some Thoughts on "Objectifying" the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC,' 15 April 2003, at 3.; Christopher K. Hall 'Suggestions concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations,' 11, submitted to the Expert consultation process on general issues relevant to the ICC Office of the Prosecutor, 28 March 2003; Theresa ("Tracy") Roosevelt 'Ethics for the Ethical: A Code of Conduct for the International Criminal Court Office of the Prosecutor' (2011) 24 *Georgetown Journal of Legal Ethics* 835 – 851 at 848.

³⁴Linda M. Keller 'Comparing the "Interests of Justice": What the International Criminal Court Can Learn from New York Law' (2013) 12 *Washington University Global Studies Law Review*, 1 - 39 at 37 arguing that '[c]ommentators differ on whether the adoption of detailed prosecutorial guidelines for "interests of justice" determinations will enhance the legitimacy of the ICC. An examination of the New York experience

development of publicly known, clear guidelines and principles, and those who argue that such principles and guidelines should evolve on a case-by-case basis.³⁵

Beyond these mainstream authors, there are some others who have advanced more specific ideas, which are relevant to this study. For example, Bitti has recommended the setting up of a ‘Committee of Prosecutors’ that will guide the ICC Prosecutor on the exercise of prosecutorial discretions.³⁶ Caban has analysed the legal criteria for preliminary examinations with the policy objectives and general principles adopted by the Prosecutor.³⁷ However, the discussions relied on the draft paper on preliminary examination which was later revised and adopted by the current ICC Prosecutor, Fatou Bensouda. In addition, a report by Human Rights Watch (HRW) discussing the shortcomings of the Prosecutor during preliminary examinations, did not evaluate the provisions of the Rome Statute with the principles and policy objectives deployed by the Prosecutor.³⁸ Another study on preliminary examinations did not discuss the gravity criteria under admissibility issues.³⁹ Thus, there are several areas inadequately explored.

Beyond the various scholarly papers already noted on this issue, a review of the opinions of other writers and legal commentators, show different and sometimes divergent ideas and suggestions. There are reasons for a lack of consensus on how the Prosecutor should exercise his discretion. Articles 15 and 53 of the Rome Statute deal with aspects of prosecutorial discretion, which regulate preliminary examinations. These provisions prescribe the powers

implementing specific criteria for dismissals in furtherance of justice shows that adoption of factors is not a panacea.’

³⁵Kai Ambos and Ignaz Stegmiller ‘Prosecuting International Crimes at the International Criminal Court: Is There a Coherent and Comprehensive Prosecution Strategy?’ (2013) 59 *Crime, Law and Social Change* 415 – 437.

³⁶ Gilbert Bitti, ‘Article 53 — Ouverture D’Une Enquête,’ in Julian Fernandez and Xavier Pacreau X (eds), *Commentaire article par article du Statut de Rome de la Cour pénale internationale* (2012) 63-64 cited in Margaret deGuzman and William A. Schabas ‘Initiations of Investigations and Selections of Cases’ in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà eds. *International Criminal Procedure: Principles and Rules* (2013) 169.

³⁷ Pavel Caban ‘Preliminary Examinations by the Office of the Prosecutor of the International Criminal Court’ (2011) 2 *Czech Yearbook of Public & Private International Law* 199 – 216.

³⁸ HRW ‘Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to –Situations under Analysis’ June 2011, 13 – 26.

³⁹ Dov Jacobs ‘A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase’ (2007) 6 *Law and Practice of International Courts and Tribunals* 317-341.

of the Prosecutor to initiate proceedings *proprio motu* and offer some guidance on the interpretation of notion of the interests of justice. Several writings have focused on the possible interpretation of these provisions and find that they do not offer much guidance on the exercise of prosecutorial discretion.⁴⁰

The Prosecutor has the power to discontinue prosecutions that do not serve the interests of justice. Therefore, the Rome Statute calls on the Prosecutor to weigh individual interests (measured by the gravity of the crime and the interests of victims) against the more general interests of justice.⁴¹ International criminal justice is not the only appropriate mode of achieving justice as the Statute expects the Prosecutor to take into consideration several factors before initiating a prosecution.⁴² In support of this argument, Goldstone and Fritz have argued that there are circumstances in which the use of amnesty will comport with the interests of justice, provided that the circumstances under which the interests of justice is introduced adhere to minimum guidelines.⁴³

Simon Weldehaimanot *Arresting Al-Bashir: The African Union's Opposition and the legalities* (2011) 19 *African Journal of International and Comparative Law*, 208 at 232; Chris Gallavin *Article 53 of the Rome Statute of the International Criminal Court: In the interests of justice?* (2003) 14 *Kings College Law Journal* 179 – 198; Jessica Gavron, *Amnesties in light of developments in international law and the establishment of the International Criminal Court* (2002) 51 *International and Comparative Law Quarterly* 91 at 110; Carsten Stahn *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court* (2005) 3 *Journal of International Criminal Justice* 695 - 720; Héctor Olásolo, *The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?* (2003) 3 *International Criminal Law Review* 87-150; Thomas Clark *The Prosecutor of the International Criminal Court, Amnesties and the Interests of Justice: Striking a Delicate Balance* (2005) 4 *Washington University Global Studies Law Review* 389 – 414; Alexander Greenawalt *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court* (2009) 50 *Virginia Journal of International Law* 107 – 162; Drazen Dukic *Transitional justice and International Criminal Court – in the interests of justice?* (2007) 89 *International Committee of the Red Cross* 691 – 718.

⁴⁰Kai Ambos *The Legal Framework of Transitional Justice* in Kai Ambos, Judith Large and Marieke Wierda (eds) *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (2008) *Springer Science & Business Media* 19 - 104.

⁴¹Gerhard Hafner *et al* *A Response to the American View as Presented by Ruth Wedgwood* (1999) 10 *European Journal of International Law* 108 - 123.

⁴²Linda Keller *The False Dichotomy of Peace versus Justice and the International Criminal Court* (2008) 3 *Hague Justice Journal* 12 - 47.

⁴³Richard Goldstone and Nicole Fritz *In the Interests of Justice* and Independent Referral: The ICC Prosecutor's Unprecedented Powers (2000) 13 *Leiden Journal of International Law* 655 – 667.

The interests of justice allow the Prosecutor to consider wider issues of justice beyond those directly involved in the case, and these should include considering the political ramifications of initiating an investigation or prosecution.⁴⁴ Stahn argues that the interests of justice may embody a broader concept, which extends beyond the consideration of criminal justice, and that the Prosecutor might invoke the concept of interests of justice to justify departures from classical prosecution, based on both amnesties and alternative methods of providing justice.⁴⁵ An argument has also been made by Villa-Vicencio that there should be recognition of restorative justice as opposed to retributive justice in the fight against impunity.⁴⁶

As the foregoing discussion shows, not enough attention is paid towards resolving the issue of the exercise of prosecutorial discretion during preliminary examinations at the ICC. Resolving this legal problem will help improve the status of the Prosecutor in the administration of international criminal justice and, in turn, the efficiency and efficacy of the ICC. A preliminary examination fills another function: it offers the Prosecutor an opportunity to prevent international crimes. This is because public information from the Prosecutor that a preliminary examination is underway provides a signal to the warring parties about the ICC's involvement, and that an investigation may follow, if the preliminary examination reveals that there is reasonable basis to open one. The action of the ICC in holding people accountable for their crimes is hoped to keep more people from transgressing. Yet another function of the preliminary examination is that it acts as a catalyst for complementarity by prodding national governments to prosecute international crimes committed within their jurisdictions.⁴⁷

A significant difference between the studies discussed above and this research is that this study specifically looks at the exercise of discretion during preliminary examinations at the ICC, a subject, which few authors have attempted to interrogate. Using the theory of

⁴⁴ Gallavin *op cit* at 186.

⁴⁵ Stahn *op cit* at 698.

⁴⁶ Charles Villa-Vicencio 'Why Perpetrators should not always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet' (2000) 49 *Emory Law Journal* 205 – 222.

⁴⁷ ICC 'Annex to the Paper on some Policy Issues before the Office of the Prosecutor: Referrals and Communications' 21 April 2004, available online at http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf, accessed 19 September 2016; Louise Chappell, Rosemary Greyy and Emily Waller 'The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia' (2013) 7 *International Journal of Transitional Justice* 455 – 475.

prosecutorial neutrality adopted in Chapter two, the study analyses the ICC's legal framework, the principles and the policy objectives that regulate the exercise of prosecutorial discretion at the ICC and applies these to the case studies discussed in the research. As further discussed in the next chapter, the theory of prosecutorial neutrality is based on the American criminal law system. However, it has been adopted for this study with modifications that suit the proceedings at the ICC.

1.5 Methodology and limitations of the study

Using the theory of prosecutorial neutrality, the study will analyse various primary sources of the international law governing the operations of the ICC, such as the Rome Statute and ICC's Rules of Evidence and Procedure.⁴⁸ It will also review the practice and judicial decisions of the ICC and other international criminal courts regarding the exercise of prosecutorial discretion. There will be discussions on the policy papers and statements of the office of the Prosecutor, including general principles and policy objectives adopted by the Prosecutor during preliminary examinations.

This study critically analyses the policy paper on preliminary examination adopted by the current Prosecutor of the ICC, Fatou Bensouda.⁴⁹ Although the policy paper was formally adopted in 2013, its draft was developed and made public by the former Prosecutor, Moreno Ocampo in 2010.⁵⁰

A positive element of the policy paper on preliminary examination is that it attempts to give a clearer picture of how the Prosecutor operates and the challenges inherent in the decision making process. In essence, the policy paper on preliminary examination is an attempt to elaborate on the provisions of the Rome Statute and the underlying policies and principles used by the Prosecutor to carry out responsibilities of the office.

⁴⁸ Rules of Procedure and Evidence ICC-ASP/1/3 (Part II-A), adopted 9 September 2002. The Rules assist in the application of the Rome Statute. Where there is a conflict between the Statute and the Rules, the Statute will prevail. See Article 21 of the Rome Statute. See Article 21 of the Rome Statute.

⁴⁹ See The Policy Paper on Preliminary Examinations adopted in November, 2013.

⁵⁰ Draft Policy Paper on Preliminary Examination, 2010.

Although the focus of the study is on preliminary examinations, analysis in the thesis will take into consideration events beyond the preliminary examination stage. This is because issues bordering on the conduct of preliminary examination have had an impact on some situations and cases that have gone beyond the stage of inquiry.

The envisaged analysis will take into consideration the standard of proof during a preliminary examination, which is that of a reasonable basis.⁵¹ This is interpreted by the Court as a justified belief that international crimes, within the jurisdiction of the ICC, have been or are being committed.⁵² Reasonable basis may be contrasted with other proceedings before the ICC. For the Court to issue an arrest warrant, it has to be satisfied that there is reasonable ground to believe that the person has committed a crime within the jurisdiction of the Court.⁵³ During the confirmation of charges (before the commencement of a trial), the Court has to determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes he or she is charged with.⁵⁴ However, in order to convict an accused person, the judges must be convinced beyond reasonable doubt of the guilt of the accused person.⁵⁵

This suggests that the standard of proof in preliminary examinations is lower than the standard of proof in other proceedings.⁵⁶ However, the lower standard of proof for 'reasonable basis' does not lower the importance of preliminary examinations or the need for the Prosecutor to be objective, impartial or independent when taking a decision whether to proceed with an investigation, or stop it.

1.6 Justification for case studies

As earlier noted in this chapter, the study explores the extent and scope of prosecutorial discretion regarding the conduct of preliminary examinations. This question is broken down

⁵¹ Paragraph 5 of the Policy Paper on Preliminary Examinations. November 2013.

⁵² Paragraph 34 of Policy Paper on Preliminary Examinations; Paragraph 35 of the Situation in the Republic of Kenya, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19-Corr 31 March 2010.

⁵³ Article 58 of the Rome Statute; Paragraph 28 of the Situation in the Republic of Kenya.

⁵⁴ Article 61 (7) of the Rome Statute.

⁵⁵ Article 66 (3) of the Rome Statute.

⁵⁶ Ignaz Stegmüller 'The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?' (2013) 24 *Criminal Law Forum* 475 – 499.

into four different sub-questions. Sub-questions (a) and (b) are answered mainly in chapters four and five while questions (c) and (d) are answered using the case studies in chapters six to eight. These questions relate to how the ICC Prosecutor has understood and applied prosecutorial discretion consistently during preliminary examinations and if the Prosecutor's understanding and practice of discretion during preliminary examination is legally defensible.

The thesis carried out a comparative analysis of the situations, following the procedures through which situations are referred to the Court i.e. through self referrals (Central African Republic I and II and Uganda); United Nations Security Council referrals (Sudan and Libya) and through the ICC Prosecutor's *proprio motu* referrals (Côte d'Ivoire and Kenya).

For the situations in Central African Republic I and II and Uganda, the study was carried out to understand how the ICC Prosecutor understood and applied the exercise of discretion during the preliminary examinations of State Parties referral. This research was carried out using the publicly available records and policies of the Prosecutor. In addition, the situations in Central African Republic I and II offered an opportunity to two compare and contrast the policies of the office of the Prosecutor under the former Prosecutor, Moreno Ocampo and the present Prosecutor Fatou Bensouda.

The Sudan and Libya situations were used to understand the exercise of discretion during preliminary examination of situations referred to the ICC by the United Nations Security Council (UNSC) acting under Chapter VII of the United Nations Charter. The study looked at the consistency of the approach, understanding and practice of the ICC Prosecutor regarding UNSC referrals.

The situations in *Cote d' Ivoire* and Kenya examined the exercise of discretion during preliminary examinations initiated using the *proprio moto* powers of the ICC Prosecutor provided in article 15 of the Rome Statute. While the study compared the approaches adopted by the ICC Prosecutors in the initiation of the investigations, a key question is whether the Prosecutors were consistent in the applications of the provisions of the Rome Statute and the policies adopted by the office of the Prosecutor.

These case studies are the most demonstrative of the exercise of discretion during preliminary examinations. In addition, the case studies analyse the similarities and differences in the exercise of prosecutorial discretion during preliminary examinations. Furthermore, the case

studies focus on African countries, in a bid to address the perception that the ICC is targeting only African countries.

This study concentrates on seven out of the ten situations where the ICC Prosecutors decided to proceed with investigations in six African countries. Although the study did not discuss all the situations where the Prosecutor has decided to proceed with an investigation, the case studies reflects a pattern which has been studied and analysed in this thesis to answer the research questions posed in the study. From 2002 to 2016, the ICC Prosecutors carried out a total of 14 preliminary examinations. In ten of the situations, the ICC Prosecutors decided to proceed with an investigation.⁵⁷ In the remaining three situations, they decided not to proceed with investigations.⁵⁸ Currently, there are nine ongoing preliminary examinations.⁵⁹ The study presents complete information on the status of preliminary examinations conducted by the ICC as of August 2016. This is provided in the annexure.⁶⁰

1.7 The structure of the thesis

The study consists of nine chapters. Chapter one is the introduction, which has discussed the background to the study and identified the issue of impartiality and inconsistency in the exercise of prosecutorial discretion in international criminal law. How such discretion is exercised has a bearing on how the administration of international criminal justice is perceived by the public. In recent years, the ICC has not enjoyed universal support for its work as a result of allegations of partiality, in some instances on the part of the ICC Prosecutor. By analysing the policies and practices of the ICC Prosecutor in six countries, this study hopes to contribute to the development of the principles that should govern the exercise of such discretion, in a way that ensures public confidence in the administration of international criminal justice.

⁵⁷ These include the Situations in Central African Republic I and II; Cote d'Ivoire; Darfur, Sudan; Democratic Republic of the Congo; Georgia; Kenya; Libya; Mali and Uganda. See ICC 'Preliminary Examinations', <https://www.icc-cpi.int/pages/preliminary-examinations.aspx>, accessed 17 August 2016.

⁵⁸ These are the Situations in Honduras, Republic of Korea and Venezuela. .

⁵⁹ These include Afghanistan; Burundi; Columbia; Guinea; Iraq/United Kingdom; Nigeria; Palestine; Registered Vessels of Comoros, Greece and Cambodia and Ukraine.

⁶⁰ See Annexure I for information on all preliminary examinations conducted from July 2002 - August 2016.

Chapter two reviews the theory of prosecutorial neutrality and its guiding principles. The first principle of prosecutorial neutrality is that prosecutors should be unbiased in their decision-making. The second principle is that the prosecutor should engage in non-partisan decision-making, and the third principle is that prosecutors should base their decisions and activities on readily identifiable and consistently applied criteria. A major contribution of the chapter is the modification of the theory of prosecutorial neutrality to fit discussions on the exercise of discretion during preliminary examination at the ICC. In arguing that the ICC Prosecutor can exercise prosecutorial discretion independently, this study proposes that law can be dispensed to achieve justice and protect all equally.

Chapter three reviews the evolution of the theory of prosecutorial neutrality at the national and international judicial systems and the influence of these institutions in the exercise of prosecutorial discretion at the ICC. This chapter seeks to draw from past experiences of the exercise of prosecutorial discretion and the role of the Prosecutor, in order to understand and criticise prosecutorial discretion at the ICC, as it is currently understood and applied by the office of the Prosecutor.

Chapter four discusses the legal framework regulating the exercise of discretion at the ICC. It examines the influence of the theory of prosecutorial neutrality on the provisions of the Rome Statute governing the exercise of discretion during preliminary examinations. The aim of this chapter is to analyse the relevant provisions of the Rome Statute dealing with prosecutorial discretion and their interpretation by the ICC Prosecutor, by judges, and by scholars.

Chapter five evaluates the principles and policy objectives governing the exercise of prosecutorial discretion during preliminary examinations adopted by the Prosecutor of the ICC. The evaluation will be based on the theory of prosecutorial neutrality discussed in Chapters two and three, and the analysis of the legal basis of such discretion in Chapter four.

Chapters six to eight examine and critique the practice of the ICC Prosecutor regarding prosecutorial discretion during preliminary investigations. These Chapters are divided according to jurisdictional triggers of the respective situations. Thus, Chapter six discusses the exercise of prosecutorial discretion during preliminary examinations initiated by self-referrals in the cases of Uganda and the Central African Republic. The chapter looks critically at how the Prosecutor of the ICC applied the principles and policy objectives adopted by the office in the exercise of discretion during the preliminary examination.

Chapter seven examines the situations in Darfur, Sudan and Libya. These are UNSC referrals. The objective of the chapter is to understand how the involvement of the UNSC affected or influenced the discretion exercised by the Prosecutor during the preliminary examination conducted in the two situations.

Chapter eight evaluates the conduct of preliminary examination using *proprio motu* powers of the Prosecutor in Kenya and Côte d'Ivoire. The objective of the chapter is to review and discuss how the Prosecutor arrived at the decision that there was a reasonable basis to open investigations in Kenya and Côte d'Ivoire respectively.

Chapter nine is the conclusion, which reviews the major findings of the study and makes recommendations on how to improve the exercise of prosecutorial discretion during preliminary examinations at the ICC.

1.8 Conclusion

The ICC was established in 2002 and has been in existence for more than a decade. However, studies on preliminary examination are not as significant yet as those conducted on issues of complementarity and interests of justice. Nevertheless, these issues cannot be discussed without a good understanding of how preliminary examinations are conducted and how they affect the activities of the Prosecutor. This study therefore contributes to knowledge by seeking to make the case for a thorough understanding of the process and its importance in the activities of the ICC Prosecutor.

The introductory chapter has tried to set the tone for the remaining parts of this study. It has discussed the background to the study and the statement of the problem by highlighting the need for a study on the exercise of prosecutorial discretion during preliminary examinations. The chapter has also looked at the research questions, the aims and objectives of the research including the significance of the study, methodology and its limitations and justification for the case studies. The chapter has described the structure of the thesis and the overall argument that runs through the thesis. In order to develop the arguments in this thesis systematically, the next chapter will look at the theoretical framework adopted in this study. This will guide subsequent discussions on the study and also answer the question whether there is a theoretical basis for the exercise of prosecutorial discretion during preliminary examinations at the ICC.

Chapter Two

The Theory of Prosecutorial Neutrality at the International Criminal Court

2.0 Introduction

This chapter reviews and discusses the theory of prosecutorial neutrality and its applicability in the exercise of discretion by the ICC Prosecutor during preliminary examinations. Although prosecutors perform almost similar tasks in prosecuting crimes, the exercise of prosecutorial discretion varies between national judicial systems, ad hoc tribunals and the ICC. This is because of historical antecedents of the evolution of the powers of the prosecutors and legal regimes adopted in different jurisdictions. For the purposes of this study, which focuses mainly on the exercise of discretion by the ICC Prosecutor during preliminary examinations, it is important to evaluate the theory of prosecutorial neutrality and its applicability to the ICC Prosecutor. The theory of prosecutorial neutrality discussed in this chapter was originally advanced for the American legal system. However, it has been slightly modified in this chapter to accommodate the differences between national legal systems and the ICC. Therefore, a major contribution of this chapter is the adoption of a modified theory of prosecutorial neutrality to discuss the exercise of discretion during preliminary examinations at the ICC.

The ICC as a justice institution is an amalgamation of different legal systems around the world and the Rome Statute itself is a blend of several of these systems.¹ Therefore, isolating the ICC from the national criminal justice system is not to its advantage. It is conceded that there are differences in the mode of operation between the ICC and most domestic criminal justice systems.² However, it is important to put into perspective that the powers currently enjoyed by the Prosecutor of the ICC evolved from both national and international criminal justice systems. In fact, in the early stages of the negotiation for the Rome Statute, reservations were expressed as to the possibility of having an independent Prosecutor. There were mixed feelings about the powers and roles of the proposed ICC prosecutor in terms of initiating cases and the conduct of preliminary examinations. As these issues are discussed exhaustively below and in subsequent chapters of this study, it will be seen that prosecutorial

¹William Burke-White refers to it as the 'Rome System of Justice'. See William Burke-White 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) *Harvard International Law Journal* 53 - 108.

² See discussions in Chapters Three and Four of the study.

discretion has become a thorny issue in the administration of criminal justice.³ This chapter adopts a holistic approach in arriving at a suitable framework, by analysing a theory of prosecutorial discretion applicable to both domestic and international criminal justice institutions.

Prosecutorial discretion is defined as ‘the power to choose between two or more permissible courses of action.’⁴ It is also defined as the process through which prosecutors discharge their responsibilities.⁵ Black’s Law Dictionary defines prosecutorial discretion as ‘a prosecutor’s power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting ... and recommending a sentence to the court.’⁶ Prosecutorial discretion may also be defined as the thin line separating objectivity and subjectivity.⁷ This is because it gives the prosecutor wide latitude in deciding on issues relating to the investigation and prosecution of individuals accused of committing crimes at both national and international levels. Prosecutorial discretion is the fulcrum of criminal justice administration and the prosecutor plays a central and decisive role throughout the entire process.

The discretion exercised by prosecutors in initiating investigations and prosecutions have been contested in courts, and most times resolved in their favour, because of the principles of separation of powers and presumption of regularity. The principle of separation of powers states that judges should not interfere needlessly in the discretion exercised by prosecutors as they act in their capacity as part of the executive arm of government.⁸ The implication of this is that the judiciary has always been circumspect in interfering with the discretion exercised by prosecutors unless there is evidence that the decision of the prosecutor is contrary to a provision of the constitution or law made in pursuant of the administration of criminal

³ Ibid.

⁴ Allison Danner ‘Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court’ (2003) 97 *American Journal of International Law* 510 – 552.

⁵ Jingbo Dong ‘Prosecutorial Discretion at the International Criminal Court: A Comparative Study’ (2009) 2 *Journal of Politics and Law* 109 - 114.

⁶ Black’s Law Dictionary, discretion (4), 9 edition (2009) 534.

⁷ Kenneth Davis *Discretionary Justice: A Preliminary Inquiry* (1969) 3, argues that ‘[w]here law ends, discretion begins, and the exercise of discretion may mean beneficence or tyranny, justice or injustice, either reasonableness or arbitrariness.’

⁸ Rebecca Krauss ‘The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments’ (2009) 6 *Seton Hall Circuit Review* 1 - 28.

justice.⁹ Under the presumption of regularity, the discretion exercised by prosecutors is constitutionally guaranteed, meaning that their actions and decisions can only be questioned when they manifestly act outside the confines of the law. The US Supreme Court has generally held that the Attorney General and US Attorneys have broad discretion to enforce US laws, due to the presumption of regularity, which assumes that their decisions are within the ambits of the law unless the defendants can prove otherwise.¹⁰

This chapter is divided into five broad sections. The next section discusses the historical evolution of prosecutorial discretion, while the third analyses the theory of prosecutorial neutrality. The fourth section evaluates the convergence of domestic and international criminal law systems under the theory of prosecutorial neutrality. The fifth section is the conclusion.

2.2 Historical evolution of prosecutorial discretion

The modern day prosecutor is an evolution of different criminal justice systems loosely identified in both common and civil law jurisdictions.¹¹ In the seventeenth and eighteenth century, what was prevalent in England and Wales was a system of private prosecutors. Public prosecutors arrived later in the administration of criminal justice. These private lawyers acted as prosecutors for their clients who were mainly victims of crimes committed against them. However, whenever the need arose, the Attorney-General of England was required to initiate prosecution on behalf of the government. In addition, the Attorney-General had the power to dismiss prosecutions initiated by private prosecutors by filing a writ of *nolle prosequi*.¹² His decision was usually final, as the courts felt it was within the powers

⁹ See *United States v. Armstrong* 517 U.S. 456, 464 (1996).

¹⁰ See generally, *Wayte v. United States*, 470 U.S. 598, 607 (1985); *United States v. Goodwin*, 457 U.S. 368, 380 (1982) ; *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

¹¹ Despina Kyprianou *The Role of the Cyprus Attorney General's Office in Prosecutions: Rhetoric, Ideology and Practice* (2009) Springer Verlag Berlin Heidelberg, 32; Ministry of Justice of New Zealand 'Examining the Prosecution Systems of England and Wales, Canada, Australia and Scotland: A background document to the Review of Public Prosecution Services in New Zealand' September 2011, 1 - 72;

¹² This is the process through which the Attorney-General can discontinue a prosecution whether commenced by the State or private prosecutors.

of the Attorney-General to discontinue any prosecution initiated by private prosecutors.¹³ The cost of hiring private prosecutors was relatively expensive in those days, and since most of the courts were based in the cities, it was difficult for parties to foot the combined bills of private prosecutors and transportation costs to where the courts were sitting.

The practice of appointing a sole Attorney-General expanded beyond England and Wales to British Colonies in Europe and the American colonies. For example, Virginia had her first Attorney-General in 1643.¹⁴ However, the population and incidents of crimes increased, making the use of private prosecutors less attractive to the populace, and they opted for government intervention. This resulted in the establishment of county courts with county attorneys who were generally regarded as local prosecutors. Despite the existence of these county attorneys, there was no unifying central authority for their administration in the US until 1861 when the US Congress gave the US Attorney-General the power to control and direct the activities of all government attorneys, thereby laying the foundation for the establishment of the US Department of Justice.

On the other hand, in Germany and mostly civil law countries like France and the Netherlands, there is the principle of compulsory prosecution, which is a limiting factor to the exercise of prosecutorial discretion.¹⁵ Discretionary powers of the prosecutor in civil law jurisdictions are curtailed to an extent. These civil law countries are said to be 'inquisitorial' and at times allow the participating judges to act as investigating officials.¹⁶

Public prosecutors are generally powerful and the most constant figures in the administration of criminal justice. They usually interact with all the parties in the administration of justice including the police, victims, defendants and judges, and in some cases juries, where jury

¹³ Abraham S. Goldstein "Prosecution: History of the Public Prosecutor." (2002) *Encyclopedia of Crime and Justice*, available online at <http://www.encyclopedia.com/doc/1G2-3403000209.html>, accessed 19 September 2016.

¹⁴ Ibid.

¹⁵ Sun-Woo Lee 'The Discordant Combination of Civil-Law Prosecution System and Presidentialism: A Theoretical Framework' (2014) 7 *Journal of Politics and Law* 81 - 93.

¹⁶ John Langbein 'Controlling Prosecutorial Discretion in Germany' (1974) 41 *University of Chicago Law Review*, 439 - 467.

trials exist.¹⁷ Most times, they exert a controlling influence over defendants. Justice Robert Jackson, former US Supreme Court Judge and prosecutor at Nuremberg trials in Germany has argued that the 'prosecutor has more control over life, liberty and reputation than any other person ... His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations.'¹⁸ Jackson recognises the enormous responsibilities bestowed on prosecutors and the dangers of having the wrong persons exercising their discretion. He further argues that 'the prosecutor at his best is one of the most beneficent forces in our society; when he acts for malice or other base motives, he is one of the worst.'¹⁹ This means that the powers of the prosecutor are open to abuse and therefore there is a need to ensure that the possibility of abuse is reduced to the barest minimum through effective checks and balances in the exercise of prosecutorial discretion.²⁰

The question therefore is what should guide the prosecutors in the exercise of discretion to ensure that they operate within the ambit of the law despite the wide latitude which they have. Authors and commentators have argued for different theories which should regulate the exercise of prosecutorial discretion, and some of these are discussed below.

2.3 Theory of prosecutorial neutrality

An important framework to discuss the exercise of prosecutorial discretion during preliminary examinations at the ICC is the theory of prosecutorial neutrality as espoused by Bruce Green and Fred Zacharias in 2004.²¹ The theory does not assume a single definition of the term neutrality. This is because the word 'neutrality' has different meanings and under the

¹⁷ Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, (1992) 3 *Brigham Young University Law Review* 669 - 704; Stephanos Bibas 'The Need for Prosecutorial Discretion' (2010) *Temple Political and Civil Rights Review* 369 - 375.

¹⁸ Robert H. Jackson, *The Federal Prosecutor*, (1940) 31 *Journal of Criminal Law and Criminology*, 1 - 6.

¹⁹ *Ibid.*

²⁰ Rachel E. Barkow 'Organizational Guidelines for the Prosecutor's Office' (2010) 31 *Cardozo Law Review* 2089 - 2118.

²¹ Bruce Green and Fred Zacharias 'Prosecutorial Neutrality' (2004) *Wisconsin Law Review* 837 - 904. See also H. Richard Uviller 'The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit' (2000) 68 *Fordham Law Review* 1695 - 1781; Timothy Waters 'Overview: Design and Reform of Public Prosecution Services' in *Open Society Justice Initiative Sofia Promoting Prosecutorial Accountability, Independence And Effectiveness: Comparative Research* (2008) 21.

administration of criminal justice assumes an entirely different concept. For example, neutrality has been defined as 'the state of not supporting or helping either side in a conflict or disagreement.'²² In addition, it is also defined as the 'absence of decided views, expression, or strong feeling.'²³ A synonym of neutrality is impartiality which involves the lack of prejudice towards or against any particular side or party, the quality of fairness or being unbiased. However, looking closely at these words, they may mean different things at different times. In the context of criminal justice, neutrality and impartiality may mean different things depending on the context. The same variation is applicable to bias and fairness.

Neutrality was initially attributed to judges and as a concept was seen as a dividing line between judges and lawyers.²⁴ This means judges were originally meant to be neutral, while discharging their responsibilities, whereas most lawyers, as discussed earlier, were involved in private practice, and had to fight the cause of their clients. However, the concept has evolved into including those lawyers who are seen as officers of the court serving in the temple of justice.²⁵ Therefore in a sense, neutrality is a concept shared by prosecutors and judges as officers of the court.

In the context of our discussion, there are three broad dimensions of neutrality which are closely linked to each other and will be discussed as proposed by Green and Zacharias. These are non-bias, non-partisanship and adherence to readily identifiable and consistently applied criteria in decision making. The theory of prosecutorial neutrality calls for the emergence of a three-dimensional neutral prosecutor. The central argument made by the authors is that:

'A three-dimensional "neutral prosecutor" simply would need to remain non-biased, non-partisan, and principled. This prosecutor would ignore impermissible considerations such as race, gender and religion, self-interest, personal beliefs, and party politics. Her frame of mind would be independent, objective, and non-

²² Oxford Dictionary of English 3rd Edition by Angus Stevenson (2010) Oxford University Press, 1194.

²³ Ibid.

²⁴ Green and Zacharias, Prosecutorial Neutrality, 839.

²⁵ Ibid.

political. She would need to act in a non-arbitrary fashion, consistently applying decision-making criteria derived from societally acceptable sources.²⁶

The authors argue that a three-dimensional neutral prosecutor is expected to take decisions that are depersonalised. In this instance, the decisions of the prosecutor should not be based on personal idiosyncrasies, but rather should be based on the pursuit of public interest. In addition, this prosecutor will consistently make decisions by reference to a set of generalised, deeply-rooted decision making norms. These norms can be administrative laws set up to guide the operations of the office or administrative laws set out to guide prosecutors generally.²⁷ Furthermore, the neutral prosecutor must be accountable to the public, in the broadest sense. In this instance, accountability refers to the fact that the primary responsibility of the prosecutor is to ensure that the public is the primary constituency of the prosecutor and not the police, the victims or the even the politicians whose interests at times may run contrary to those of the general public.

This study adopts the theory of prosecutorial neutrality and the concept of three-dimensional neutral prosecutor proposed by Green and Zacharias. Although the theory and concept are based on an expansive study of the American criminal law system, the issues discussed are applicable to the ICC. The framework proposed by the authors clearly mirrors some of the approaches adopted by the former and current Prosecutors of the ICC. In addition, these policies have been made public in the policy paper on prosecutorial discretion during preliminary examinations which was released officially in November 2013.²⁸ These principles and polices in the policy paper on preliminary examinations will be applied in the case studies discussed later. In addition, ICC Prosecutors have consistently maintained that they only apply the provisions of the Rome Statute. Therefore, the policy papers ordinarily will reflect a progressive interpretation of the Treaty of Rome that established the ICC.

²⁶Ibid at 886. See also Justice Robert Jackson The Federal Prosecutor, (1940) 31 *Journal of Criminal Law and Criminology*, 1 - 6, who argues that a good prosecutor is one 'who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.'

²⁷ Rory K. Little 'Proportionality as an Ethical Precept For Prosecutors in Their Investigative Role' (1999) 68 *Fordham Law Review* 723 - 770.

²⁸ The ICC 'Policy Paper on Preliminary Examinations' November 2013. See Chapter Five for exhaustive discussions on the policy paper on preliminary examinations.

2.3.1 Neutrality as non-biased decision-making

The first principle of the theory is that prosecutors should not be biased in their decision-making. Bias in this instance, means that the prosecutor should not be unduly influenced in making a decision, or determination on prosecution. This principle of non-bias is corroborated by the policy of the Director Public Prosecution of Victoria, Australia on prosecutorial discretion. The policy provides that a decision whether or not to prosecute must not be influenced by (a) the race, religion, sex, national origin or political associations, activities or beliefs of the offender or any other person involved (b) personal feelings concerning the offence, the offender or a victim (c) possible political advantage or disadvantage to the Government or any political group or party; and (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision-making.²⁹

The principle of non-bias in the US criminal justice system extends to what is called avoiding impermissible considerations, where the prosecutor insists on opening a prosecution, regardless of the strength of the evidence or the likelihood of guilt.³⁰ In this instance, prosecutors are not allowed to make decisions tainted with racial, ethnic or religious bias. This is one area where the discretion of the prosecutor is subject to judicial review as the right to non-bias is protected by the US Constitution.³¹ Therefore, when a decision of the prosecutor whether to prosecute or not to prosecute is based on an unjustifiable standard such as race, religion, or other arbitrary classification, the courts are bound to interfere.³²

Racial and ethnic bias refers to a decision is made for or against a person because of his or her race or ethnicity. In the same vein, a prosecutor may be biased in deciding whom to investigate or prosecute due to personal or economic interests. The prosecutor, in the decision to charge for a particular crime and not another one, especially when the crime committed falls under different counts of criminality, may also exhibit the possibility of bias. For countries that still retain the death penalty in their Statute books, the possibility of bias is

²⁹Article 8 of the Director of Public Prosecution's Policy on Prosecutorial Discretion, Victoria, Australia, 24, November, 2014.

³⁰Earle Hobbs 'Prosecutor's Bias, an Occupational Disease' (1949) *Alabama Law Review*, 40 - 62.

³¹*United States v. Batchelder*, 442 U.S. 114, 125 (1979).

³²*Oyler v. Boles*, 368 U.S. 448, 456 (1962). See also Angela Davis 'Prosecution and Race: The Power and Privilege of Discretion (1998) 67 *Fordham Law Review* 13 - 67.

always an issue. This is because any decision to charge for capital punishment may be questioned by critics when there is lack of uniformity in application.³³

Ultimately, discretion is the hallmark of the administration of criminal justice. The prosecutor is not under obligation to explain why he decides to pursue the death penalty in a particular case and not the other. It only become problematic if a glaring case of injustice results due to racial, ethnic, gender or religious sentiments, or if the rights of the defendants are trampled upon, in the process of initiating criminal proceedings.

Prosecutorial bias in the administration of criminal justice is also possible in countries where prosecutors are elected or appointed. In this instance, the prosecutor may be an active member of a political party and therefore use the position to further party interests instead of promoting justice and fairness to all parties involved in the criminal case. Bias can also be seen when a prosecutor takes a position not according to the law of the land but because of personal beliefs. The problem with personal beliefs is that although the right to hold a belief may be protected by the law, the prosecutor will be seen by those who practice a contrary belief, as biased. A clear example as pointed out by Green and Zacharias is that of laws that call for the protection of abortion clinics, and those that restrict abortion practices.³⁴ In this instance, it may be difficult for the prosecutor to effectively enforce either of the laws without accusation of bias by the other party.

Another instance of bias is a prosecutor's decision to press charges against a defendant based on personal or economic interest, or public and media pressure. The issue of personal or economic interests is clearly a case of conflict of interest, and may also result in breaking existing professional rules or legislation, which clearly speaks against prosecutors making decisions based on personal or economic benefit. On the other hand, public and media pressure may be used by the prosecutor to gain political capital to the detriment of the rights of the defendant. The International Association of Prosecutors argues that prosecutors should 'remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest'.³⁵

³³ John A. Horowitz 'Prosecutorial Discretion and the Death Penalty: Creating A Committee to Decide Whether to Seek the Death Penalty' (1997) 65 *Fordham Law Review* 2571 - 2610.

³⁴ Green and Zacharias, *Prosecutorial Neutrality op cit* at 854.

³⁵ Article 3 (b) of Standards of Professional Responsibility and the Statement of the Essential Duties and Rights of Prosecutors, International Association of Prosecutors, 20 October 2003.

Thus, the theory of neutrality recognizes non-bias as a strong element in the exercise of discretion by the prosecutor. Bias based on ethnicity, race, religious group, economic or personal interests and party affiliations are generally seen as negating the principle of prosecutorial neutrality. However, it must be mentioned that these discussions are not cast in stone, and a decision by the prosecutor that is within an operational legal framework can still be labeled as biased, depending on the circumstance and the personalities involved. As earlier discussed, the courts can only step in when there is a clear violation of the laws of the land. This means that an accusation of bias against a prosecutor must be anchored in the provision of an existing law. The decision should not be based the discretion of the prosecutor to charge an individual for a crime and what charges should be brought before a court of law. Clearly, the courts will side with the prosecutor unless there is evidence that an impermissible consideration has been violated.

2.3.2 Neutrality as non-partisan decision making

The second principle is that the prosecutor should engage in non-partisan decision-making. The factors that influence non-partisanship include a) independence from those actors within and outside the office of the prosecutor who tend to influence decisions, b) objectivity in weighing evidence before taking decisions, and c) freedom from political agendas.³⁶ In relation to independence, prosecutors are not supposed to make decisions to prosecute or drop charges based only on the recommendations of the police or other investigating agencies. The decisions of prosecutors should be influenced by the evidence before them, the quality of witnesses, and the possibility of conviction. Although prosecutors may ordinarily be aligned with the cause of the police and victims of crimes, their primary constituency is neither the police nor the victim, but the society at large.³⁷ Therefore, in the final analysis, the prosecutors should make decisions on the potential cases before them without leaning to closely either to the victim or the police who may have conducted the initial investigation.

Non-partisanship can also be referred to as objectivity in decision-making. This means that the prosecutor is under obligation to study the available evidence at all stages of reviewing a case-file. The review of cases must be based on available evidence within the reach of the

³⁶ Green and Zacharias 'Prosecutorial Neutrality' at 851.

³⁷Ibid at 863.

prosecutor.³⁸ However, the notion of objectivity also creates problems. As noted by Green and Zacharias, when prosecutors represent the society at large, it equally means that the interest of the victim has to be protected. In addition, the prosecutor is under obligation to ensure that exculpatory evidence in favour of the defendant is made public or brought to the attention of the judge, as the sole aim of prosecution is not punishment, but to ensure that justice is done.³⁹ In addition, objectivity means that the personal dispositions of the prosecutor should not be an overriding factor in a decision whether to prosecute or not to. While they have to act in such a way as to express the will of the legislators (that is, according to the law that has been legislated), prosecutors are also under obligation to protect public interests and expectations of the society. Finally, they should be detached from factors that cloud their sense of judgment.⁴⁰

Another facet of neutrality as non-partisanship is that prosecutors should act non-politically. A prosecutor should not use the office or position to further the political interests of affiliated political parties or politicians.⁴¹ Green and Zacharias agree that there is tension between this principle and the concept that the prosecutor's responsibility is to represent the interest of the society. An example of this inconsistency is when the interest of the society is akin to mob justice or societal agitations based on community sentiments. The prosecutor's role is to not to follow a particular interest group, but to weigh the evidence and make a decision based on principled criteria, guided by an objective disposition of the circumstances of each case.⁴² It may turn out that the prosecutor will become unpopular in the short term, however, a non-partisan decision will stand the test of time, better than the one taken to satisfy a small section of the community. This means that the prosecutor will always engage in a balancing act to satisfy different and conflicting interests.

The need for independence, objectivity and non-partisanship cannot be over-estimated. It shows that the exercise of discretion, although within the bounds of the rights of the prosecutor, is usually constrained by some of the factors outlined above.

³⁸ Ibid at 864.

³⁹ Ibid at 868.

⁴⁰ Ibid at 869.

⁴¹ Ibid at 869.

⁴² Ibid at 870.

2.3.3 Neutrality as principled decision-making

The third principle of neutrality is that prosecutors should base their decisions and activities on readily identifiable and consistently applied criteria.⁴³ These include implementing legislative will, principled decision-making rooted in the purposes of criminal law, principled policy making through the adoption of administrative policies, and avoiding non-legal rationale in decision making.⁴⁴ A major essence of the prosecutor's job is to implement the laws enacted by lawmakers to curtail or punish crimes. It is therefore a responsibility of the prosecutor to ensure that the enforcement of the law is not arbitrary or inconsistent and meets the threshold of justice and fairness. At times, it is noted that the desire of the lawmakers to punish a particular conduct is born out of the desire to please the electorate. Under these circumstances, the prosecutor has to work the fine line of implementing the legislators' will and also ensuring that discretion is not used to pander to the whims and caprices of elected officials.

In relation to principled decision rooted in the purposes of criminal law, the prosecutor has to decide on the sole essence of seeking punishment for a defendant. This is where the theories of punishment become handy and the prosecutor is expected to ensure that the desire to press charges is rooted in the purposes of criminal law. This relates to the reason or aim of punishing a defendant, which can either be retributive, deterrent or restorative in nature.

In relation to retributive justice, there are several strands, which include vengeful, deontological and empirical conceptions of retribution.⁴⁵ The vengeful strand of retribution also known as *lex talionis* is associated with the Judeo-Christian Bible which seeks to punish the offender _eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.⁴⁶ Retributive justice is an improved version of a system that knew overwhelming punishment, like destroying a village for one person's crime. The *lex talionis* limited retribution is to ensure that the punishment could be no greater than the crime. Therefore, retributive justice aims at achieving equal punishment for the crime

⁴³ Ibid at 871.

⁴⁴ Ibid.

⁴⁵ Paul Robinson _Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical (2008) 67 *Cambridge Law*, 145 – 175.

⁴⁶ See the Book of Exodus 21:24-25 (King James Version).

committed by the accused person.⁴⁷ The essence of punishment under retributive justice does not focus on the harm of the offense committed but on the culpability of the offender.⁴⁸ Therefore, a prosecutor's decision to seek for punishment of the defendant is in furtherance of the purposes of criminal law and in this instance, retribution.

The main argument of the retributive theory of punishment is that criminal punishment is justified by the moral desert of the perpetrator. In other words, retributive justice theories are characterised by their emphasis on the relationship between punishment and moral wrongdoing of the perpetrator.⁴⁹ Another element of retributive justice is the fact that the victims are reduced to being witnesses, and not really recognised as stakeholders in the process. Although some commentators have argued that the process of arrest, prosecution and punishment of the perpetrator does justice to the victims, it is clear that the focus of retributive justice is on the offender and not the victim.⁵⁰

On the other hand, a prosecutor's choice of punishment may be based on deterrence, which has its origin from the utilitarian moral philosophy espoused by philosophers like Jeremy Bentham, who argues that punishment persuades potential perpetrators not to commit crimes.⁵¹ Prospective perpetrators of crimes constantly engage in a cost/benefit analysis whether to commit crimes or not.⁵² Therefore perpetrators are assumed to always rationalise whether the possibility of apprehension and prosecution outweighs the benefits of committing the crime.

Generally, deterrence is divided into two broad categories of general deterrence and specific deterrence. General deterrence refers to the situation where punishment is meted out to an individual to deter the general public. However, specific deterrence refers to the punishment that is meted out to an individual, in order to deter that particular individual from committing

⁴⁷Michael Moore 'The Moral Worth of Retribution' in Andrew von Hirsch and Andrew Ashworth (eds.) *Principled Sentencing: Readings on Theory and Policy* 2nd edition (1998) Oxford University Press, 179 - 190.

⁴⁸ Paul Robinson *op cit* at 148.

⁴⁹Godfrey Musila Restorative Justice in International Criminal Law: The Rights of Victims in The International Criminal Court (2009) PhD Thesis submitted to the University of Witwatersrand, 8 - 10.

⁵⁰ Ibid.

⁵¹ Jeremy Bentham 'An Introduction to the Principles of Morals and Legislation' (1907) Library of Economics and Liberty, available at <http://www.econlib.org/library/Bentham/bnthPML14.html>, accessed, 19 September 2016.

⁵² Richard Posner 'An Economic Theory of the Criminal Law' (1995) 85 *Columbia Law Review*, 1193 - 1321

a related crime. General deterrence is more pronounced than individual deterrence as the goal of deterrence is aimed more at the society than an individual. It is argued that a prosecutor who decides to prosecute a defendant to deter others or the particular individual facing investigation or prosecution is exercising discretion and furthering one the aims of criminal law.

If the prosecutor's reason for seeking punishment is to ensure justice for the victim through restorative justice, it is still within the confines of prosecutorial discretion. Restorative justice is aimed at both the defendant and victim of crime. It places victims at the centre of the criminal investigation and gives them a voice and place of participation, depending on the procedure in place. A major feature of the Rome Statute is the expansive focus on the rights of victims of international crimes. They participate in the proceedings and are entitled to reparations including compensation and restitution. In addition, a Victims' Trust Fund is dedicated to victims of international crimes. Therefore, a prosecutor who prioritises the interests of victims in prosecuting a defendant is exercising discretion, in furtherance of the purposes of criminal law.

Another concept of prosecutorial neutrality is principled policy making, which involves the adoption of administrative policies that guide the exercise of prosecutorial discretion.⁵³ It is the responsibility of the prosecutor to ensure that decisions follow laid-down procedures and easy to follow principles, policies and guidelines affecting the exercise of discretion.⁵⁴

Several countries have adopted different policies to guide the exercise of prosecutorial discretion. These policies vary from jurisdiction to jurisdiction. For example, the American Bar Association (ABA) Standards for Criminal Justice in prosecutorial investigations provides standards governing the exercise of prosecutorial discretion during investigations.⁵⁵ The ABA Standards argues that 'a prosecutor is not an independent agent, but is a member of an independent institution, the primary duty of which is to seek justice.'⁵⁶ The ABA Standards also expects the prosecutor not to take decisions that are considered impermissible, as earlier discussed.

⁵³ Green and Zacharias, *Prosecutorial Neutrality* at 877.

⁵⁴ *Ibid* at 870.

⁵⁵ ABA Standards for Criminal Justice - Prosecutorial Investigations 3rd Edition, Prosecutorial Investigations.

⁵⁶ Standard 26-1.2 General Principles ABA

In Ireland, there is a guideline for public prosecutors known as the Code of Ethics.⁵⁷ Its primary aim is to ensure the promotion of those principles and standards recognised as necessary for the proper and independent prosecution of offences. The Code of Ethics sets out the standards of conduct and practice expected of prosecutors working for, or on behalf of, the Director of Public Prosecutions in Ireland. It is intended to supplement, rather than to replace applicable professional codes, governing the conduct of lawyers and public servants.⁵⁸ The Code establishes minimum standards of ethical conduct. In addition, it is meant to provide general but not exhaustive, guidance to prosecutors. Furthermore, it is formulated to assist in securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings.

The overriding principle in the exercise of prosecutorial discretion in Ireland is public interest. For example, the code of ethics provides that 'a fundamental consideration when deciding whether to prosecute is whether to do so would be in the public interest.'⁵⁹ Therefore, a prosecution should be initiated or continued, subject to the available evidence disclosing a *prima facie* case, if it is in the public interest, and not otherwise.⁶⁰

In New Zealand, prosecutorial discretion is exercised independently, and subject to evidentiary and public interests tests, which must be conducted by the prosecutor before any prosecution is carried out.⁶¹ Therefore, if there is evidentiary evidence that a crime has been committed, the prosecutor has to be satisfied that prosecution is required in the public interest.⁶²

It is clear from the discussions in this section that some countries have adopted different administrative policies to guide the exercise of discretion. The extent to which these policies are adhered to is debatable. However, it is obvious that prosecutors who fail to observe the minimum ethics prescribed in these policies risk sanctions. From the foregoing, one thing that is clear is that the existence of these policies does not limit discretion, but tries to ensure consistency and less dependence on the personal disposition of the prosecutors.

⁵⁷ Ireland Guidelines for Prosecutors Director of Public Prosecutions Revised November 2010

⁵⁸ Ibid.

⁵⁹ Ibid

⁶⁰ Ibid.

⁶¹ Sections 5.3 and 5.5 of the New Zealand Code of Ethics.

⁶² Ibid.

There have been several debates on whether it is desirable to have clear, written criteria for the exercise of prosecutorial discretion. The contention is based on the fact that prosecutorial discretion is ordinarily not subject to judicial control and prosecutors are free to exercise their discretion within the confines of the law. However, the inability of prosecutors to show clearly how decisions are made affects citizens' perceptions of the powers of the prosecutor.

2.4 Prosecutorial neutrality: convergence of domestic and international criminal law systems

As already noted above, this study adopts the theory of prosecutorial neutrality to examine the exercise of prosecutorial discretion during preliminary examinations at the ICC. However, since the ICC is an international justice institution and applies a hybrid legal system derived from national judicial systems, it is also necessary to discuss the similarity and differences between the domestic and international criminal justice system and the applicability of the theory of prosecutorial neutrality at the ICC.

There is a nexus between the theory of prosecutorial neutrality as advanced by Green and Zacharias and the activities of the ICC Prosecutor. However, it has to be reiterated that the theory as propounded by Green and Zacharias standing alone does not answer the critical questions discussed in this thesis, which revolves around the powers of the ICC Prosecutor. As the theory of prosecutorial neutrality was originally developed from the American legal system, there are notable differences between a domestic legal system and the international criminal justice system.

The prosecutor at the national level has more latitude to operate compared to the ICC Prosecutor in the exercise of the functions of the office. This is because the ICC Prosecutor is considerably restricted by the Pre-Trial Chamber that must approve a request by the Prosecutor to open an investigation.⁶³ However, at the national level and depending on the legal system in place, there is a distinction between general and specific control of the prosecutor.⁶⁴ For example, the executive arm of the government can issue guidelines for the exercise of discretion but there is no direct control of the prosecutor in the discharge of daily activities. This includes the decision to charge or not charge a particular defendant.⁶⁵

⁶³ Article 15 (3) of the Rome Statute. See generally, chapter four of the study.

⁶⁴ See chapter three, paragraph 3.1.

⁶⁵ Kai Ambos *op cit* at 115.

Depending on the jurisdiction, national prosecutors conduct investigations with police or with investigative judges.⁶⁶ For instance, in most commonwealth countries, the police conducts investigations and hands over the docket to the national prosecutor for decision whether to prosecute or not.⁶⁷ In civil-law jurisdictions like France, an investigative judge is part of the decision to investigate and prosecute crimes.⁶⁸ However, under the Rome Statute of the ICC, the responsibility to investigate and prosecute international crimes is the sole responsibility of the office of the ICC Prosecutor. While the prosecutor at the national level is responsible for the prosecution of every criminal offence, the ICC Prosecutor is limited to the prosecution of 'serious crimes of concern to the international community as a whole'.⁶⁹

Although national prosecutors are independent, they are accountable to government institutions. For example, some national prosecutors are accountable to the Parliament through appropriate line Ministries which is directly under the control of the executive arm of government.⁷⁰ However, the ICC Prosecutor is accountable to the Assembly of States Parties of the ICC who provides 'management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court'.⁷¹

Some national legal systems like the US employ the use of private prosecutors for the prosecution of crimes.⁷² This has its historical roots in the emergence of the modern prosecutor as earlier discussed in this chapter. However, the use of private prosecutors is alien to the ICC. The Rome Statute provides that the Prosecutor is responsible for conducting investigations and prosecutions before the Court.⁷³ The Statute allows the ICC Prosecutor to appoint advisers with legal expertise on specific issues, including but not limited to , sexual and gender violence and violence against children.⁷⁴ These experts only

⁶⁶ See Chapter three, paragraph 3.1.

⁶⁷ Kai Ambos, *op cit* at 116.

⁶⁸ See Chapter three, paragraph 3.1.

⁶⁹ See Article 5 of the Rome Statute.

⁷⁰ Daniel Nsereko *op cit* at 144.

⁷¹ Article 112 (2)(b) of the Rome Statute.

⁷² Roger A. Fairfax 'Delegation of the Criminal Prosecution Function to Private Actors' (2009) 43 *University of California, Davis Law Review* 411 - 456.

⁷³ See Chapter 42 (1) of the Rome Statute. See also chapter four of the study.

⁷⁴ Article 42 (9) of the Rome Statute.

advise the Prosecutor on areas of their expertise but do not take over the investigation and prosecution roles of the Prosecutor which is obtainable in some national legal systems.

As the theory of prosecutorial neutrality was originally developed for the American criminal law system, it has to be adapted into the international criminal justice system, to accommodate some of the differences inherent in the two systems. The relationship between the domestic and international criminal law systems are discussed in subsequent chapters of the study. However, it is important at this stage to lay the foundation that will guide further discussions.

What is generally known today as the international criminal justice system is a hybrid of different domestic criminal justice systems that evolved over time to give birth to procedures applied at the Nuremberg and Tokyo Tribunals in Germany and Japan respectively.⁷⁵ The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in The Hague and Tanzania respectively benefitted from developments in domestic legal systems. In addition, as noted in Chapter four of the study, the Rome Statute itself is an amalgam of different legal systems that converged to form what is loosely termed the Rome Statute System of Justice. Prosecutorial discretion, the subject matter of this study, also evolved from the national to international criminal justice systems. Lawyers in both systems train and practice at the national level. There is currently no special training for lawyers who practice in the international criminal justice system. Therefore, the major legal education received by lawyers and judges is first and foremost at the domestic level.

The Rome Statute that established the ICC is a treaty negotiated by sovereign States whose primary interest is to protect national interests.⁷⁶ In this regard, a key interest in establishing the ICC is for it to collaborate with national judicial institutions in investigating and prosecuting crimes within its jurisdiction. This is the reason why a key principle of the Rome Statute is complementarity.⁷⁷ It places primary obligation on States to investigate and prosecute those accused of international crimes at the domestic level. It is only when a State is unable, unwilling and inactive in doing so that the ICC will step in to ensure that there is

⁷⁵ See Chapter three of the study generally.

⁷⁶ Robert Cryer 'International Criminal Law vs State Sovereignty: Another Round?' (2006) 16 *European Journal of International Law*, 979 - 1000.

⁷⁷ See the Preamble and Articles 1 and 17 of the Rome Statute.

justice and no impunity gap. The relationship between the domestic legal system and international criminal justice system is reinforced by the fact that national procedures are recognised as legitimate and effective, as long as they meet the threshold of justice and fairness and, in this instance, the principle of complementarity.

In addition, it will be recalled that that the highest decision-making organ of the ICC is the Assembly of States Parties, which appoints and elects officials of the Court, including the Prosecutor, Registrar, Judges and Board Members of the Victims' Trust Fund.⁷⁸ In addition, the Assembly of States party to the Statute provides management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court.⁷⁹ Although composed mainly of sovereign states, its decisions are binding on the ICC as a justice institution.

From the foregoing, it is argued that the Rome Statute is a merger of the procedures used in different legal domestic criminal justice systems and the ad-hoc tribunals. Therefore it can best be described as a hybrid system of justice.

2.5 Conclusion

This chapter has established that the theory of prosecutorial neutrality applies at the national and international criminal justice institutions. The chapter adopts prosecutorial neutrality as the working theory for the study. Although the theory is based on the American criminal law system, the study expounds on the similarities and differences between the domestic and international criminal law systems represented by the American legal system and the ICC. The chapter makes a case for the transposition of the theory of neutrality from the American criminal justice system to the ICC.

The chapter notes that early manifestations of prosecutorial discretion were expressed through private prosecutors who acted on behalf of their clients. However, their powers to act were subject to the decision of an Attorney-General, who had to power to terminate proceedings through the issuance of *nolle prosequi*. The study further notes that courts are generally reluctant to intervene in the way prosecutors exercise discretion due to the doctrine

⁷⁸ See Article 112 of the Rome Statute.

⁷⁹ See Article 112(2) of the Rome Statute.

of separation of powers and the presumption of regularity. It is usually when a decision of the prosecutor infringes constitutionally protected rights that that courts would intervene.

The chapter extensively discusses the theory of prosecutorial neutrality, which proposes a three-dimensional neutral prosecutor who is expected to be non-biased, non-partisan and principled. The chapter discusses the three principles of prosecutorial neutrality and their applicability to the discretion exercised by the Prosecutor of the ICC. The chapter also notes that although the theory is primarily related to the American criminal justice system, its applicability to the ICC cannot be faulted as evidenced by the policy paper adopted by the ICC Prosecutor on the issue. The next chapter looks at the evolution of prosecutorial discretion from the domestic to international legal systems and how these institutions have influenced the activities of the Prosecutor of the ICC.

Chapter Three

Evolution of Prosecutorial Discretion: From National to International Justice Systems

3.0 Introduction

This chapter looks at the historical evolution of the exercise of prosecutorial discretion from national to international criminal justice systems. It compares the powers and limits on the powers of prosecutors in the common and civil law systems regarding the exercise of prosecutorial discretion. This discussion sets the stage for the analysis of the powers of the prosecutors of the ad hoc international criminal tribunals on the exercise of prosecutorial discretion. The main objective of the chapter is to track the development of prosecutorial discretion in international criminal law from its domestic origins to its international manifestations.

3.1. Prosecutorial discretion and national judicial systems

The exercise of discretion by the prosecutor at the state level is influenced by the criminal justice system that is in operation in that State. There are two main legal systems within which prosecutorial powers are exercised: the common law and civil law criminal systems. The common law system is mainly ‘adversarial’ while the civil law system is mainly ‘inquisitorial’.¹ These two criminal justice systems each define a particular role for prosecutors. However, recent developments in some civil law countries have blurred the distinction between common law and civil law models of prosecutorial discretion.² Factors

¹ China does not fall into any of the categories discussed. See Kai Ambos ‘The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports’ (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 89 – 118.

² Julia G. Mirabella ‘Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial’ (2012) 30 *Boston University International Law Journal* 229 – 260; Yue Ma ‘Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective’ (2002) 12 *International Criminal Justice Review* 22 – 52; Elisabetta Grande ‘Italian Criminal Justice: Borrowing and Resistance,’ (2000) 48 *American Journal of Comparative Law* 227 – 259; William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation* (1992) 17 *Yale Journal of International Law* 1 – 40; William T. Pizzi and Mariangela

which influence the independence of prosecutors when exercising discretion include the legal status of the office, the method of appointment, the degree of autonomy of the office and the tenure of the incumbent.

In general rule, prosecutorial independence is guaranteed in common law countries although how this is done and ensured in practice differs in each country.³ Thus, in common law systems, prosecutors have discretion on whether to initiate a proceeding or not. Even when proceedings have been initiated, a prosecutor can decide to close the investigation and even decide not to prosecute at all.⁴ According to the Canadian Supreme Court, the:

'independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process.'⁵

In deciding whether to initiate investigations or to prosecute, the prosecutor applies evidentiary and public interest tests.⁶ Because of the similarity in their roles and functions, the specifications applied to the prosecutor at a national level can logically transfer to the Prosecutor in the ICC.

Even though the prosecutor has overall control over prosecutions, in some instances investigations are carried out by a different government institution, for example, the police. This means that the role of the prosecutor begins after the police have concluded

Montagna 'The Battle to Establish an Adversarial Trial System in Italy' (2004) 25 *Michigan Journal of International Law* 429 – 466.

³ Philip C Stenning 'Prosecutions, politics and the law: The way things are' in Danwood Chirwa and Liz Nijzink eds. *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2012) 109.

⁴ Ambos *op cit* at 98.

⁵ Paragraph 46 of *Miazga v. Kvello Estate* 2009 SCC 51.

⁶ Evidentiary test refers to the 'existence of sufficient credible and admissible evidence that could sustain a conviction.' The public policy text involves decisions that are in the public interests and not based on legal judgments. Stenning *op cit* at 106; See also Part 4 of the South African Prosecution Policy, 1 December 2005; Paragraph 523 - 4 of *Gouriet v Union of Post Office Workers* [1978] AC 435; Deborah MacNair 'In the name of the public good: Public interest as a legal standard (2006) 10 *Canadian Criminal Law Review* 175 – 204.

investigations.⁷ For example, in England and Wales, the Crown Prosecution Service (CPS) is headed by the Director of Public Prosecution (DPP) who is responsible for the prosecution of crimes.⁸ The DPP is not involved in the investigation of crimes as this is the responsibility of the police. It is after the police have concluded investigation that the DPP takes over the file for prosecution. This practice has been replicated in many Commonwealth countries.

In some common law countries, the prosecutor called Director of Public Prosecution (DPP) or National Director of Public Prosecution, is appointed by the President or the parliament, and has the final decision on the prosecution of crimes. However, in some countries the chief prosecutor is subject to some control by the Attorney General.⁹ In this context, it is possible for the attorney general and the chief prosecutor to disagree on the exercise of prosecutorial discretion. In such instances, the courts have tended to hold that there is a limitation to the exercise of prosecutorial discretion but the attorney general cannot do certain things. For example, in *Attorney-General In Re: Constitutional Relationship Between Attorney-General and the Prosecutor-General* the Supreme Court of Namibia held that the Attorney-General cannot ‘instruct the Prosecutor-General to institute a prosecution, to decline to prosecute or to terminate a pending prosecution in any matter’.¹⁰ In addition, the Supreme Court stated that the Attorney General cannot ‘instruct the Prosecutor-General to take or not to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution’,¹¹ which is a notable separation between the politician and the civil servant. However, the court further held that the Constitution of Namibia provides that ‘the Prosecutor-General should keep the Attorney-General informed of

⁷ Julia Fionda *Public Prosecutors and Discretion: A Comparative Study* (1995) 14; Kai Ambos ‘The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports’ (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 89 – 118.

⁸ Section 1 of the *Prosecution of Offences Act* 1985, Cap 23.

⁹ The Constitution of Namibia, for example, provides for the position of Attorney-General who is appointed by the President. The powers and functions of the Attorney-General of Namibia include (a) to exercise the final responsibility for the office of the Prosecutor-General; (b) to be the principal legal adviser to the President and Government; (c) to take all action necessary for the protection and upholding of the Constitution; and (d) to perform all such functions and duties as may be assigned to the Attorney-General by Act of Parliament. See also the Section 76 of Indian Constitution which provides for the powers and functions of the Attorney-General of India.

¹⁰ See *Ex Parte: Attorney-General In Re: Constitutional Relationship Between Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS) (13 July 1995), 39.

¹¹ *Ibid.*

all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority'.¹² This means that the Prosecutor General is subject to a minimum degree of accountability through the Attorney General, at least as far as information sharing is concerned.

In the *Certification of the Constitution of the Republic of South Africa*,¹³ the Constitutional Court interpreted a similar relationship between the National Director of Public Prosecution and the Minister of Justice. In interpreting section 179(4) of the South African Constitution, the Supreme Court of Appeal of South Africa held that 'although the Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the Minister is entitled to be kept informed of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority'.¹⁴

In civil law countries, the position and role of the prosecutor are slightly different. The investigation and prosecution of crimes are carried out by prosecutors and investigative judges. In France, for example, 'a judge, called the investigative judge or *juge d'instruction*, participates in the investigation and in the decision to prosecute'.¹⁵ In addition, the principle of legality applies in some civil law countries requiring an investigative judge or prosecutor to investigate and prosecute individuals for crimes where *prima facie* evidence exists.¹⁶

The German Criminal Code provides that 'the public prosecution office shall be obliged to take action in the case of all criminal offences which may be prosecuted, provided there are sufficient factual indications'.¹⁷ German Prosecutors have the same career as judges and are civil and public servants.¹⁸ This means prosecutors are under obligation to investigate and prosecute offenders as long as there is evidence in support. According to Fionda, in Germany,

¹² Ibid.

¹³ *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) (6 September 1996).

¹⁴ See paragraph 32 of the *National Director of Public Prosecutions v. Zuma* 2009 (4) BCLR 393 (SCA).

¹⁵ Nsereko *op cit* at 126.

¹⁶ Nidal Jurdi *The International Criminal Court and National Courts: A Contentious Relationship* (2011) 94; Nsereko *op cit* at 127.

¹⁷ Section 152 (2) of the German Code of Criminal Procedure known as principle of legality (Legalitätsprinzip)

¹⁸ Ambos *op cit* at 94.

there is no uniform prosecutorial policy. Instead, each prosecutorial office develops guidelines that guide the exercise of discretion in its area of jurisdiction.¹⁹

From the foregoing, it can be argued that the extent of discretion exercised by prosecutors at national level is subject to several factors. These include the provisions of the constitution, the type of legal system adopted by the country in question and the practice that has evolved over the years in the administration of criminal justice. In addition, other institutions such as the police might play a role, particularly in countries where investigations are conducted by the police.

3.1.2 Prosecutorial discretion at the International Criminal Tribunals

In the International Criminal Tribunals, does the position of prosecutor resemble that of civil law or common law systems or both? This section seeks to answer this question.

After the end of the Second World War, the allied forces set up the Nuremberg International Military Tribunal (IMT) for the ‘just and prompt trial and punishment of the major war criminals’ in Europe.²⁰ The crimes prosecuted by the Nuremberg Tribunal were crimes against peace, war crimes and crimes against humanity.²¹ Instead of having a single prosecutor, the Nuremberg Tribunal Charter established a ‘Committee of Prosecutors’ for the investigation and prosecution of war criminals. The Committee was made up of Chief Prosecutors appointed by States that were signatories to the Charter.²²

According to the Charter of the Nuremberg Tribunal, the responsibilities of the Chief Prosecutors were (a) to agree upon a plan of the work of each of the Chief Prosecutors and his staff; (b) to settle the final designation of major war criminals to be tried by the Tribunal; (c) to approve the indictment and the documents to be submitted therewith; (d) to lodge the indictment and the accompanying documents with the Tribunal; and (e) to draw up and

¹⁹ See Fionda *op cit* at 11.

²⁰ Preamble to the Charter of the IMT. The Tribunal was set up pursuant to the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics.

²¹ Article 6 of the IMT Charter.

²² Article 14 of the IMT Charter.

recommend draft rules of procedure to the Tribunal for its approval.²³ The Chief Prosecutors were also mandated to prepare indictments for approval by the Committee and to conduct preliminary examination of all necessary witnesses and all defendants.²⁴

The Chief Prosecutors acting individually and in collaboration with other members of the Committee, investigated, collected and produced evidence before and during the trial of the defendants.²⁵ Since they received direct instructions from their respective governments, they did not have the independence needed to discharge their duties.²⁶ No wonder these prosecutors failed to prosecute any Nazi officials who had collaborated with the allied forces during the war.²⁷

Unlike in the Nuremberg Tribunal, the Tokyo Tribunal granted more discretion to prosecutors. The Charter of the International Military Tribunal for the Far East (Tokyo Tribunal) took a different path by not leaving the appointments of the prosecutor entirely to their respective governments. The Tokyo Tribunal had the responsibility to ensure that war criminals from the Far East received justice and prompt trial.²⁸ The Tokyo Tribunal Charter provided for a Chief of Counsel to be appointed by the Supreme Commander of the Allied Powers. The responsibilities of the Chief of Counsel (Chief Prosecutor) included ‘the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal, and ...render[ing] such legal assistance to the Supreme Commander as is appropriate’.²⁹ The Charter also provided for the appointment of Associate Counsel (Deputy Prosecutor) to assist the Chief Prosecutor. Countries with which Japan had been at war were, however, allowed to appoint Deputy Prosecutors to assist the work of the Chief Prosecutor.³⁰

²³ Ibid.

²⁴ Ibid.

²⁵ Article 15 of the IMT Charter.

²⁶ William Schabas *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (2012) 75.

²⁷ Margaret M. DeGuzman and William A. Schabas ‘Initiation of Investigations and Selection of Cases’ in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà eds. *International Criminal Procedure: Principles and Rules* (2013) 133 – 34.

²⁸ Article 1 of the IMTFE Charter of 1946.

²⁹ Article 8 of the IMTFE Charter of 1946

³⁰ Ibid. These countries were Australia; Republic of China; Provisional Government of the French Republic; British India; Netherlands; New Zealand; United Kingdom and former Union of Soviet Socialist Republics (USSR).

However, notwithstanding these differences, both the Nuremberg and Tokyo prosecutors largely acted to serve the interests of their governments. The indictments of the Tokyo Tribunal were a result of political negotiations between the allied forces.³¹ They did not address the crimes of the individuals accused of war crimes who had handed over classified information on chemical weapon experiments.³² In addition, the prosecutors were responsible to the States that appointed them into the tribunals.³³

Both the Nuremberg and Tokyo tribunals were largely adversarial in their procedures and proceedings. The prosecutors were responsible for both the investigation and prosecution of the crimes. There were no judicial reviews of the decisions of the prosecutors, as the enabling legislation did not provide for such powers.³⁴

From the foregoing, it is clear that prosecutors at the Nuremberg and Tokyo Tribunals did not exercise discretion independently. The shortcomings at both Nuremberg and Tokyo played an important role in the conception of prosecutorial discretion for the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR),³⁵ to which we now turn.

3.1.3 Prosecutorial discretion at the ad hoc tribunals

The establishment of the ad-hoc criminal tribunals in Rwanda (ICTR) and in the former Yugoslavia (ICTY) marked a turning point in the functions, powers, importance or independence of the prosecutor in the administration of international criminal justice. Unlike the Nuremberg and Tokyo Tribunals that were established by the allied powers (the victors in the conflict), the ICTR and ICTY were established pursuant to a UN Security Council

³¹ DeGuzman and Schabas *op cit* at 134.

³² DeGuzman and Schabas *op cit* at 135; Robert Cryer *Prosecuting International Crimes: Selectivity and the International Criminal Regime* (2005) 208.

³³ Luc Cote ‘Independence and Impartiality’ in Luc Reydam, Jan Wouters and Cedri Ryngaert eds. *International Prosecutors* (2012) 372; Ralph Zacklin ‘The Failings of Ad Hoc International Tribunals’ (2004) 2 *Journal of International Criminal Justice* 541-545.

³⁴ DeGuzman and Schabas *op cit* at 135.

³⁵ Schabas *Unimaginable Atrocities op cit* at 76.

resolution.³⁶ These were passed pursuant to Article 39 of the UN Charter which mandates the Security Council to act when there is a threat to international peace and security.³⁷

The prosecutors of the ad-hoc tribunals are appointed by the UN Security Council and are expected to possess high moral character and the highest levels of competence and experience in the conduct of investigation and prosecution of criminal cases.³⁸ The ICTY and ICTR Statutes provide that the prosecutors serve four year terms and are eligible for reappointment.³⁹ This guarantees security of tenure of the prosecutors. The advantage is that prosecutors cannot easily be removed during their tenure without following the laid down procedure. In addition, the two Statutes provide that the prosecutors shall act independently as separate organs of the tribunals.⁴⁰ Articles 15 of the ICTR and 16 of the ICTY do not allow the prosecutors to seek or receive instructions from any government or from any other source.⁴¹

When the Nuremberg and Tokyo Tribunals are compared with the ICTY and the ICTR, some differences are apparent. Under the ICTY and the ICTR Statutes, prosecutors' independence is clearly recognised and protected while the Nuremberg and Tokyo Tribunals' founding documents did not reflect that. Then there is the issue of appointment. While the prosecutors of the Nuremberg and Tokyo Tribunals were appointed by the Allied Powers themselves, the prosecutors of the ICTY and the ICTR were appointed by the UNSC. The distinct processes through which the ad-hoc tribunals were set-up, it can be argued, mirror the differences in the appointment of their prosecutors.

Article 16 (2) of the ICTR Statute and Article 17 (2) of the ICTY Statute provide that the prosecutors shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organisations. These articles require the prosecutor to assess the information received or obtained and decide whether there is sufficient basis to proceed with an investigation or prosecution. In addition, the ICTY and ICTR prosecutors have the power

³⁶ The ICTY was established by Resolution 827 of the UNSC passed on 25 May 1993 while the ICTR established on 8 November 1994 by the UNSC Resolution 955.

³⁷ See Article 39 of the UN Charter.

³⁸ Article 15 (4) of the ICTR Statute; Article 16 (4) of the ICTY Statute.

³⁹ Ibid.

⁴⁰ Article 15 (2) of the ICTR Statute; Article 16 (2) of the ICTY Statute;

⁴¹ Ibid.

to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations.⁴² Whenever a determination that a *prima facie* case exists has been made, prosecutors are required to prepare indictments containing concise statements of the facts and the crimes with which the accused persons are charged for the judges of the Trial Chambers.⁴³ It is up to the judges of the ICTY and ICTR to decide whether to confirm or dismiss the indictments.⁴⁴ Thus, the two statutes guarantee the independence of the ICTY and ICTR explicitly and prescribe a procedure for exercising prosecutorial decision that guarantees such independence.

As noted in chapter two, a three-dimensional prosecutor has to exercise discretion through a process that is not biased and is objective by consistently applying criteria derived from societally acceptable sources.⁴⁵ The question that needs to be asked then is whether the prosecutors of the ad-hoc tribunals measure up to the theory of prosecutorial neutrality adopted in this study. This brings up the issue of discretion and selectivity.

In relation to the discretion exercised by the ICTY, Kerr argues that there is a difference between prosecutorial discretion and ‘selective prosecution’.⁴⁶ Selective prosecution is defined as ‘partiality or bias on the part of the prosecutor, rather than the exercise of discretion based on fixed criteria’.⁴⁷ In other words, the prosecutor of an ad-hoc tribunal can afford to be selective in the indictment of criminals in contrast with the prosecutor at the national level who is not called to be selective in the prosecution of criminals as long as there is evidence. This is because the financial implication of selection of cases for prosecution is more pronounced at the international level.⁴⁸

The discretionary power of the ad-hoc tribunals was confirmed in *Prosecutor vs Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo (Čelebići case)*⁴⁹ where the Appeals

⁴² Article 17 (2) of the ICTR Statute; Article 18 (2) of the ICTY Statute

⁴³ Article 17 (4) of the ICTR Statute 18 (4) of the ICTY Statute.

⁴⁴ Article 18 (1) of the ICTR Statute; Article 19 (1) of the ICTY Statute

⁴⁵ Chapter Two para 2.3.1

⁴⁶ Rachel Kerr *International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (2004) New York: Oxford University Press, 178.

⁴⁷ Ibid.

⁴⁸ Louise Arbour ‘Progress and Challenges in International Criminal Justice’ (1997) 21 *Fordham International Law Journal* 531 – 540.

⁴⁹ *Celebisi Delalić and others*, IT-96-21-A, Decision of the Appeal Chambers of the ICTY, 20 February 2001.

Chamber held that prosecutor of the ICTY had broad discretion in the investigation and prosecution of international crimes within the jurisdiction of the tribunal.⁵⁰ The ICTY Appeal Chambers further stated that '[p]rosecutorial discretion must therefore be exercised entirely independently, within the limitations imposed by the Tribunal's Statute'.⁵¹

Despite clear guarantees of independence, accusations of bias have been made about the manner in which the prosecutors of the ICTY and ICTYR have exercised their discretion in practice. For example, these tribunals have been criticised for not adopting regulations and clear prosecutorial strategies that outline how decisions are taken by the tribunals.⁵² Some criticisms have focussed on the specific decisions of the prosecutors. For example, the prosecutor of the ICTY's decision not to prosecute North Atlantic Treaty Organisation (NATO) officials for the bombing that took place during the Kosovo conflict has been cited as evidence of bias.⁵³ So too has the decision not to launch an investigation into the NATO bombings led to accusations that the ICTY was pursuing victor's justice reminiscent of prosecutions in Nuremberg and Tokyo after the Second World War.⁵⁴ The possibility of investigating citizens of NATO countries for alleged crimes committed in Kosovo would have incurred hostility on the part of the governments responsible.⁵⁵ According to Koskenniemi, a key proponent of the critical legal studies theory, the failure to prosecute NATO officials have 'provided space for cynicism and denial' regarding the successes of the ICTY as an international criminal justice institution.⁵⁶

⁵⁰ Ibid at paragraph 602.

⁵¹ Ibid at Paragraph 603.

⁵² Luc Cote 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 162 – 186 at 171-72 who argues that '[i]t is difficult to understand why the Prosecutors of the ICTR and ICTY both institutions being confronted with credibility problems in their specific regions, failed to adopt public regulations stating the criteria used in the general exercise of prosecutorial discretion. It becomes even more difficult if we consider that regulations were adopted in order to guide prosecutorial discretion in the case of *nolle prosequi*. It is all the more regrettable, considering that these important and broad discretionary powers are minimally regulated by the Statutes and Rules and, to a large extent, escape judicial control.'

⁵³ See Paragraph 91 of the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000.

⁵⁴ Kerr *op cit* at 203.

⁵⁵ Ibid at 204.

⁵⁶ Martti Koskenniemi 'Between Impunity and Show Trials' in J. A. Frohwein and R. Wolfrum (eds.), (2002) 6 *Max Planck Yearbook of United Nations Law*, 1 – 35.

On its part, the ICTR has been accused for the lack of prosecution of soldiers of the Rwanda Patriotic Front (RPF) for crimes committed during 1994 genocide which stands out as a reminder that there are constraints to prosecutorial independence.⁵⁷ The ICTR has only succeeded in indicting one party to the Rwandan conflict. This is because prosecutors have failed to pursue a single case of atrocities committed by RPF soldiers.⁵⁸

The experiences of the ICTY and ICTR show that prosecutorial independence and discretion are important for the effectiveness of international criminal tribunals. However, to insulate the tribunals from accusations of bias, more needs to be done to guarantee that independence and to regulate the exercise of discretion.

3.1.4 Prosecutorial discretion and completion strategies of the ICTY/ICTR

The ad hoc nature of international criminal tribunals serves as a constraint on the exercise of prosecutorial discretion. For the ICTY and ICTR, it was always expected that they would be wound up at some point. In order to systematically carry out its responsibility and also wind up its activities within a clear time-bound strategy, the President of the ICTY, Judge Claude Jorda, in 2002 submitted an annual report to the UNSC which contained a comprehensive strategy to fulfill the task of the ICTY and wind down its operation.⁵⁹

The genesis of the completion strategy of the ad hoc tribunals can be traced to the ‘Rules of the Road’ program established by the Rome Agreement of 18 February 1996. The governments of Croatia, the Federal Republic of Yugoslavia and Bosnia and Herzegovina agreed that war crimes investigations pursued by the authorities in Bosnia and Herzegovina

⁵⁷ See generally George W. Mugwanya ‘The Contribution of the International Criminal Tribunal for Rwanda to the development of International Criminal Law’ in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (2011) 63 – 93.

⁵⁸ HRW ‘Rwanda Tribunal Should Pursue Justice for RPF Crimes: Failure to Act Risks Undermining Court’s Legacy’ 12 December 2008, available online at <http://www.hrw.org/news/2008/12/12/rwanda-tribunal-should-pursue-justice-rpf-crimes>, accessed 7 January 2016; HRW ‘ICTR: Address Crimes Committed by the RPF - A Letter to the ICTR Prosecutor’ 11 December 2008, available online at <http://www.hrw.org/en/news/2008/12/11/ictr-address-crimes-committed-rpf>, accessed 7 January 2016.

⁵⁹ See ICTY ‘Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Court’ S/2002/678, June 2002, available online at http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf, accessed 14 September 2014.

were to be submitted to the ICTY Prosecutor for review prior to an arrest warrant, indictment and proceeding to trial before domestic courts.⁶⁰

This completion strategy proposed by the ICTY president was endorsed by the UNSC through the presidential statement which stated that ‘the ICTY should concentrate its work on the prosecution and trial of the civilian, military and paramilitary leaders suspected of being responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, rather than on minor actors.’⁶¹ In addition, UNSC resolution 1503 also confirmed the presidential statement.⁶² Furthermore, resolution 1503 also requested the ICTR to develop a completion strategy modeled after the ICTY.⁶³ The ICTR later developed its own completion strategy as required by the UNSC.⁶⁴ The ICTY and ICTR completion strategies envisage concentration on the investigation and prosecution of senior officials most responsible for crimes within the tribunals and the possibility of transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions.⁶⁵ However, the UNSC adopted resolution 1534 and clearly stated that judges of the ICTY and ICTR ‘in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503’.⁶⁶ This is a clear limitation on the discretions of the prosecutors of the ICTY and ICTR.⁶⁷

In conformity with the resolution of the UNSC, the judges of the ICTY amended the RPE to allow the transfer of cases to national jurisdictions and vetting of indictments by the prosecutor to ensure that only senior officials most responsible for crimes were charged.⁶⁸ However, the judges of the ICTR approved the amendment of the RPE to allow for the

⁶⁰ Daryl Mundis ‘Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?’ (2004) 28 *Fordham Journal of International Law* 591 – 615.

⁶¹ UNSC ‘Statement of the President of the Security Council’ S/PRST/2002/21, 23 July 2002.

⁶² Resolution 1503, S/RES/1503 (2003) adopted on 28 August 2003.

⁶³ Ibid at paragraph 8 of the Preamble.

⁶⁴ See ICTY ‘Completion Strategy’ *op cit* at 85.

⁶⁵ Laura Bingham ‘Strategy or Process - Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda’ (2006) 24 *Berkeley Journal of International Law* 687 – 717.

⁶⁶ UNSC resolution 1534, S/RES/1534 (2004), 26 March 2004.

⁶⁷ Bingham *op cit* 92 at 703.

⁶⁸ See ICTY RPE 11 *bis* and 28 respectively.

transfer of cases to national judicial systems under RPE 11 *bis* but refused to amend RPE 28 to vet the powers of the prosecutor to indict individuals. The judges argued that such a decision would infringe on the independence of the prosecutor and the discretion exercised under the ICTR Statute.⁶⁹ Although the ICTR judges declined to amend the RPE to allow them to vet the indictments of the prosecutor, the possibility of the UNSC suggesting such a process clearly infringes on the independence of the activities of the prosecutors of the tribunals. However, since the tribunals were set up by the UNSC, it may not be out of place for the UNSC to issue policy directions, as long as it is within the parameters of the Statutes that set up the ad hoc tribunals.

3.2 Prosecutorial discretion at the hybrid tribunals

3.2.1 The Special Court for Sierra Leone

Hybrid or mixed tribunals combine national and international criminal justice models of prosecutorial independence. Prosecutors of hybrid tribunals exercise discretion at various stages of the prosecution of international crimes. Unlike the ICC, the Special Court for Sierra Leone (SCSL) does not conduct preliminary examinations, although the prosecutor has discretion to charge individuals for crimes within the jurisdiction of the tribunal. The SCSL Statute empowers the tribunal to prosecute persons who bear the greatest responsibility for international crimes committed in the territory of Sierra Leone within the temporal jurisdiction of the Court.⁷⁰ In addition, the SCSL has the power to indict those leaders that threatened the establishment and implementation of the peace process in Sierra Leone through the commission of crimes of international concern.⁷¹ The Statute provides that the prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone.⁷²

⁶⁹ Daryl Mundis ‘The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals’ (2005) 99 *American Journal of International Law* 142 – 158; Mundis *op cit* note 87 at 612; Bingham *op cit* 92 at 705.

⁷⁰ Article 1 of the SCSL Statute.

⁷¹ *Ibid.* See generally Charles Chernor Jalloh ‘Prosecuting those Bearing “Greatest Responsibility”: The Contributions of the Special Court for Sierra Leone in Charles Chernor Jalloh ed. *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (2013) 589 – 623.

⁷² Article 15 (1) of the SCSL Statute.

In discharging the responsibilities provided in the SCSL Statute, the Prosecutor is required to act independently as a separate organ of the Special Court and shall not seek or receive instructions from any government or from any other source.⁷³ The SCSL Prosecutor is appointed by the UN Secretary-General for a three-year term and is eligible for re-appointment.⁷⁴ In addition, the Prosecutor is expected to be of high moral character, possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.⁷⁵ Furthermore, the SCSL Prosecutor is empowered to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations.⁷⁶ The SCSL has concurrent jurisdiction with national courts in Sierra Leone in the prosecution of international crimes.⁷⁷

The Statute gives the SCSL primacy over national proceedings. This is because at any stage of the proceedings at the national level, the SCSL may formally request a national court to defer to its competence in accordance with its Statute and the Rules of Procedure and Evidence.⁷⁸ Elucidating the powers/functions of the SCSL Prosecutor, the Appeals Chamber of the SCSL in *Brima's case* held that the Prosecutor is expected to indict the defendants bearing the greatest responsibility for international crimes, but the prosecutorial discretion to determine the individuals that meet the criteria is not subject to judicial review.⁷⁹ This shows the extent of the discretion given to the Prosecutor of the SCSL. One thing that stands out in the indictment of those responsible for international crimes in the SCSL is that the indictments targeted all the parties in the conflict.

The decision to indict all parties demonstrates an effort to balance prosecutorial discretion at the SCSL.⁸⁰ Its enabling statute clearly states the parameters within which it operates. The

⁷³ Ibid.

⁷⁴ Article 15 (3) of the SCSL Statute.

⁷⁵ Ibid.

⁷⁶ Article 15 (2) of the SCSL Statute.

⁷⁷ Article 8 (1) of the SCSL Statute

⁷⁸ Article 8 (2) of the SCSL Statute.

⁷⁹ Paragraph 282-83 of *Brima's case*, Appeal Chambers, SCSL, 22 February 2008.

⁸⁰ William Schabas 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice*, 731-761 at 750 argues that 'the most sincere attempt at balanced prosecution came from the Prosecutor of the SCSL. He issued three clusters of indictments, each directed at a different group in the conflict, including the government-supported Civil Defence Forces.'; Cote *op cit* note 56 at 385.

temporal jurisdiction of the SCSL is limited to the events that occurred within a specific period in Sierra Leone. The SCSL is an example of an international institution with an independent prosecutor expected to exercise prosecutorial discretion within the parameters of its enabling statute.

3.2.2 Extra-Ordinary Chambers in the Courts of Cambodia

Another innovation of hybrid tribunals in the exercise of prosecutorial discretion is the appointment of co-prosecutors. The enabling law of the Extraordinary Chambers in the Courts of Cambodia (ECCC) provides for two Co-Prosecutors. One must be Cambodian and the other an international staff member.⁸¹ The Co-Prosecutors are independent and not to be influenced by external actors in reaching their decisions.⁸² Furthermore, they shall not accept or seek instructions from any government or any other source.⁸³ The Co-Prosecutors are expected to reach decisions together and when there is no consensus between them, the Pre-Trial Chamber consisting of five judges settles the matter.⁸⁴

The exercise of prosecutorial discretion between two co-prosecutors at the ECCC became a problematic issue as they could not agree on some issues including the number of the people to be indicted by the ECCC. Furthermore, they had limited discretion in the exercise of their duties. A scholar argues that _the discretion afforded to the ECCC Co-Prosecutors seems rather limited. The obvious limits of temporal, material, and personal jurisdiction contained in the ECCC law serve as the initial limitation as to whom the Co-Prosecutors may indict.⁸⁵ For example, the ECCC can only try those who are responsible for the crimes committed during the reign of the Khmer Rouge in Cambodia.

The uniqueness of the ECCC in having two co-Prosecutors also had its own problems. Decision making was always a problem as the co-Prosecutors had divergent views on the same issue at times. This was witnessed when the International Prosecutor requested to open investigations for other top ranking Khmer Rouge leaders for crimes committed during the

⁸¹ Article 16 of the ECCC Law.

⁸² Rule 13 of the ECCC Rules of Procedure.

⁸³ Article 19 of the ECCC Law.

⁸⁴ Article 20 of the ECCC Law.

⁸⁵ Neha Jain _Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice_ (2010) 20 *Duke Journal of Comparative and International Law* 247 – 290.

period. The Cambodian Co-Prosecutor resisted this move arguing that opening more investigations in Cambodia would cause undue tension and make reconciliation difficult.⁸⁶ In its decision, the Pre-Trial Chamber resolved that the investigations should continue since there was no super majority as required by law to stop the discretion exercised by the International Co-Prosecutor.⁸⁷ The ECCC operates in a civil law system and has co-investigating judges, who are responsible for running the investigation and for effecting the indictment, following an introductory submission by the prosecutors. This can be contrasted with the Rome Statute where the Prosecutor has to apply for Pre-Trial Chamber for authorisation to proceed with investigations *proprio motu*.⁸⁸

Discussing prosecutorial discretions in the hybrid tribunals involves contrasting the activities of the SCSL and the ECCC. One major problem hampering the discretion of the prosecutor in the ECCC is the appointment of two independent prosecutors with divergent views as illustrated in their divergent views on the prosecution of Khmer Rouge suspects. Having two individuals agree on the same course of action and working together was not achieved in the ECCC.⁸⁹ On the other hand, though the Prosecutor for the SCSL has the discretion to choose who should be indicted for international crimes committed during the Sierra Leonean civil war, it is obvious that he had to contend with several political choices relating to the indictment of former President of Liberia, Charles Taylor.

In contrast with the ICC, the ECCC does not provide for preliminary examinations. Whereas the ICC Statute provides for the suspension or deferral of cases in the interests of justice, the ECCC law does not have such a provision. The procedure at the ICC is different in this regard, in that the Prosecutor has power to decide whether there is a reasonable basis to proceed with an investigation or to do otherwise. One factor that the ICC Prosecutor has to take into consideration is the interests of justice as provided in article 53 of the Rome Statute, which was one of the contentious issues for the ECCC.

⁸⁶ Open Society for Justice Initiative ‘Political Interference at the Extraordinary Chambers in the Courts of Cambodia’ July 2010, 16 available online at <http://www.opensocietyfoundations.org/reports/political-interference-extraordinary-chambers-courts-cambodia> (accessed 10 November 2013).

⁸⁷ See paragraph 45 of the Public redacted version - Considerations of the PTC regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, available online at [Public_redacted_version_-_Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71_\(English\).pdf](#), accessed 11 January 2016.

⁸⁸ Article 15 (3) of the Rome Statute.

⁸⁹ Cote *op cit* at 391.

3.2.3 Special Tribunal for Lebanon

The Special Tribunal for Lebanon (STL) was established through an agreement between the UN and the Government of Lebanon.⁹⁰ It is a treaty-based special tribunal established to try those responsible for the death of the former Prime Minister of Lebanon, Rafic Hariri, who was killed along with 21 others in a terrorist attack on 14 February 2005. The STL is neither a subsidiary organ of the UN nor part of the Lebanese court system.⁹¹ For the purposes of our discussion, the STL can be distinguished from other international criminal tribunals in several ways.

First, in the conduct of trials, more elements of civil law are evident than that of common law. Second, the investigation conducted by the International Independent Investigation Commission constitutes the core nascent prosecutor's office.⁹² Third, the STL is the first international criminal tribunal to combine substantial elements of both civil and common legal systems. For example, the applicability of the Lebanese Code of Criminal Procedure as a guiding principle alongside other reference materials reflecting the highest standards of international criminal procedure is a clear example of this development.⁹³ Fourth, the powers of the STL are enhanced by the provisions of the Statute to take measures to ensure expeditious hearing and prevent any action that may cause unreasonable delay during investigations and trials of accused suspects.⁹⁴ Fifth, the STL introduces trials in absentia.⁹⁵ This means that even when an accused person is not in the custody of the STL trials can be commenced pending the arrest and transfer of the accused person to the STL. This is a manifestation of elements of civil law in the activities of the STL.⁹⁶

It should be noted that the establishment of the STL was preceded by the Commission established by UNSC.⁹⁷ The report of the UN Secretary-General argues that establishing the

⁹⁰ Paragraph 6 of the Report of the Secretary-General on the establishment of a special tribunal for Lebanon 15 November 2006, S/2006/893.

⁹¹ *Ibid.*

⁹² *Ibid* at paragraph 8.

⁹³ See Article 28 of the STL Statute.

⁹⁴ Article 21 of the STL Statute.

⁹⁵ Article 22 of the STL Statute.

⁹⁶ Paragraph 9 of the UN Secretary General Report.

⁹⁷ UNSC Resolution 1595 (2005).

Commission first, has the effect of reducing the lifespan of the tribunal and increasing the efficiency and cost-effectiveness of its operation.⁹⁸

The Statute of the STL provides that the prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the STL. In addition, the Statute provides that in the interest of proper administration of justice, he or she may decide to charge jointly, persons accused of the same or different crimes committed in the course of the same transaction.⁹⁹ The prosecutor of the STL is expected to act independently as a separate organ of the STL, and shall not seek or receive instructions from any Government or from any other source.¹⁰⁰

The Statute provides that the prosecutor may be appointed by the Secretary-General for a three-year term and may be eligible for re-appointment for a further period to be determined by the Secretary-General in consultation with the Government. The prosecutor shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.¹⁰¹ The STL Statute also provides that the prosecutor shall be assisted by a Lebanese Deputy Prosecutor and by such other Lebanese and international staff as may be required to perform the assigned functions effectively and efficiently.¹⁰² In addition, the prosecutor has the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the prosecutor shall, as appropriate, be assisted by the Lebanese authorities concerned.¹⁰³

The co-operation between the STL and the Lebanese government is vital for the success of the STL. However, such cooperation also raises challenges for the independence of the Prosecutor of the STL. This challenge of cooperation and independence has also played out

⁹⁸ Paragraph 10 of the UN Sec Gen Report. See also Nidal Jurdi 'The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon' (2007) 5 *Journal of International Criminal Justice* 1125-1138.

⁹⁹ Article 11 of the STL Statute.

¹⁰⁰ Article 11 (2) of the STL Statute.

¹⁰¹ Article 11 (3) of the STL Statute.

¹⁰² Article 11 (4) of the STL Statute.

¹⁰³ Article 11 (5) of the STL Statute.

in the activities of the Prosecutor of the ICC. This is because the ICC Prosecutor is accused of bowing to the wishes of some of the States where it is conducting investigations.¹⁰⁴

3.3 Conclusion

This chapter has traced the evolution of prosecutorial discretion at national jurisdictions and international criminal courts. Its main purpose was to lay a foundation for the examination of the legal framework governing prosecutorial discretion at the ICC in chapter three. The chapter has noted the differences in the appointment, powers, roles and responsibilities of prosecutors at national and international criminal justice institutions. In most common law systems, the prosecutors are not responsible for carrying out investigations. This responsibility lies with other organs of the government, like the police. In addition, international criminal justice systems like the ICTY and the ICTR do not carry out preliminary examinations to determine whether there is a reasonable basis to commence an investigation. This is because the mere fact that tribunals were set up by the UNSC acting under Chapter VII of the UN Charter means that the gravity of the crimes is not in question. The UNSC also limited the territorial and temporal jurisdictions of the tribunals, meaning that they could not investigate or indict individuals outside the provisions of the enabling statutes. The ICC Prosecutor has wider jurisdiction than that of the ad-hoc tribunals (ICTY and ICTR).

The jurisdiction of the ICC is not limited to a particular conflict as the Prosecutor has the power to investigate crimes committed in the territory of both States Parties and non-State Parties. This means the ICC Prosecutor has a wider territorial and temporal jurisdiction compared with the ad-hoc tribunals. Furthermore, the ICC can investigate the conduct of non-State Parties if the conduct is referred to the ICC by the UN Security Council acting under Chapter VII of the UN Charter.¹⁰⁵

¹⁰⁴Darryl Robinson *‘Inescapable Dyads: Why the ICC Cannot Win’* (2015) 28 *Leiden Journal of International Law* 323 - 347; Ray Murphy *‘Gravity Issues at the International Criminal Court’* (2006) 17 *Criminal Law Forum*, 281 – 315; Adam Branch *‘Uganda’s Civil War and the Politics of Intervention’* (2007) 21 *Ethics and International Affairs* 179 - 198.

¹⁰⁵ Luc Cote *‘International Criminal Justice: Tightening up the Rules of the Game’* (2006) 88 *International Review of the Red Cross* 133 – 144.

Overall, the ICTY and the ICTR represent improvements in the administration of justice over the Nuremberg and Tokyo Tribunals as far as prosecutorial independence is concerned. However, each has shown that the tension between the independence of the prosecutor and exercise of prosecutorial discretion, by the tribunals has not been resolved. These experiences shaped negotiations for the adoption of the Statute that established the ICC which also placed some restrictions on the powers of the ICC Prosecutor to exercise discretion. For example, Nsereko argues that:

'the restrictions placed on the [ICC] Prosecutor may appear intrusive and obstructive. Nevertheless, given the volatile political environment in which the Court operates the interests of States that may be at stake and the profile of the individuals that are likely to appear before the Court, the restrictions are justified. They ensure transparency and accountability in the exercise of the Prosecutor's powers. They serve to shield the Prosecutor from accusations of initiating politically motivated prosecutions.¹⁰⁶

It does not seem, however, as if these restrictions have shielded the ICC Prosecutor from these accusations. The next chapter will discuss the Rome Statute legal frame work and how it regulates the exercise of prosecutorial discretion during preliminary examinations.

¹⁰⁶ Nsereko *op cit* at 141.

Chapter Four

Prosecutorial Discretion and the Rome Statute Legal Framework

4.0 Introduction

To critically evaluate the activities of the Prosecutor of the ICC during preliminary examination, it is pertinent to understand the legal framework governing the powers of the ICC Prosecutor and how the theory of neutrality features in that legal framework. This will entail a discussion of the formal protection of the independence of the Prosecutor and the mechanisms of ensuring that the Prosecutor is independent in fact. Other questions answered by the chapter are to what extent does the ICC Statute guarantee the independence of the Prosecutor? What mechanisms are there to ensure that the Prosecutor is independent in law and in practice? Uniting these questions is the assumption that the proper exercise of prosecutorial discretion depends on the independence and accountability of the Prosecutor.

In answering these questions, the chapter will draw from the preceding chapters which have looked at prosecutorial independence and discretion as it has evolved at the national level and in international criminal law. Of interest is how much the ICC framework for the exercise of prosecutorial discretion has learnt from the past and whether there are specific lessons for the future.

The Prosecutor of the ICC is the heart of the international criminal justice system. One area where the role of the Prosecutor is crucial relates to preliminary examinations. The Prosecutor, as will be seen in this chapter, has the responsibility to conduct preliminary examinations of national situations to determine whether international crimes have been committed before charges can be brought against specific individuals. The manner in which that discretion is exercised has a bearing on how the ICC is perceived throughout the world.

4.1 Prosecutorial discretion and treaty interpretations

Before the review of the provisions of the Rome Statute is attempted, it is important to set out clearly the parameters of interpretation that will guide subsequent discussions. The Vienna Convention on the Laws of Treaties (VCLT) applies in the interpretation of the provisions of

the Rome Statute.¹ This is because the Statute is a multi-lateral treaty signed by about 122 State Parties.² Therefore, the customary rules of treaty interpretation under article 31 of the VLCT will ordinarily apply.³

The VCLT provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁴ This is a three-step inquiry involving, the 'ordinary meaning' the 'object and purpose' and 'the context' of the provision in relation to other provisions.⁵ The text of the Rome Statute, its preamble and available annexes form part of the materials consulted to interpret the provision of the Statute.⁶ However, where there is ambiguity in the provisions of a statute, the *travaux préparatoires* can be used to clarify its meaning as agreed by parties to the treaty.⁷

¹ The Vienna Convention on the Law of Treaties was adopted on 22 May 1969 and entered into force on 27 January 1980 *United Nations Treaty Series*, vol. 1155, 331; Leila Sadat and Jarrod Jolly 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 *Leiden Journal of International Law*, 755-788.

² See Paragraph 19 of Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the *Situation in the Republic of Kenya*, ICC-01/09 31 March 2010; Para 33 of Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal in the *Situation in Democratic Republic of the Congo*, ICC-01/04-168 of 13 July 2006.

³ Para 33 of Maritime Delimitation and Territorial Questions (*Qatar v. Bahrain*), Jurisdiction and Admissibility, Judgment of 15 February 1995, ICJ Reports 1995; Para 47 of the Dispute Regarding Navigational And Related Rights (*Costa Rica v. Nicaragua*) Judgment, I.C.J. Reports 2009, 213; Para 41 of Territorial Dispute (*Libyan Arab Jamahiriya v Chad*), Judgment of 3 February 1994, ICJ Reports 1994; Para 160 of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ICJ Reports 2007.

⁴ Article 31 (1) of the VCLT.

⁵ Michael Kourabas 'A Vienna Convention Interpretation of the "Interests of Justice" Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, And the Situation In Northern Uganda: A "Great Qualitative Step Forward," or A Normative Retreat?' (2007) 14 *University of California Davis Journal of International Law and Policy* 59 – 93 at 69.

⁶ Article 31 (2) of the VCLT.

⁷ Article 32 of the VCLT.

4.2 The Prosecutor of the ICC: Drafting history

As noted in chapter two, the office of the Prosecutor was one of the most contentious issues that negotiators had to resolve during the Diplomatic Conference in Rome.⁸ One of the issues in contention was whether the prosecutor should be allowed to initiate investigations *proprio motu*. The initial drafts produced by the ILC in 1994 did not allow for that possibility.⁹ The ILC was of the opinion that 'the investigation and prosecution of the crimes covered by the statute should not be undertaken in the absence of the support of a State or the UNSC, at least not at the present stage of development of the international legal system'.¹⁰ The ILC was of the view that the support of State parties or the UNSC would prevent 'frivolous, groundless or politically motivated complaints'.¹¹ In other words, the ILC assumed that the prosecutor was vulnerable to political pressures and frivolous complaints. Only member States and the UNSC could rise above such pressures.

However, at a meeting of the Ad hoc Committee on the Establishment of the International Criminal Court in 1995, a proposal was made by some delegates supporting an enhanced role for the Prosecutor, including the possibility to initiate investigations and prosecutions of international crimes of its own accord.¹² The delegates argued that such a role would enhance 'the independence and autonomy of the prosecutor, who would be in a position to work on behalf of the international community rather than a particular complainant State or the Security Council'.¹³

⁸Chapter two, paragraph 2.5. See also Morten Bergsmo and Jelena Pejic 'Article 15' in Otto Triffterer ed. *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2nd ed. (2008) 582.

⁹ Paragraph 4 of commentary to Article 25 of the Draft Statute of the International Criminal Court in Report of the International Law Commission on the Work of its Forty-Sixth Session A/CN.4/SER.A/1994/Add.I (Part 2).

¹⁰Ibid at Paragraph 5.

¹¹ Draft Statute of the International Criminal Court in Report of the International Law Commission on the Work of its Forty-Sixth Session A/CN.4/SER.A/1994/Add.I (Part 2). *Yearbook of the International Law Commission 1994: Report of the Commission to the General Assembly on the work of its forty-sixth session* (1997) 46.

¹² William Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010) 316.

¹³Paragraph 113 of the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court General Assembly Official Records, Fiftieth Session Supplement No. 22 (A/50/22), 26.

The States that opposed the possibility of having an independent Prosecutor included the US.¹⁴ The US believed that it would be detrimental to the pursuit of international peace and security to have a prosecutor with unfettered powers.¹⁵ The US stated further that the UN Security Council and States Parties were better positioned to refer cases to the ICC and that the Prosecutor could be politically motivated in initiating investigations and prosecutions.¹⁶ Japan, India and Malaysia supported the position of the US.¹⁷

However, several countries, including those from Africa, argued for an independent prosecutor with powers to refer matters to the ICC. A delegate from South Africa argued that ‘a strong Prosecutor, with the power to act *proprio motu*, [i]s critical to the independence and effectiveness of the Court’.¹⁸ A delegate from Belgium argued that ‘the power of the Prosecutor to initiate investigations *proprio motu* was essential’.¹⁹ The delegate from Sierra Leone argued that it was ‘imperative that the Court should have inherent jurisdiction and that the Prosecutor should be empowered to initiate investigations *proprio motu*’.²⁰ The delegate from Namibia argued that the ‘independence of the Prosecutor was of great importance to the effective operation of the Court; he or she must be able to initiate investigations and institute

¹⁴ For example, the US government opposed the idea of an independent prosecutor by arguing that ‘[i]t would be unwise to grant the Prosecutor the right to initiate investigations. That would overload the Court, causing confusion and controversy, and weaken rather than strengthen it. The Prosecutor should not be turned into a human rights ombudsman responding to complaints from any source.’ See Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 17 July 1998, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, A/CONF.183/13 (Vol.11), 95, available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed 12th March 2016.

¹⁵ Morten Bergsmo ‘The Jurisdictional Regime of the International Criminal Court (Part II, Articles 11-19)’ (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 345 – 363 at 356.

¹⁶ William Schabas ‘United States Hostility to the International Criminal Court: It’s All About the Security Council’ (2004) 15 *European Journal of International Law* 701 – 720.

¹⁷ For example, the Japanese delegate argued it was ‘inappropriate to give the Prosecutor the right to initiate an investigation *proprio motu*’. The delegate from India argued that ‘it was inappropriate to vest an individual Prosecutor with the power to initiate investigations *proprio motu*’. The delegate from Malaysia stated that ‘the Prosecutor ... should not be empowered to initiate an investigation *proprio motu* in view of the principle of complementarity and the danger of adverse effects on the integrity and credibility of the office and possible accusations of bias.’ See Rome Statute Official Records 67 – 109.

¹⁸ Ibid

¹⁹ Ibid.

²⁰ Ibid.

prosecutions *proprio motu*, subject to appropriate judicial scrutiny'.²¹ The Philippine delegate argued that the ICC Prosecutor should be 'independent and be entitled to investigate complaints *proprio motu*, subject to the safeguards provided by a supervisory pre-trial chamber'.²² In the end, there was a compromise between the two camps, leading to the current provisions in the Rome Statute regarding the powers of the Prosecutor. The Rome Statute empowers the prosecutor to open an investigation, *proprio motu*, over a situation within the jurisdiction of the ICC, but subjects this power to the authority of the Pre-Trial Chamber of the ICC.²³

4.3 The formal independence of the Prosecutor

The office of the Prosecutor is established under Article 42 of the ICC Statute. The ICC Prosecutor is elected by secret ballot and needs an absolute majority of State Parties to the Rome treaty.²⁴ Although the Statute provides limited information on the procedure for nominating and electing the Prosecutor, the State Parties have adopted a procedure for the nomination of judges, the Prosecutor and the Deputy Prosecutors of the Court (Resolution on the Procedure for the nomination and election).²⁵

These Procedures attempt to ensure that the person appointed as Prosecutor is independent in law and practice. For example, they state that nominations for the Prosecutor should be made by several State Parties.²⁶ In addition, they urge State Parties to make every effort to elect the Prosecutor by consensus.²⁷ If consensus does not emerge, then the candidates have to be put

²¹ Ibid.

²² See Rome Conference Official Records. See also Lawyers Committee for Human Rights 'The International Criminal Court Trigger Mechanisms and the need for an independent Prosecutor: A position paper of the Lawyers Committee for Human Rights', July 1997, available online at <http://www.iccnw.org/documents/LCHRTriggerMechanism.pdf>, accessed 19 September 2016.

²³ Article 15 (3) of the Rome Statute.

²⁴ Article 42 (4) of the Rome Statute. The Assembly of States Parties of the Rome Statute consists of all States that have ratified the treaty. Though non-state parties can participate in the meetings, they do not have a right to vote.

²⁵ Resolution on the Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court, ICC-ASP/3/Res.6, adopted at the 6th plenary meeting, on 10 September 2004, available online at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-3-Res.6-CONSOLIDATED-ENG.pdf, accessed 7 January 2016.

²⁶ Ibid at paragraph 29.

²⁷ Paragraph 33 of the Resolution on the Procedure for the nomination and election.

up for election. The absolute majority required for election was intended to ensure that the Prosecutor garners widespread support from states. Such level of support would militate against partiality on the part of the Prosecutor. In addition to these requirements, candidates for the office of the Prosecutor are expected to be persons of high moral character and competence, and to have extensive practical experience in the prosecution or trial of criminal cases.²⁸

The Prosecutor enjoys a relatively secure tenure. The Prosecutor is appointed to an uninterrupted single term of nine years.²⁹ During this period, the Prosecutor is expected not to engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence.³⁰ Furthermore, the Prosecutor is prohibited from engaging in any other occupation of a professional nature while in office.³¹ If there is any likelihood of conflict of interest, the Prosecutor may request to be excused from a particular situation or case.³²

The Prosecutor can be removed from office on two grounds only. The first is when the Prosecutor is found to have committed ‘serious misconduct’ or a ‘serious breach’ of his or her duties under the Statute, as provided for in the Rules of Procedure and Evidence or displays inability in exercising the functions required by the Statute.³³ The second is when the Prosecutor is unable to exercise the functions required by the Rome Statute.³⁴

A serious misconduct is conduct that is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court.³⁵ Serious breach of duty occurs where a person has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties.³⁶ Inability to exercise the functions of the office can be due to

²⁸ Article 42 (3) of the Rome Statute

²⁹ Article 42 (4) of the Rome Statute

³⁰ Article 42 (5) of the Rome Statute.

³¹ Ibid.

³² Article 42 (6) of the Rome Statute.

³³ Article 46 (1) (a) of the Rome Statute.

³⁴ Article 46 (1) (b) of the Rome Statute.

³⁵ Rule 24 (1) of the Rule of Procedure and Evidence.

³⁶ Rule 24 (2) of the Rules of Procedure and Evidence.

sickness or any other factor that could militate against the effective functioning of the Prosecutor.

The security of tenure of the Prosecutor is not only guaranteed by the prescription of grounds of removal. It is also guaranteed by a specific procedure by which such removal can happen. Article 46 (2) of the Rome Statute provides that a decision to remove the Prosecutor from office is made by the ASP through a secret ballot by an absolute majority of States Parties to the Rome Statute.³⁷ This means that the Prosecutor can be removed for gross misconduct only during the annual sessions of the ASP, unless a special session is convened for that purpose.³⁸ Where the Prosecutor has committed misconduct of less serious nature, he or she shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.³⁹

For the Prosecutor to be independent, it is important that his or her powers are clearly laid down by law. The Rome Statute does this in Article 42 of the Rome Statute which provides that the 'Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof.'⁴⁰ The Rome Statute also provides that the Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. In addition, it states that the Prosecutor and the Deputy Prosecutors shall be of different nationalities and shall both serve on a full-time basis.⁴¹

The Rome Statute sets a high standard for the ICC Prosecutors with regard to character and competence. It provides that the Prosecutor and the Deputy Prosecutors 'shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases'.⁴² In addition, the Prosecutor and Deputy Prosecutors

³⁷ Article 46 (2) (b) of the Rome Statute.

³⁸ Annual Sessions of the ASP meeting are alternated between The Hague, Netherlands and the United Nations Headquarters in New York. See Art 112 (6) of the Rome Statute; S. Rama Rao *‘Assembly of States Parties’* in Otto Triffterer ed. *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 2nd ed. (2008) 1687 – 1697 at 1695.

³⁹ Article 47 of the Rome Statute.

⁴⁰ Article 42 (1) of the Rome Statute.

⁴¹ Ibid.

⁴² Article 43 (3) of the Rome Statute.

shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.⁴³

The Rome Statute provides expressly that the ICC Prosecutor shall act independently as a separate organ of the Court. As such, it has a responsibility to receive referrals on crimes within the jurisdiction of the Court, examine evidence and conducting investigations and prosecutions before ICC judges. The Office of the Prosecutor is prohibited from seeking or acting on instructions from any external source.⁴⁴

This discussion shows that at the formal level, the Rome Statute has provisions aimed at ensuring that the Prosecutor is independent and exercises prosecutorial discretion without any interference or favour. Like the prosecutors at the national level and in other international criminal tribunals, the ICC Prosecutor derives his or her powers from the empowering law. Such guarantee of formal independence is bolstered by other specific provisions of the Rome Statute and its accompanying subsidiary laws that define the powers of the Prosecutor, make provision for a relatively credible appointment process of the Prosecutor, protect the tenure of the incumbent and provide the legal framework for the exercise of prosecutorial discretion. This is a marked improvement on the Nuremberg and Tokyo tribunals whose prosecutors were appointed in a partisan fashion by the Allied Powers to prosecute losers of the World War II. To some extent, this is also an improvement on the prosecutors of the ICTY and the ICTR who were appointed by the UNSC with recommendations from the Secretary-General of the UN.

The Prosecutor of the ICC also enjoys a longer tenure of nine years compared to the prosecutors of the SCSL and the STL referred to in this study as hybrid tribunals who were or are appointed into office by the UN Secretary-General for three renewable years, and the prosecutors of the ICTY and ICTR, who enjoy four-year renewable terms.

4.4 The Prosecutor and jurisdiction of the ICC

Jurisdiction is a critical factor in the exercise of discretion during preliminary examinations. If the ICC does not have jurisdiction over a situation, the Prosecutor cannot exercise

⁴³ Ibid. The Working Languages of the Court are French and English. However, the Official Languages of the Court are Arabic, Chinese, English, French, Russian and Spanish. See Article 50 of the Rome Statute.

⁴⁴ Article 42 of the Rome Statute.

discretion over that situation. There are several forms of jurisdiction and these are discussed extensively in the following section.

4.4.1 The subject matter jurisdiction of the ICC

As already noted in this chapter, the jurisdiction of the ICC is limited to the most serious crimes of concern to the international community as a whole. Therefore, the Court has jurisdiction over the crimes of genocide; Crimes against humanity; War crimes; and the crime of aggression.⁴⁵

According to the Rome Statute, the crime of genocide is committed when it can be established that the perpetrator acted with an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, by committing any of the following crimes: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.⁴⁶

On the other hand, crimes against humanity involves several acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁴⁷ The ICC also has jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. In addition, these crimes are related to the grave breaches of the Geneva Conventions of 12 August 1949. Furthermore, War crimes also include other serious violations of the laws and

⁴⁵ Article 5 of the Rome Statute.

⁴⁶ Article 6 of the Rome Statute.

⁴⁷See Article 7 of the Rome Statute. These acts include the following crimes (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law; (i) Enforced disappearance of persons;(j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

customs applicable in international armed conflict, within the established framework of international law.⁴⁸

Regarding the crime of aggression, the Review Conference of the Rome Statute held in Kampala, Uganda from 31 May - 11 June 2010 adopted a definition of the crime of aggression. However, the ICC will have jurisdiction over the crime subject to a decision to be taken after 1 January 2017 by the same majority of State parties as is required for the adoption of an amendment to the Statute.⁴⁹

4.4.2 The personal jurisdiction of the ICC

The personal jurisdiction of the ICC, which can be contrasted with the subject matter jurisdiction already discussed, is subject to the provisions of the Rome Statute. This is because the ICC does not have universal jurisdiction and therefore cannot conduct investigations in all places where crimes are committed. A State which becomes a party to the Rome Statute accepts the jurisdiction of the Court. The jurisdiction of the ICC can be activated by a State Party to the Rome Statute,⁵⁰ by the UNSC acting under Chapter VII of the UN Charter,⁵¹ and when the Prosecutor initiates an investigation in respect of a crime within the jurisdiction of the ICC.⁵²

A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.⁵³

⁴⁸ Ibid.

⁴⁹ Assembly of State Parties resolution RC/Res.6 adopted at the 13th plenary meeting, on 11 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf, accessed 2nd February 2016.

⁵⁰ Article's 13 (a) and 14 of the Rome Statute; Nabil Elaraby 'The Role of the Security Council and the Independence of the International Criminal Court' in Mauro Politi and Giuseppe Nesi eds. *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 43.

⁵¹ Article 13 (b) of the Rome Statute.

⁵² Article's 13(c) and 15 of the Rome Statute.

⁵³ Article 14 (1) of the Rome Statute.

When a State has ratified the Rome Statute, it means that the ICC has jurisdiction over its citizens regarding crimes which are within the jurisdiction of the ICC. Therefore, ratification of the Rome Statute activates the jurisdiction of the ICC. The jurisdiction of the ICC can be activated by a State Party that decides to refer a situation to the ICC. The Rome Statute provides that the State Party shall specify, as far as possible, the relevant circumstances of the crimes allegedly committed and be accompanied by such supporting documents as is available to the State referring the situation.⁵⁴

Although the Statute envisages the referral of a situation by a State Party, the ICC Prosecutor has opened several situations as a result of self-referral. Some scholars have argued that the ICC Statute did not envisage self- or auto-referrals.⁵⁵ However, there is no provision in the Statute that excludes the use of self-referral as a mode of triggering the jurisdiction of the Court.

The ICC may exercise jurisdiction over non-States party that, by declaration lodged with the Registrar of the ICC, accept the jurisdiction of the Court.⁵⁶ In addition, if a State becomes a Party after the entry into force of the Statute, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless the State in question makes a declaration accepting the retroactive jurisdiction of the ICC.⁵⁷

When a State Party or the Prosecutor initiates an investigation, the ICC may exercise jurisdiction over the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of the registration of that vessel or aircraft.⁵⁸ In addition, the Court has jurisdiction over nationals of State Parties accused of committing international crimes within the jurisdiction of the ICC whether the crimes were committed within the territory of the State party or that of a non-State Party.⁵⁹

The way the jurisdiction of the ICC is triggered is important in a study on preliminary examinations. This is because the Prosecutor is mandated by the Rome Statute to investigate

⁵⁴ Article 14 (2) of the Rome Statute.

⁵⁵ William Schabas ‘Complementarity in Practice: Some Uncomplimentary Thoughts’ (2008) 19 *Criminal Law Forum* 5 – 33.

⁵⁶ Article 12 (3) of the Rome Statute.

⁵⁷ Article 11 (2) of the Rome Statute.

⁵⁸ Article 12 (2) (a) of the Rome Statute.

⁵⁹ Article 12 (2) (b) of the Rome Statute.

crimes committed in the territory of State Parties or by citizens of State Parties or when a non-State Party accepts the jurisdiction of the Court.⁶⁰

However, when crimes are committed in the territories of non-State Parties and by their citizens, the ICC does not have jurisdiction unless the UNSC refers the situation to the Prosecutor as already stated.⁶¹ Irrespective of how the jurisdiction of the ICC is triggered, the Prosecutor is mandated to conduct a preliminary examination to decide whether there is reasonable basis to proceed with an investigation.⁶² The decision to open an investigation after a preliminary examination can be suspended by the UNSC acting under Chapter VII of the UN Charter.⁶³ This means that the decision of the Prosecutor is subject at times to the decisions of the UN Security Council.

If a situation is referred to the Prosecutor by a State Party or the UNSC, the Prosecutor initiates an investigation once a determination is made that there is a reasonable basis to proceed. However, if a communication is submitted to the Prosecutor under article 15 of the Rome Statute, the Prosecutor has to seek an authorisation from the Pre-Trial Chamber to open an investigation. For the ICC to exercise jurisdiction over a situation, it has to be established that crimes within the jurisdiction of the Court have been committed.⁶⁴ As already noted in chapter one, the Pre-Trial Chamber of the ICC can intervene in a preliminary examination only when a decision is made not to proceed.⁶⁵

⁶⁰ Article 12 of the Rome Statute; Dapo Akande *‘The Jurisdiction of the International Criminal over Nationals of Non-Parties: Legal Basis and Limit (2003) 1 Journal of International Criminal Justice 618 – 650*; Eve La Haye *‘The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising Its Jurisdiction’ (1999) 46 Netherlands International Law Review 1 – 25*.

⁶¹ Article 13 (b) of the Rome Statute.

⁶² See Paragraph 1.0 of chapter one; Article 53 (1) of the Rome Statute.

⁶³ Article 16 of the Rome Statute provides, *‘[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.’*

⁶⁴ These are Genocide (Article 6), War Crimes (Article 8), Crimes Against Humanity (Article 7) and the Crime of Aggression (Article 8bis). See Kelly D. Askin *‘Crimes Within the Jurisdiction of the International Criminal Court (1999) 10 Criminal Law Forum 33 – 59*.

⁶⁵ Article 53 (3) (a) of the Rome Statute.

As a court of last resort, its jurisdiction is limited to the most serious crimes of concern to the international community.⁶⁶ Jurisdiction is an important aspect of preliminary examination. The Prosecutor cannot commence an investigation if the ICC does not have jurisdiction. Jurisdiction relates to the period when the crimes were committed, the types of crimes that were committed, the territory where the crimes were committed and whether the ICC has jurisdiction over individuals who committed the alleged crimes.

The ICC has jurisdiction only over natural persons.⁶⁷ This means that crimes allegedly perpetrated by States and non-State actors like multinational corporations are not within the jurisdiction of the Court.⁶⁸

The exercise of prosecutorial discretion during preliminary examinations is limited by the age of an individual accused of committing an international crime. The Statute prohibits the Prosecutor from investigating or prosecuting any person who is under the age of eighteen at the time the person is alleged to have committed international crimes within the jurisdiction of the ICC.⁶⁹

4.4.3 Jurisdiction *ratione temporis*

According to Article 11 of the Rome Statute, the ICC's jurisdiction relates to crimes committed after July 2002 when the Statute entered into force. This is referred to as jurisdiction *ratione temporis*.⁷⁰ This means that the jurisdiction of the ICC is not retroactive and commences after the entry into force of the Rome Statute in 2002.⁷¹ Furthermore, if a state becomes a State Party to the Statute after its entry into force, the ICC may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for

⁶⁶ Article 5 of the Rome Statute; Daniel N. Nsereko 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 *Criminal Law Forum* 87 – 120.

⁶⁷ Article 25 (1) of the Rome Statute.

⁶⁸ There were discussions to include crimes committed by non-state actors under the jurisdiction of the Court. However, the proposals were not accepted as the negotiators settled for core international crimes dealing with individual criminal responsibility.

⁶⁹ Article 26 of the Rome Statute.

⁷⁰ Article 11 (1) of the Rome Statute.

⁷¹ See Article 24 of the Rome Statute.

that State.⁷² This provision can only be waived if the State makes a declaration under article 12 (3) of the Statute.⁷³

4.4.4 Jurisdiction *ratione materiae*

Therefore, crimes that fall outside genocide, crimes against humanity and war crimes are beyond the investigative powers of the Prosecutor during preliminary examinations.⁷⁴ A person is not criminally liable unless the conduct in question constitutes a crime within the jurisdiction of the Court at the time it took place. That means that crimes that do not meet the threshold set out in the Rome Statute are beyond the discretionary powers of the Prosecutor and the scope of the ICC. Jurisdiction *ratione materiae* or subject-matter jurisdiction is an important aspect of jurisdiction analysis during preliminary examinations. This is because the Prosecutor cannot investigate crimes that are not within the jurisdiction of the Court.⁷⁵

4.4.5 Territorial jurisdiction

The ICC needs to have both territorial and personal jurisdiction in order for the Prosecutor to decide whether there is reasonable basis to proceed with an investigation.⁷⁶ This means that preliminary examinations will involve questions as to whether crimes within the jurisdiction of the ICC were committed on the territory of a State Party or by a national of a State Party.⁷⁷ Furthermore, jurisdiction *ratione personae* is satisfied if a State that is not a party to the Statute lodges a declaration to that effect, accepting the jurisdiction of the Court.⁷⁸ The UNSC provides an exception to this rule. This is because the UNSC can refer non-State Parties to the ICC.⁷⁹

⁷² Article 11 (2) of the Rome Statute.

⁷³ Ibid. Cote D'Ivoire made such a declaration which means that the ICC has jurisdiction over crimes committed in the country since July 2002.

⁷⁴ Paragraph 37 of the Policy Paper on Preliminary Examinations.

⁷⁵ See Article 5 of the Rome Statute.

⁷⁶ Paragraph 40 of the Policy Paper on Preliminary Examinations.

⁷⁷ Article 12 (2) of the Rome Statute.

⁷⁸ Article 12 (3) of the Rome Statute.

⁷⁹ Article 13 (b) of the Rome Statute.

4.5 The Prosecutor and trigger mechanisms of jurisdiction

There are different ways that the jurisdiction of the ICC can be activated. These are generally referred to as trigger mechanisms because it is usually through these processes that the jurisdiction of the ICC is activated by one of the following: a State Party, the Prosecutor of the ICC or by the UNSC acting under Chapter VII of the UN Charter. These trigger mechanisms are discussed below. It is important to discuss the trigger mechanisms through which situations can be referred to the ICC. In addition, as stated in chapter one, the case-studies in the thesis adopts the three ways through which referrals are made to the ICC in the analysis made in chapters six to eight subsequently.

4.5.1 Referral of a situation by a State party

A situation that is within the jurisdiction of the ICC can be referred to the Prosecutor by a State Party to the Rome Statute. The ICC Prosecutor encourages States to self-refer cases within the jurisdiction of the Court to the ICC for adjudication.⁸⁰ This means that State Parties to the Rome Statute refer potential situations within their jurisdiction to the ICC Prosecutor to commence preliminary examinations.⁸¹

This procedure has given rise to self-referral or auto-referral which is consistent with the provisions of the Statute regarding the principle of complementarity.⁸² For example, a State

⁸⁰ Paragraph 98 Policy Paper on Preliminary Examinations.

⁸¹ Non-States Parties can accept the jurisdiction of the ICC under article 12 (3) of the Rome Statute to refer situations to the Prosecutor. Carsten Stahn *‘Why Some Doors May Be Closed Already: Second Thoughts on a ‘Case-by-Case’ Treatment of Article 12(3) Declarations’* (2006) 75 *Nordic Journal of International Law*, 243 – 248; Steven Freeland *‘How Open Should the Door Be? Declarations by Non States Parties under Article 12(3) of the Statute of the International Criminal Court’* (2006) 75 *Nordic Journal of International Law* 211- 241; James Chan *‘Judicial Oversight over Article 12(3) of the ICC Statute’* (2013) 11 *Forum for International Criminal and Humanitarian Law Policy Brief* 1-4, available online at http://www.fichl.org/fileadmin/fichl/documents/FICHL_Policy_Brief_Series/FICHL_PB11.pdf, accessed 16 September 2016.

⁸² Andreas Muller and Ignaz Stegmiller *‘Self-Referrals on Trial: From Panacea to Patient’* (2010) 8 *Journal of International Criminal Justice* 1267 – 1294; Jann Kleffner *‘Auto-referrals and the Complementarity Nature of the ICC’* in Carsten Stahn and Goran Sluiter eds. *The Emerging Practice of the International Criminal Court* (2009) Martinus Nijhoff Publishers, The Hague, 42; *The Lord’s Resistance Army Case: Uganda’s Submission*

Party that fails to investigate and prosecute crimes committed in its territory and also falling within the jurisdiction of the ICC can refer the situation to the Prosecutor using the legal framework established by the Statute.⁸³ However, the encouragement of self-referrals by the Prosecutor has proved to be counter-productive and continues to be a source of concern in the activities of the ICC.⁸⁴

4.5.2 Initiation of an investigation by the Prosecutor

The exercise of prosecutorial discretion at the ICC begins with the Prosecutor's initiation of preliminary examinations.⁸⁵ The Prosecutor exercises various types of discretion until the accused person is either convicted or acquitted of the alleged crimes. The Prosecutor receives information from individuals or groups, States, intergovernmental or non-governmental organisations, or a referral from a State Party or the Security Council, or a declaration issued pursuant to article 12(3) of the Statute by a state that is not a State Party to the Statute, but which accepts the jurisdiction of the Court.⁸⁶ Subsequently, the Prosecutor embarks upon a four-phased process to evaluate whether the case complies with the requirements provided in the Statute. These factors are jurisdiction, admissibility (complementarity and gravity) and interests of justice.⁸⁷

of the First State Referral to the International Criminal Court (2005) 99 *American Journal of International Law* 403 at 405; Claus Kress 'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy' (2004) 2 *Journal of International Criminal Justice* at 944 – 948. However, see William Schabas *An Introduction to the International Criminal Court* 4th ed. (2011) 167 who argues that '[t]he self-referral sends the troubling message that States may decline to assume their duty to prosecute, despite the terms of the preamble to the Statute, not to mention obligations imposed by international human rights law, by invoking the provisions of Article 14 and referring the 'situation' to The Hague'.

⁸³ Paragraph 35 of the Situation in the Democratic Republic of the Congo, *Prosecutor v. Lubanga* (Decision on the Prosecutor's Application for Warrant of Arrest, ICC-01/04-01/06-8-US-Corr (10 February 2006) Article 58, Annex I; Ignaz Stegmüller 'The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?' (2013) 24 *Criminal Law Forum* 475 – 499.

⁸⁴ HRW 'The Selection of Situations and Cases for Trial before the International Criminal Court' October 2006, 3 (HRW Policy Paper).

⁸⁵ Danner *op cit* note 36.

⁸⁶ Article 12 of the Rome Statute; Regulation 25 of the Regulations of the Office of the Prosecutor (2009); Paragraph 4 and 73 of the Policy Paper on Preliminary Examinations.

⁸⁷ Article 53(1) (a-c); Morten Bergsmo and Pieter Kruger 'Article 53' in Otto Triffterer ed *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2nd ed. (2008) 1065 - 1076; Giuliano Turone 'Powers and Duties of the Prosecutor' in Anthonio Cassese, Paola Gaeta and John

According to the policy paper on preliminary examinations, the information received is assessed to identify matters that fall within the jurisdiction of the ICC and those that do not. The initial assessment distinguishes between communications relating to matters that are manifestly outside the jurisdiction of the Court, situations that are already under preliminary examination, situations that are already under investigation or that form the basis of a prosecution, and lastly, matters that are neither manifestly outside the jurisdiction of the Court nor related to situations already under preliminary examination or that form the basis of a prosecution.⁸⁸

The second phase relates to the preliminary examination, and is focussed on all petitions that have scaled through the first phase.⁸⁹ It involves factual and legal assessments of the crimes committed in the referred situation. The Prosecutor pays particular attention to ‘crimes committed on a large scale, as part of a plan or pursuant to a policy’.⁹⁰

After this phase, an ‘Article 5 report’ is published, which includes a decision on whether the alleged crimes fall within the material jurisdiction of the ICC in relation to the provisions of article 5 of the Statute.⁹¹ This involves the evaluation of whether the threshold of complementarity and gravity provided in article 17 of the Statute has been met.⁹² The next phase is an assessment that leads to the publication of ‘Article 17 report’ detailing how admissibility issues have been resolved by the Prosecutor.⁹³ The final phase considers whether a decision to initiate an investigation would be in the interests of justice.⁹⁴ A report titled ‘Article 53 report’ is published discussing the reasons for the Prosecutor’s decision to proceed or not to proceed with an investigation.⁹⁵

For the Prosecutor to commence any preliminary examination, the above factors must be considered in detail. The Prosecutor cannot commence an investigation and prosecution of

R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* Vol II. (2002) 1138 – 1180.

⁸⁸ Paragraph 78 Policy Paper on Preliminary Examinations.

⁸⁹ Paragraph 80 Policy Paper on Preliminary Examinations.

⁹⁰ Paragraph 81 Policy Paper on Preliminary Examinations.

⁹¹ Ibid.

⁹² Paragraph 82 Policy Paper on Preliminary Examinations.

⁹³ Ibid.

⁹⁴ Paragraph 83 Policy Paper on Preliminary Examinations.

⁹⁵ Ibid.

crimes within the jurisdiction of the ICC without conducting a preliminary examination. There is a difference between a preliminary examination conducted before the initiation of an investigation and the examination conducted before the initiation of a prosecution.⁹⁶ If the Prosecutor decides that there is a reasonable basis to open an investigation, the Statute mandates that a preliminary examination be conducted following the criteria laid down in article 53 of the Rome Statute to determine whether there is reasonable basis to proceed with a prosecution.

Before the Prosecutor can decide that there is a reasonable basis to proceed with an investigation, there must be a determination that the ICC has jurisdiction over the case. The Prosecutor regards this decision to be a core element of the preliminary examination. Indeed, the policy paper on preliminary examinations states that '[t]he establishment of the Court's jurisdictional scope in accordance with article 53(1)(a) defines in objective terms the parameters within which the Office conducts its investigative activities, i.e, the situation.'⁹⁷

Irrespective of how a preliminary examination is initiated, the Prosecutor must analyse the seriousness of any information received,⁹⁸ and may seek additional information from States, organs of the UN, intergovernmental organisations, NGOs or other reliable sources through written or oral testimonies.⁹⁹ At this stage, victims of the alleged crimes may make representations to the Pre-Trial Chamber, in accordance with the provisions of the Rules of Procedure and Evidence that govern such submissions.¹⁰⁰ A preliminary examination must conclude with a decision whether or not to proceed with an investigation.

Some authors have argued that in case of UNSC referral, the Prosecutor does not have the power to decide whether there is reasonable basis to proceed with an investigation.¹⁰¹ A close

⁹⁶ Article 53 (1) (a-c) and (2) (a-c).

⁹⁷ Paragraph 41 Policy Paper on Preliminary Examinations.

⁹⁸ Article 15(2) of the Rome Statute; Geert-Jan Alexander Knoops, 'Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective' (2004) 15 *Criminal Law Forum* 365 – 390;

⁹⁹ Article 15 (2) of the Rome Statute.

¹⁰⁰ Ibid.

¹⁰¹ Jens Ohlin 'Peace, Security, and Prosecutorial Discretion' in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2008), 189; George Fletcher and Jens Ohlin 'The ICC - Two Courts in One?' (2006) 4 *Journal of International Criminal Justice* 428 at 431-32; Jens D. Ohlin 'International Law and Prosecutorial Discretion' (2007) 8 *Whitehead Journal of Diplomacy and International*

reading of article 53 shows that this is not a correct interpretation of the Statute. Every referral is subject to preliminary examination and the Rome Statute does not limit the conduct of preliminary examination to State and *proprio motu* referrals only. In addition, as will be noted in the discussions in chapter seven of the study, the ICC Prosecutor conducted preliminary examinations in the UNSC referrals in Sudan and Libya which is a precedent followed by the Prosecutor. This view is supported by other scholars.¹⁰²

4.5.3 Referral by the UNSC

The UN Charter provides a significant role for the UNSC in promoting international peace and security and the creation of the ICC was seen as an extension of that role.¹⁰³ The 1994 version of the Draft Code of Crimes against the Peace and Security of Mankind prepared by the ILC made the jurisdiction of the ICC subject to the approval of the UNSC.¹⁰⁴ If the provision had been adopted, it would have given the UNSC a considerable influence over the activities of the ICC.¹⁰⁵ During the Preparatory Committee meeting in August 1997, Singapore proposed an amendment reversing the structure of the ICC-Security Council relationship as initially provided for in the 1994 ILC Draft Statute.¹⁰⁶

The adoption of article 16 has several implications for the work of the ICC. According to some scholars:

Relations 146 at 147; Jens D. Ohlin ‘On the Very Idea of Transitional Justice’ (2007) 8 *Whitehead Journal of Diplomacy and International Relations* 51 - 68.

¹⁰² Luc Cote ‘Independence and Impartiality’ in Luc Reydam, Jan Wouters and Cedri Ryngaert (eds) *International Prosecutors* (2012) 405; John L. Washburn ‘On Some Aspects of Prosecutorial Discretion in the International Criminal Court’ (2007) 8 *Whitehead Journal of Diplomacy and International Relations* 145; Pavel Caban ‘Preliminary Examinations by the Office of the Prosecutor of the International Criminal Court’ (2011) *Czech Yearbook of Public & Private International Law* 199 – 216.

¹⁰³ Article 39 of the UN Charter.

¹⁰⁴ Article 23(3) of the ILC 1994 Draft Statute for an International Criminal Court provides that ‘[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.’

¹⁰⁵ Elizabeth Wilmhurst ‘The International Criminal Court: The Role of the Security Council’ in Mauro Politi and Giuseppe Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) Ashgate: Aldershot and Burlington, 40.

¹⁰⁶ Bergsmo and Pejic *op cit* at 597.

'the drafting history of article 16 gives rise to at least three comments. First, political considerations were not surprisingly given more weight than legal arguments in the determination of the appropriate role for the [UNSC] in ICC proceedings. Second, the [UNSC]'s deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict. Third, article 16 provides an unprecedented opportunity for the [UNSC] to influence the work of a judicial body.'¹⁰⁷

The UNSC is empowered by the Rome Statute to trigger the jurisdiction of the Court when crimes within the jurisdiction of the court have been committed in the territory of both State Parties and non-State Parties to the treaty.¹⁰⁸ The UNSC has made use of this provision in the cases of Sudan and Libya which were referred to the ICC pursuant to the Chapter VII powers of the UNSC. Article 16 of the Statute grants the UNSC the power to defer cases before the ICC. In deferring cases, the UNSC acts under Chapter VII of the UN Charter which means that there has to be evidence that there is a threat to international peace and security.

4.5.4 Referrals and prosecutorial discretion

When a situation is referred by a State Party or the UNSC acting under Chapter VII of the UN Charter, the Prosecutor opens an investigation after reaching a decision that there is reasonable basis to proceed. However, if the preliminary investigation is initiated through article 15 of the Rome Statute, the Prosecutor has to apply to the Pre-Trial Chamber for an authorisation to initiate an investigation.¹⁰⁹ The reason for this difference is that State Parties were not comfortable with an unaccountable Prosecutor exercising unfettered discretion. The Pre-Trial Chamber is expected to authorise the commencement of investigations if it appears to it that the case falls within the jurisdiction of the ICC.¹¹⁰ However, the decision is without

¹⁰⁷ Ibid at 598.

¹⁰⁸ Article 13(b) of the Rome Statute; Sharon Williams and William Schabas 'Article 13: Exercise of Jurisdiction' in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2nd edition (2008) Munchen: C.H. Beck Publishers, 569.

¹⁰⁹ Article 15(4) of the Rome Statute; Lakshman Marasinghe, '*Proprio Motu* Powers – The Prosecutor of the International Criminal Court: Article 15 of the Rome Statute' (2010) 22 *Sri Lanka Journal of International Law* 195 – 213.

¹¹⁰ Article 15 (4) of the Rome Statute. At the stage of preliminary examination, it is still a 'situation' that is before the Prosecutor and not a 'case' *stricto sensu*. This is the conclusion reached by the Prosecutor and

prejudice to subsequent determinations regarding jurisdiction and admissibility.¹¹¹ If the Pre-Trial Chamber refuses to authorise the investigation of crimes, the decision does not preclude the Prosecutor from making subsequent representation based on new facts or evidence regarding the same situation.¹¹²

Jurisdiction is not the only factor that the Prosecutor has to consider. However, jurisdiction is so fundamental that the judges of the ICC are mandated to inquire if they have jurisdiction to handle a particular situation irrespective of the determination of the Prosecutor to proceed with an investigation. Another important factor is admissibility, which is divided into complementarity and gravity as discussed below.

4.6 Admissibility and prosecutorial discretion

Article 53(1) (c) of the Statute provides that in deciding whether to initiate an investigation, the Prosecutor shall consider whether the case is or would be admissible under article 17 of the Statute. Article 17 of the Statute provides for issues of complementarity¹¹³ and gravity.¹¹⁴ The Statute does not provide a particular sequence on the examination of complementarity and gravity.¹¹⁵ However, the Prosecutor must be satisfied as to admissibility on both aspects before deciding whether there is sufficient basis to proceed with an investigation.¹¹⁶ An assessment of complementarity is in relation to serious crimes allegedly committed by those who bear the greatest responsibilities for international crimes within the jurisdiction of the ICC.¹¹⁷

accepted by the Chambers of the ICC. Hector Olasolo *—The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?* (2003) 3 *International Criminal Law Review* 87 - 150.

¹¹¹ Article 15 (4) of the Rome Statute

¹¹² Article 15 (5) of the Rome Statute. The prosecutor has used the *proprio motu* power to initiate investigations in Kenya and Cote d'Ivoire. See *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11; *The Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11 and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11.

¹¹³ Article 17 (1) (a-c) of the Rome Statute.

¹¹⁴ Article 17 (1) (d) of the Rome Statute.

¹¹⁵ Paragraph 42 Policy Paper on Preliminary Examinations.

¹¹⁶ *Ibid.*

¹¹⁷ Paragraph 50 of the *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010.

A determination on admissibility conducted by the Prosecutor during a preliminary examination is not binding on the Prosecutor when taking the decision whether to proceed with a prosecution. In addition, legal assessments conducted during preliminary examinations are not binding for the purpose of future admissibility determinations that may be made by ICC judges for a situation or case.¹¹⁸ The relevance of the discussion above is that the conduct of preliminary examination relates to situations and circumstances in existence during the process. It does not bind the judges of the ICC or the Prosecutor in future determinations regarding the admissibility of a situation.

4.6.1 Complementarity and prosecutorial discretion

Another crucial factor in the exercise of preliminary examination is the principle of complementarity which gives primacy to national judicial systems in the investigation and prosecution of international crimes. The Rome Statute provides that the ICC is complementary to national judicial systems.¹¹⁹ It has been defined as the fulcrum that prioritises the authority of domestic fora to prosecute the crimes defined in Article 5 of the Rome Statute.¹²⁰ In addition, the complementarity principle is aimed at encouraging national judicial systems to investigate and prosecute international crimes committed within their jurisdictions.¹²¹

¹¹⁸ ICC Situation in Mali - Article 53(1) Report, 28, 16 January 2013; Para 56 of the Situation in the Democratic Republic of the Congo, Prosecutor v. Katanga and Chui (Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case.; Para 50 of the Situation in Kenya (Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr., 31 March 2010; Paragraph 217 of the Situation in Central African Republic, Prosecutor v. Bemba (Decision on the Admissibility and Abuse of Process Challenges) ICC-01/05-01/08-802, 24 June 2010.

¹¹⁹ See generally, Preamble to the Rome Statute; Articles 1 and 17 of the Rome Statute.

¹²⁰ Michael Newton Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court (2001) 167 *Military Law Review* 20 – 73.

¹²¹ Paragraph 34 of Decision on the admissibility of the case under article 19(1) of the Statute, *the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, 10 March 2009, ICC-02/04-01/05; Max du Plessis Complementarity: a working relationship between African States and the International Criminal Court in Max du Plessis (ed.) *African Guide to International Criminal Justice* (2008) 129; Mohamed El-Zeid *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008) 4; Markus Benzing The complementarity regime of the International Criminal Court: International criminal justice between States sovereignty and the fight against impunity in Armin von Bogdandy and Rüdiger Wolfrum, (eds.), (2003) 7 *Max Planck Yearbook of United Nations Law* 591 – 632; Danielle Goldstone Embracing Impasse: Admissibility, Prosecutorial Discretion, and the Lessons of Uganda for the International

Complementarity refers to the principle that the ICC can gain jurisdiction only when domestic legal systems are inactive, unwilling or genuinely unable to carry out an investigation or prosecution of an accused individual.¹²² This means that the ICC is not a court of first instance, but rather a court of last resort when it is obvious that a State has failed to discharge obligations assumed under the Rome Statute.

This is a unique development of the Rome Statute, as the ICC does not have primacy over domestic legal systems. The ICC is not expected to assume jurisdiction over situations a State is already investigating or prosecuting. It is desirable that the definition of international crimes by national judicial systems reflect the progressive nature of the Rome Statute. However, States can prosecute international crimes using national laws. This is valid as long as the proceedings were not conducted in ways that defeat the cause of justice. The preamble and article 1 of the Rome Statute provide that the ICC ‘shall be complementary to national criminal jurisdictions,’ meaning that States have primacy over the prosecutions of international crimes.¹²³

The relationship between the ICC and national governments is vital to the effective functioning of the ICC. In his statement as the first Prosecutor of the ICC in 2003, Luis Moreno-Ocampo acknowledged the complementary nature of the jurisdiction of the ICC when he stated that ‘[t]he effectiveness of the [ICC] should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.’¹²⁴

Criminal Court’ (2008) 22 *Emory International Law Review* 761 – 798; Mahnoush Arsanjani ‘The Rome Statute of the International Criminal Court’ (1999) 93 *American Journal of International Law* 22 - 43; Carsten Stahn ‘Complementarity: A Tale of Two Notions’ (2008) 19 *Criminal Law Forum* 87 – 113; Robert Cryer *et al An Introduction to International Criminal Law and Procedure* (2007) 127.

¹²² Mark Ellis ‘The International Criminal Court and its implication for domestic law and national capacity building’ (2002) 15 *Florida Journal of International Law* 215 – 242.

¹²³ Paragraph 10 of the Preamble and Article 1 of the Rome Statute.

¹²⁴ Statement made by Luis Moreno-Ocampo during the ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court Monday, 16 June 2003 The Peace Palace, The Hague, Netherlands, available online at http://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf, accessed 19 September 2016.

The complementarity principle defines the relationship between the ICC and State Parties to the Statute and provides that a case is inadmissible if it is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution.¹²⁵ Unwillingness and inability are resolved by looking critically at the activities of a state at the national level and weighing those activities with the provisions of article 17 of the Rome Statute.

A case is also inadmissible if it has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or genuine inability of the State genuinely to prosecute.¹²⁶ Furthermore, a case is inadmissible if the person concerned has already been tried for the conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20 (3) of the Rome Statute on the *ne bis in idem* rule.¹²⁷ A case is also not admissible if it is not of sufficient gravity to justify further action by the Court.¹²⁸

According to the Statute, determination of unwillingness is subject to several factors. This relates to proceedings conducted for the purpose of shielding the person from criminal responsibility for crimes within the jurisdiction of the ICC.¹²⁹ Another example of unwillingness is that there has been an unjustified delay in the proceedings which is inconsistent with an intention to bring the person concerned to justice.¹³⁰ In addition, unwillingness to prosecute an individual can be seen when proceedings are not conducted independently or impartially or are conducted _in a manner which, in the circumstances, is inconsistent with an intention to bring the person concerned to justice.¹³¹

¹²⁵ Article 17 (1) (a) of the Rome Statute.

¹²⁶ Article 17 (1) (b) of the Rome Statute.

¹²⁷ See the *Ne bis in idem* principle in Article 20 (3) of the Rome Statute which provides that, '[n]o person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

¹²⁸ Article 17 (1) (d) of the Rome Statute.

¹²⁹ Article 17 (2) (a) of the Rome Statute.

¹³⁰ Article 17 (2) (b) of the Rome Statute.

¹³¹ Article 17 (2) (c) of the Rome Statute; John Holmes 'Principle of complementarity' in Roy Lee ed *The International Criminal Court – The making of the Rome Statute: Issues - negotiations – results* (1999) 50.

Complementarity during the preliminary examination phase involves the evaluation of the existence of relevant national proceedings in relation to the potential cases being considered for investigation.¹³² An admissibility determination is not a judgment or reflection on the national justice system as a whole.¹³³ This is because the Prosecutor may still consider the absence of relevant domestic proceedings regarding a case that has come before him as evidence that the criminal justice system, though efficient and well run, has failed to initiate necessary proceedings in that matter.¹³⁴ For example, if a State is inactive, the Prosecutor need not inquire whether the State is unwilling or unable. The mere fact that there are no relevant proceedings at the national level makes the case admissible.

This interpretation of the provisions of the Rome Statute has been endorsed by several decisions of the ICC. The Appeals Chamber has held that there are two limbs of interpretation under article 17 of the Rome Statute. The first relates to the existence of national proceedings and the second is whether the state involved is unwilling or unable to prosecute the cases.¹³⁵ If a State is not investigating or prosecuting a crime and has not taken any step whatsoever, this is referred to as ‘inactivity’ or ‘inaction’. The case is automatically admissible and there is no need to question whether the State concerned is ‘unwilling’ or ‘unable’ to prosecute the crimes.¹³⁶

¹³² Paragraph 8 Policy Paper on Preliminary Examinations.

¹³³ Paragraph 46 Policy Paper on Preliminary Examinations.

¹³⁴ Ibid.

¹³⁵ Paragraph 78 of the Decision 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; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 25 September 2009, ICC-01/04-01/07 OA 8.

¹³⁶ Paragraph 4 of the Decision on the Prosecutor's Application under Article 58, 7 May 2009, ICC-02/05-02/09, *Prosecutor v. Bahr Idriss Abu Garda* where Pre-Trial Chamber I argued that ‘since the Prosecutor has indicated that there are no national proceedings in relation to the case, the Chamber sees no ostensible cause or self-evident factor compelling it to exercise its discretion to review the admissibility of the case *proprio motu* at the instant stage of the proceedings’; Para 66 of the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali*, 30 May 2011, ICC-01/09-02/11, where Pre-Trial Chamber II held that ‘in the absence of information, which substantiates Government of Kenya's challenge that there are ongoing investigations against the three suspects, up until the party filed its Reply, the Chamber considers that there remains a situation of inactivity.’

In *the Prosecutor v. Omar Hassan Ahmad Al Bashir* ('Omar Al Bashir'), Pre-Trial Chamber I held that:

'the materials presented by the Prosecution in support of the Prosecution Application offer no indication that: (i) national proceedings may be conducted, or may have been conducted, at the national level against Omar Al Bashir for any of the crimes contained in the Prosecution Application; or that (ii) the gravity threshold provided for in article 17(1)(d) of the Statute may not be met.'¹³⁷

The Chambers have also held that in terms of admissibility proceedings, there must be a correlation between the individual and the conduct in both the ICC and national judicial system for a case to be inadmissible. This means that a case is inadmissible at the ICC if the domestic system is functional and effective. For example, in the *Prosecutor v Thomas Lubanga Dyilo*, Pre-Trial Chamber I held that 'it is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.'¹³⁸ This is referred to as the 'same person/same conduct' test, which has been adopted in most Pre-Trial Chamber decisions.¹³⁹ The Appeals Chamber confirmed this jurisprudence in the Kenyan situation.¹⁴⁰

¹³⁷ See Para 50 of the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09.

¹³⁸ Para 31 of Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, *Prosecutor v. Thomas Lubanga Dyilo*, 24 February 2006, ICC-01/04-01/06-8-Corr.

¹³⁹ See Para 219 of the Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 31 May 2013, ICC-01/11-01/11, where Pre-Trial Chamber I held that it 'has not been provided with enough evidence with a sufficient degree of specificity and probative value to demonstrate that the Libyan and the ICC investigations cover the same conduct and that Libya is able genuinely to carry out an investigation against Mr Gaddafi. The Chamber finds that the present case is admissible before the Court and recalls Libya's obligation to surrender the suspect.'; Para 24 of the Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, *Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, where Pre-Trial Chamber I held that 'for a case to be admissible, it is a *condition sine qua non* that national proceedings do not encompass both the person and the conduct which are the subject of the case before the Court.'; Para 20 of Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, ICC-01/04-01/07, *Prosecutor v. Germain Katanga* where Pre-Trial Chamber I held that 'on the basis of the evidence and information provided in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, the proceedings against

The provisions of the Statute relating to the principle of complementarity are subject to different interpretations and have led to different opinions on the issue. For example, several commentators have argued that ‘inactivity’ or ‘inaction’ is a basis for the admissibility of a case before the ICC and that the Court’s interpretation is consistent with the Statute.¹⁴¹ If the ICC labels a case inactive, it automatically becomes admissible regardless of the action that might have been taken to bring the person to justice at the national judicial system. However, other scholars argue that the interpretation by ICC judges does not reflect the intention of the drafters of the treaty. These authors accuse the Chambers of expanding the interpretation of

Germain Katanga in the DRC do not encompass the same conduct which is the subject of the Prosecution Application.’; Para 21 Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, ICC-01/04-01/07-262, *Prosecutor v. Mathieu Ngudjolo Chui* where Pre-Trial Chamber I held that ‘on the basis of the evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, the proceedings against Mathieu Ngudjolo in the DRC do not encompass the same conduct which is the subject of the Prosecution Application.’; Para 21 of the Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08, where Pre-Trial Chamber III held that ‘the circumstances in the instant case justify it in ruling on the admissibility of the case, and finds that there is no reason to conclude that Mr Jean-Pierre Bemba’s case is not admissible, particularly since there is nothing to indicate that he is already being prosecuted at national level for the crimes referred to in the Prosecutor’s Application.’

¹⁴⁰ The Appeal Chambers held that ‘the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.’ See Para 40 of the Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, *Prosecutor v. William Samoe Ruto, Henry Kipron Kosgey and Joshua Arap Sang*, 30 August 2011, ICC-01/09-02/11 O A.

¹⁴¹ Darryl Robinson ‘The mysterious mysteriousness of complementarity’ (2010) 21 *Criminal Law Forum* 67 – 102; Jo Stigen *The relationship between the International Criminal Court and national jurisdiction* (2008) 199; Jann Kleffner, *Complementarity in the Rome Statute and national criminal jurisdiction* (2008) New York: Oxford University Press, 104; Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008) 230; Markus Benzing ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity’, (2003) 7 *Max Planck Yearbook of United Nations Law* 591 – 632.; William Burke-White and Scott Kaplan ‘Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Ugandan Situation’ (2009) 7 *Journal of International Criminal Justice* 257 - 279.

the Statute to accommodate ‘inaction and inactivity’ as a basis for the intervention of the ICC.¹⁴²

The decision of the Appeals Chamber confirming the Pre-Trial Chambers interpretation of admissibility is adopted in this study as it also regulates the preliminary examination carried out by the Prosecutor. According to the policy paper on preliminary examinations, the non-availability of proceedings or inactivity in a state is a basis for the Prosecutor to decide that there is reasonable basis to open an investigation. Several factors may be responsible for inactivity including lack of adequate legislative framework,¹⁴³ amnesties, immunities and statutes of limitations, focus on low level perpetrators, lack of judicial capacity and political will.¹⁴⁴

If there is evidence that the state involved is investigating or prosecuting crimes within the jurisdiction of the ICC, the Prosecutor has to evaluate whether the state is ‘unwilling’ and ‘unable’ to carry out genuine proceedings.¹⁴⁵ In citing inability on the part of a state to conduct prosecutions, the Prosecutor has to determine whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to carry out its

¹⁴² William Schabas *An Introduction to the International Criminal Court* 4th edition (2011) 193; Mahnouch Arsanjani and Michael Reisman ‘The Law-in-Action of the International Criminal Court’ (2005) 99 *American Journal of International Law*, 385 - 403; William Schabas ‘Prosecutorial Discretion v. Judicial Activism’ (2008) 6 *Journal of International Criminal Justice* 731 – 761; Ada Sheng ‘Analyzing the International Criminal Court Complementarity Principle Through a Federal Court Lens’ (2007) 13 *International Law Students Association Journal of International and Comparative Law* 413 – 452..

¹⁴³ Several States Parties to the Statute are yet to adopt implementing legislation to incorporate provisions of the Rome Statute into domestic legal systems. This problem is acute in the African continent where only few African countries have ratified and implemented the treaty into national law. See generally Max du Plessis and Jolyon Ford (eds.) *Unable or Unwilling: Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries* (2008); Max du Plessis ‘Bringing the International Criminal Court Home: The Implementation of the Rome Statute of the International Criminal Court Act’ (2003) 16 *South African Journal of Criminal Justice* 1-16; Cathleen Powell and Florence Jessberger ‘Prosecuting Pinochets in South Africa: Implementing the Rome Statute of the International Criminal Court’ (2001) 14 *South African Journal of Criminal Justice* 344 - 362; Christopher Mbazira ‘Prosecuting International Crimes committed by the Lord’s Resistance Army in Uganda’ in Chacha Murungu and Japhet Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 197 at 205; Mandiaye Niang ‘The Senegalese Legal Framework for the Prosecution of International Crimes’ (2009) 7 *Journal of International Criminal Justice* 1047 - 1062.

¹⁴⁴ Paragraph 48 Policy Paper on Preliminary Examinations.

¹⁴⁵ Paragraph 49 Policy Paper on Preliminary Examinations; Article 17 (2) (a-c) of the Rome Statute

proceedings.¹⁴⁶ Unwillingness refers to the political will to pursue prosecution while inability refers to structural deficiencies in the national legal system due to substantial collapse or unavailability of the national legal system.¹⁴⁷

Positive complementarity has its roots in the complementarity principle which has its origin in the 1994 ILC Draft Statute for the ICC.¹⁴⁸ The 1994 ILC Draft provided in its preamble that the [ICC] is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.¹⁴⁹ The ILC Draft also proposed circumstances under which situations or cases within the jurisdiction of the Court may be inadmissible.¹⁵⁰

The proposals in the ILC Draft went through several changes during the Preparatory Committee meetings convened by the UN.¹⁵¹ However, some of the thorny issues surrounding the principle were agreed upon before the Diplomatic Conference in Rome.¹⁵² For example, States were interested in the relationship between the proposed court and national courts and hesitant to accept any compromise proposal without knowing the legal relationship between the two.¹⁵³ This shows that States were interested in how the ICC would

¹⁴⁶ Article 17 (3) of the Rome Statute; Policy Paper on Preliminary Examinations Para 56.

¹⁴⁷ Article 17 (2) and (3) of the Rome Statute.

¹⁴⁸ The Draft Statute for an International Criminal Court was adopted by the ILC at its forty-sixth session, in 1994, and was submitted to the General Assembly as a part of the ILC's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission*, 1994, vol II (Part Two); Mohamed El-Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008) 126.

¹⁴⁹ Paragraph 3 of the 1994 ILC Draft.

¹⁵⁰ Article 35 of the 1994 ILC Draft provides that [t]he Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:(a) Has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded; (b) Is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or (c) Is not of such gravity to justify further action by the Court.'

¹⁵¹ The *Ad-hoc* Committee that drafted the ILC Draft in 1994 was replaced by the Preparatory Committee in 1996.

¹⁵² John Holmes 'Principle of Complementarity' in Roy Lee (ed) *The International Criminal Court – The Making of the Rome Statute: Issues - negotiations – results* (1999) 43.

¹⁵³ Mohamed El-Zeidy *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008) 127.

affect their sovereignty and also wanted to ensure that the ICC would not take over genuine efforts by national judicial institutions to make their citizens accountable for crimes committed in their jurisdiction. The complementarity principle is recognised as the hallmark of the Rome Statute because of the relationship envisaged between States and the Court.

The Statute gives States the primary responsibility to prosecute international crimes committed in their jurisdiction, which means the ICC is not expected to supplant the prosecution of international crimes by national courts.¹⁵⁴ The principle of complementarity is based not only on respect for the primary jurisdiction of States, but also on practical considerations of efficiency and effectiveness, since States when willing and able to prosecute international crimes will generally have the best access to evidence, witnesses, and resources to carry out proceedings.¹⁵⁵ However, willingness and ability to investigate and prosecute international crimes is at times a tall order for the countries that the ICC is currently operating in.

The ICC Prosecutor argues that the office would operate on four fundamental principles: (a) positive complementarity, (b) focussed investigations and prosecutions, (c) addressing the interests of victims, and (d) maximising the impact of the Prosecutor's work.¹⁵⁶ This reiterates the importance of complementarity in the activities of the Prosecutor of the ICC.

In analysing the need for positive complementarity, it is important to highlight some provisions of the Rome Statute that support this view. Under part 9 of the Rome Statute, which provides for International Cooperation and Judicial Assistance,¹⁵⁷ the ICC may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.¹⁵⁷ The Prosecutor is also given the opportunity to seek for additional information from States¹⁵⁸ regarding crimes that fall under the jurisdiction of the ICC.¹⁵⁸ The Prosecutor can defer an

¹⁵⁴ Michael Newton Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court (2001) 167 *Military Law Review* 20 – 73.

¹⁵⁵ Robert Cryer *et al. An Introduction to International Criminal Law and Procedure* (2007) 127.

¹⁵⁶ Paragraph 15 OTP Prosecutorial Strategy 2009 – 2012.

¹⁵⁷ Article 93(10) of the Rome Statute.

¹⁵⁸ Article 15 of the Rome Statute.

investigation at the request of the State to allow the State to conduct its own investigations and trials.¹⁵⁹

The ICC Prosecutor can encourage State Parties to investigate and prosecute crimes and may at any time reconsider a decision to initiate an investigation or prosecution based on new facts or information which may be related to the ability of the State concerned to hold its nationals accountable.¹⁶⁰ These provisions in the Rome Statute recognise the role of the Prosecutor in promoting positive complementarity.¹⁶¹

Positive complementarity is an important tool in the fight against impunity and should not be ignored for several reasons. The ICC can only try a few of those who bear responsibility for crimes of international concern. If there are no effective national judicial mechanisms, there will be serious issues of impunity gap which could undermine any success recorded by the ICC.

In an ideal situation, national judicial institutions offer the best places to try these crimes, as they would serve as a deterrent to others and give victims the opportunity to participate and closely follow the proceedings at the national level. Furthermore, positive complementarity will ensure the development of national judicial systems in the prosecution of international crimes. However, most domestic legal systems do not have legal procedures for the participation of victims in the proceedings at domestic level except as witnesses.

4.6.2 Gravity and prosecutorial discretion

Another crucial factor in the exercise of prosecutorial discretion during preliminary examination is gravity. It plays an important role in the determination by the Prosecutor whether or not to proceed with an investigation. The Statute provides that the Prosecutor should determine that a case is inadmissible where the case is not of sufficient gravity to justify further action by the Court.¹⁶² The Prosecutor assesses gravity on potential cases that

¹⁵⁹ Article 18 of the Rome Statute.

¹⁶⁰ Article 53 of the Rome Statute.

¹⁶¹ Burke-White *op cit* at 62.

¹⁶² Article 17 (1) (d) of the Rome Statute; Ray Murphy *‘Gravity Issues and the International Criminal Court’* (2006) 17 *Criminal Law Forum* 281 – 235 at 297 argues that *‘[t]he gravity of the crime is one of the express considerations to be taken into account in ascertaining the existence of a reasonable basis to proceed.’*

will likely arise from investigating a situation.¹⁶³ This is because during preliminary examinations, there are no concrete cases before the Court. The factors used by the Prosecutor in assessing the gravity of a situation include: (a) scale of the crimes committed, (b) nature of the crimes, (c) the manner of commission of the crimes and (d) the impact of the crimes.¹⁶⁴

The scale of the crimes is evaluated using the number of direct or indirect victims who have suffered as a result of the crimes. Furthermore, the geographical and temporal spread of the crimes is relevant.¹⁶⁵ The inquiry into the nature of crimes will involve specific elements of each offence including killing, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.¹⁶⁶

The gravity of the manner of the commission of a crime includes: (a) the means employed to execute the crime, (b) the degree of participation and (c) the intent of the perpetrator (if discernible) at the particular stage of the inquiry.¹⁶⁷ Other relevant factors include the extent to which the crimes were systematic or resulted from a plan or organised policy or otherwise resulted from the abuse of power or official capacity.¹⁶⁸ Also important are the elements of particular cruelty, including the vulnerability of the victims, the use of rape or sexual violence as a weapon and means of destroying groups.¹⁶⁹ The impact of the crimes may be assessed by the sufferings endured by the victims and their increased vulnerability; terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.¹⁷⁰

¹⁶³ Paragraph 59 of the Policy Paper on Preliminary Examinations; Regulations 29 of the Regulations of the Office of the Prosecutor; Rules 48 and 104 of the Rules of Procedure and Evidence.

¹⁶⁴ Regulation 29(2) of the Regulations of the Office of the Prosecutor; Paragraph 188 of *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010; Paragraph 203-204 of the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, 3 October 2010.

¹⁶⁵ Paragraph 62 Policy Paper on Preliminary Examinations.

¹⁶⁶ Paragraph 63 Policy Paper on Preliminary Examinations.

¹⁶⁷ Paragraph 64 Policy Paper on Preliminary Examinations.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Paragraph 65 of the Policy on Preliminary Examinations.

Although the mandate and scope of their jurisdictions differ from those of the ICC, the sentencing history of the ICTY and ICTR are illustrative of the gravity criteria.¹⁷¹ In this instance, several sentencing judgments of the tribunals have highlighted the importance of gravity in the sentences pronounced on the accused persons.¹⁷² In addition, Rule 11 *bis* of the ICTY and the ICTR also highlights the gravity of crimes within the ad hoc tribunals.¹⁷³

Gravity is not defined or explained in the Statute.¹⁷⁴ The first policy paper released by the Prosecutor on preliminary examination did not contain gravity as a legal criterion.¹⁷⁵ However, it has gradually emerged as a decisive factor in the decision by the Prosecutor whether to proceed with an investigation.¹⁷⁶ After conducting preliminary examinations in Iraq and Venezuela, the Prosecutor decided not to proceed with an investigation due to lack of sufficient gravity of the crimes committed.¹⁷⁷ On the other hand, the opening of

¹⁷¹ Susana SáCouto and Katherine A. Cleary ‘The Gravity Threshold of the International Criminal Court’ (2008) 5 *American University International Law Review* 807 – 854.

¹⁷² See generally, Paragraph 18 *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Sentence Judgment 21 May 1999; Paras 29 – 30 *Prosecutor v. Serushago*, Case No. ICTR-98-39, Sentencing Judgment, 5 February 1999; Para 884 of *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10, ICTR-96-17, Judgment and sentence, 21 February 2003; Para 572 of *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Judgment and Sentence, 7 December 2007; Paragraph 693 *Prosecutor v. Krstic*, Case No. IT-98-33, Judgment, 2 August 2001; Paragraph 7 of *Prosecutor v. Tadic*, Case No. IT-94- 1, Sentencing Judgment, 11 November 1999; Para 571 of *Prosecutor v. Semanza* Case No. ICTR-97-20; Judgment and Sentence, 15 May 2003; Paragraph 702 of *Prosecutor v. Kvočka*, Case No. IT-98-30/1, Judgment, 2 November 2001; Para 512 of *Prosecutor v. Kmojelac*, Case No. IT-97-25, Judgment, 15 March 2002; Paragraph 3 of *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sentence 2 October 1998.

¹⁷³ See Rule 11 *bis*, ICTY Rules of Procedure and Evidence, IT/32/Rev. 49, 22 May 2013. See also Rule 11 *bis* ICTR Rules of Procedure and Evidence, 10 April 2013.

¹⁷⁴ Margaret M. deGuzman ‘Gravity and the Legitimacy of the International Criminal Court’ (2008) 32 *Fordham International Law Journal*, 1400 – 1465.

¹⁷⁵ See Annex to the Policy Paper which states that ‘[t]he Prosecutor makes the determination as to whether there is a reasonable basis to proceed based on the three factors required by the Statute (Article 53. 1 (a) to (c)): a) the factual/legal basis: the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; b) the admissibility test: the case is or would be admissible (including on complementarity grounds) under Article 17; c) the interests of justice: taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.’

¹⁷⁶ Margaret M. DeGuzman ‘Choosing To Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal of International Law* 265 – 320.

¹⁷⁷ ICC ‘OTP response to communications received concerning Iraq’ 9 February 2006, available online at <http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77->

investigations in other countries was because the gravity threshold and other necessary legal factors were fulfilled.¹⁷⁸

There are problems associated with interpretation of gravity by the Prosecutor during preliminary investigations.¹⁷⁹ For example, despite the argument by the Prosecutor that gravity of the crimes committed in DRC were decisive in opening investigations, the Prosecutor charged Thomas Lubanga, with the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities.¹⁸⁰

There is no doubt that conscripting and enlisting children under the age of 15 and using them actively in hostilities is a war crime of serious proportion. However, its gravity pales into insignificance compared with other international crimes committed in DRC especially the issue of rape and sexual violence and other related crimes.¹⁸¹ In fact, when the Prosecutor issued the arrest warrant against Lubanga, there was outrage in DRC as victims and survivors of international crimes contended that there were cases of sexual crimes which the Prosecutor had ignored. Furthermore, it was argued that the Prosecutor was insensitive to the plight of

4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf, accessed 19 September 2016; ICC _OTP response to communications received concerning Venezuela‘ 9 February 2006, available online at http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf, accessed 19 September 2016.

¹⁷⁸ According to the former Prosecutor of the ICC '[g]ravity is one of the most important criteria for selection of our situations and cases. The Congo is the gravest situation under our treaty jurisdiction, and Northern Uganda is the second gravest. Darfur, referred to the Court by the Security Council, is even graver still. The three situations are in Africa precisely because of the gravity criterion.' See Luis Moreno-Ocampo 'Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives' (2006) 21 *American University International Law Review* 497–503 at 498; See also Luis Moreno-Ocampo 'Statement at the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' 6, 24 October 2005.

¹⁷⁹ Mohamed M. El Zeidy 'The Gravity Threshold Under The Statute of the International Criminal Court' (2008) *Criminal Law Forum* 35 - 57.

¹⁸⁰ See Paragraph 1358 of *The Prosecutor v. Thomas Lubanga Dyilo* Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2013.

¹⁸¹ Gregory Gordon 'An African Marshall Plan: Changing U.S. Policy to Promote the Rule of Law and Prevent Mass Atrocity in the Democratic Republic of the Congo' (2008) 32 *Fordham International Law Journal* 1361–1399; Amber Peterman, Tia Palermo and Caryn Bredenkamp 'Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo' (2011) 101 *American Journal of Public Health* 1060–1067; British Broadcasting World Service 'UN official calls DR Congo 'rape capital of the world' 28 April 2010, available at <http://news.bbc.co.uk/2/hi/8650112.stm>, accessed 19 September 2016.

the women who faced several challenges daily due to sexual crimes committed against them by warring parties in the conflict.¹⁸²

It is obvious that the indictment of Lubanga was not due to the gravity of his crimes but was simply based on the practical consideration of successfully transferring him to The Hague for trial.¹⁸³ This is because at the time the warrant of arrest was issued, Lubanga was in detention in DRC for charges of genocide and crimes against humanity before the national judicial system. These crimes are graver than the crimes he was eventually charged with by the Prosecutor of the ICC.¹⁸⁴ The sentence passed on an accused person also reflects the gravity of the crime committed. Lubanga was sentenced to fourteen years' imprisonment. However, the time he will spend in prison will be reduced due to the time already spent in detention.¹⁸⁵

The assessment of gravity by the Prosecutor includes both qualitative and quantitative considerations.¹⁸⁶ However, it is not clear from the practice of the Prosecutor what importance is attached to gravity related during preliminary examinations.¹⁸⁷ One problem with the issue of gravity is that the Prosecutor has failed to show effectively how gravity is measured during preliminary investigations. The reports on preliminary examinations do not offer concrete information on how the Prosecutor approaches the issue of gravity. For example, a recent report in which the Prosecutor determined that there was reasonable basis to proceed with an investigation in the Mali situation failed to address in clear terms the issues of gravity and how it has influenced the decision to proceed with an investigation.¹⁸⁸

¹⁸² Susana Sacouto and Katherine A. Cleary 'The Importance of Effective Investigation of Sexual Violence and Gender-based Crimes at the International Criminal Court (2009) 17 *American University Journal of Gender, Social Policy and the Law* 339 – 359.

¹⁸³ ICC 'Office of the Prosecutor, Report on the Activities Performed during the First Three Years (June 2003-June 2006), 8; Susana SáCouto and Katherine A. Cleary *op cit* at 852; Mohamed M. El- Zeidy *op cit* at 41.

¹⁸⁴ William Schabas 'Prosecutorial Discretion v. Judicial Activism' (2008) 6 *Journal of International Criminal Justice* 731 – 761.

¹⁸⁵ Paragraph 107 and 108 of *The Prosecutor v. Thomas Lubanga Dyilo* Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012.

¹⁸⁶ Paragraph 61 Policy Paper on Preliminary Examinations; Paragraph 31 of *Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010.

¹⁸⁷ Jan Wouters and Kenneth Chan 'Policies, Not Politics: The Pursuit of Justice in Prosecutorial Strategy at the International Criminal Court' *Leuven Centre for Global Studies Working Paper* No. 95 (July 2012), 11.

¹⁸⁸ ICC 'Situation in Mali: Article 53(1) Report' 16 January 2013, 29 – 31, available online at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx, accessed 19 September 2016; Stegmiller *op cit* at 499.

The Pre-Trial Chamber has held that in analysing gravity the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale.¹⁸⁹ In addition, the Chamber argues that in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community.¹⁹⁰ However, the Appeals Chamber has rejected the requirements set by the Pre-Trial Chamber by arguing that the interpretation of article 17 (1) (d) is inconsistent with the definition of crimes over which the Court has jurisdiction.¹⁹¹ In essence, the Court argued that setting such a legal requirement for gravity will hamper the deterrent effect of the ICC.¹⁹² The Court has confirmed this ruling in subsequent decisions.¹⁹³ This current approach makes it possible for the ICC to admit any case that is within the jurisdiction of the Court.¹⁹⁴

The decision of the Appeals Chamber and subsequent endorsement by the Pre-Trial Chambers does not affect the importance of gravity during preliminary examination. This is because the decision of the Appeals Chamber related specifically to the legal criteria for the admissibility of the case before the Court and does not affect the discretion of the Prosecutor to decide if the gravity of the situation meets the legal criteria for the decision to proceed with an investigation.

4.7 Interests of justice and prosecutorial discretion

The interests of justice is another factor which the prosecutor has to weigh in order to reach a decision whether to open an investigation. The interests of justice under the Rome Statute has

¹⁸⁹ Paragraph 47 Situation in the Democratic Republic of Congo, *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58*, ICC-01/04-01/07, 10 February 2006.

¹⁹⁰ Ibid.

¹⁹¹ Paragraph 69 of the Situation in Democratic Republic of the Congo, *Judgment on the Prosecutor's Application for Warrants of Arrest, Article 58*, ICC-01/04-16913 July 2006.

¹⁹² Paragraph 60 of the Policy Paper on Preliminary Examinations.

¹⁹³ See for example, Paragraph 30 of *Prosecutor vs Bahar Idriss Abu Garda*, Case No ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010; Paragraphs 27 – 28 of *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No ICC-02/05-03/09, Corrigendum of the Decision on the Confirmation of Charges 7 March 2011.

¹⁹⁴ Margaret M. DeGuzman The International Criminal Court's Gravity Jurisprudence at Ten (2013) 12 *Washington University Global Studies Review* 475 – 483.

been subjected to different kinds of debate and scholars are polarised on how the principles sit with the primary obligation of the ICC Prosecutor to investigate and prosecute those accused of complicity in crimes within the jurisdiction of the ICC.

4.7.1 Background to the interests of justice debate

The relationship between the ICC and national governments has brought into focus the debate between peace and justice and whether amnesty and truth commissions can be accommodated under the interests of justice. The preliminary examination conducted by the Prosecutor raises the issue whether amnesties, including truth and reconciliation commissions embarked upon by national governments, are compatible with the provisions of the Statute. The preamble to the Statute supports the prosecution of international crimes.¹⁹⁵ However, whether amnesties are compatible with the Rome Statute is subject to debate.

During the fourth session of the Preparatory Committee meeting on the establishment of the ICC in August 1997, the US government issued a document requesting the recognition of amnesties in the Rome Statute.¹⁹⁶ Several delegates did not accept the proposal and there was no consensus on amnesty during the negotiations in Rome in 1998.¹⁹⁷ A major issue was that amnesty provisions obtainable in some countries were incompatible with the Rome Statute. The ‘interests of justice’ in article 53 is subject to different interpretations including the

¹⁹⁵Paragraph 4 of the Preamble to the Rome Statute provides that ‘the most serious crimes of concern to the international community as a whole must not go unpunished and ... their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.’

¹⁹⁶ The US delegation argued in a statement (‘non-paper’) that ‘[m]any amnesties and pardons have formed part of transitions to democratic governments, in which members of the outgoing regime, the armed forces, and the national security apparatus, as well as political insurgents, are protected from prosecution for ‘political’ acts that were carried out during the rule of the outgoing regime. Amnesties and pardons are also promulgated in the hope of achieving a kind of ‘national reconciliation’ by closing a door on the conflict of a past era. Also, amnesties and pardons have been offered to encourage the surrender or reintegration of armed dissident groups.’ See CICC ‘US Delegation Draft: State Practice Regarding Amnesties and Pardons’ available online at <http://www.iccnw.org/documents/USDraftonAmnestiesPardons.pdf>, accessed 19 September 2016; Ruth Wedgwood ‘The International Criminal Court: An American View’ (1999) 10 *European Journal of International Law* 93 - 107; Manhoush Arsanjani ‘International Criminal Court and National Amnesty Laws: The Future of the International Criminal Court’ (1999) 93 *American Journal of International Law* 385 - 403.

¹⁹⁷ Louise Mallinder *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (2008) 280.

possibility of deferring investigations and prosecutions due to amnesties, truth commissions and other alternative justice mechanisms.¹⁹⁸

During preliminary examinations, the Prosecutor is invited to consider whether, taking into account the gravity of the crimes and the interests of victims, there are nonetheless, substantial reasons to believe that an investigation would not serve the interests of justice. The ‘substantial reasons’ are not enumerated, thereby giving the Prosecutor the discretion to determine other factors that should be taken into consideration. Kenneth Rodman argues that the Prosecutor should apply discretionary powers in a broad manner to accommodate the exigencies of each situation before the ICC.¹⁹⁹

It is safe to conclude that whenever the Prosecutor decides there is a reasonable basis to proceed with an investigation during a preliminary examination, the decision, though a purely legal question, is not immune to political interpretations. This problem can only be minimised if the Prosecutor adheres to the legal criteria set out in the Rome Statute and consistently follows the policy objectives and rules laid down for the conduct of preliminary examinations. There is no guarantee that this will solve all the problems associated with the criticisms against the Prosecutor in the exercise of prosecutorial discretion. However, it will to an extent, show that the activities of the Prosecutor are objective, independent and impartial.

¹⁹⁸For example, Michael Scharf argues that article 53 of the Rome Statute, ‘reflects creative ambiguity’ which could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court.’ See Michael Scharf ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ (1999) 32 *Cornell International Law Journal* 507 - 527; Kristin Henrard ‘The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law’ (1999) 8 *Michigan State University-DCL Journal of International Law* 595 - 650; Michael Scharf ‘From the eXile Files: An Essay on Trading Justice for Peace’ (2006) 63 *Washington and Lee Law Review*, 339 - 376; Michael Kourabas ‘Vienna Convention Interpretation of the ‘Interests of Justice’ Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A Great Qualitative Step Forward or a Normative Retreat?’ (2007) 14 *University of California Davis Journal of International Law & Policy* 59 - 94.

¹⁹⁹ Kenneth Rodman argues that ‘[p]ursuing justice in ways that are blind to power realities will either be futile exercises in high-mindedness or counterproductive to political settlements that are necessary to end violent conflicts. International law cannot be isolated from the political context in which it has to operate.’ See Kenneth Rodman ‘Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court’ (2009) 22 *Leiden Journal of International Law* 99 - 126.

4.7.2 The Rome Statute and the interests of justice

A decision by the Prosecutor during preliminary examinations that there is no basis to proceed with an investigation due to the interests of justice is subject to review. If the Prosecutor's decision not to proceed with an investigation is based on the interests of justice, he or she must inform the Pre-Trial Chamber of the decision.²⁰⁰ The Prosecutor is required to promptly inform in writing the State or States that referred the matter under article 14 of the Rome Statute, or the UNSC if the situation is referred pursuant to Chapter VII powers under article 13(b) of the Rome Statute.²⁰¹

Beyond the preliminary examination phase, the Prosecutor can also conclude after investigation that there is not sufficient basis for a prosecution because a prosecution is not in the interests of justice. Such a conclusion must have taken into account all the circumstances, including the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime. The Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13(b) of his or her conclusion and the reasons for the conclusion.²⁰²

If a situation under preliminary examination is referred to the Prosecutor through a State Party or the UNSC, and the Prosecutor decides that there is no reasonable basis to proceed with an investigation because of jurisdiction and admissibility, the Prosecutor is obliged to inform the State or the UNSC. However, if the decision not to proceed is solely based on the interests of justice, a State Party or the UNSC that referred the situation can, through the Pre-Trial Chamber, request the Prosecutor to review the decision not to proceed with an investigation that is not in the interests of justice.²⁰³ If the decision of the Prosecutor is based on the interests of justice alone, the Pre-Trial Chamber may on its own initiative review a decision by the Prosecutor. Such a decision not to proceed with an investigation can only be effective if confirmed by the Pre-Trial Chamber.²⁰⁴

²⁰⁰ Article 53 (1) (c) of the Rome Statute.

²⁰¹ Rule 105 of the Rules of Procedure and Evidence.

²⁰² Article 53 (2) (c) of the Rome Statute.

²⁰³ Article 53 (3) (a) of the Rome Statute.

²⁰⁴ Article 53 of the Rome Statute.

The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information regarding a case or situation currently before the Court.²⁰⁵ This means that a concluded preliminary examination not to proceed with an investigation can be re-opened when new facts emerge that may change the circumstances under which the previous decision was made. This is exactly what happened in the Iraq situation when on 13 May 2014, the current Prosecutor, Fatou Bensouda, decided to re-open the preliminary examination of the situation in Iraq, previously concluded in 2006, following submission of further information to the Office of the Prosecutor in January 2014 in accordance with Article 15 of the Rome Statute.²⁰⁶

4.8 Prosecutorial discretion and interests of victims

Another factor in the exercise of discretion is the interest of victims. An innovation of the Rome Statute is the participation of victims in the proceedings of the ICC. The Statute does not define ‘victims.’ However, the RPE defines victims as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.’²⁰⁷ It also includes ‘organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.’²⁰⁸ Another international instrument, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law includes the family and dependents of victims in its definition.²⁰⁹

²⁰⁵ Article 53 (4) of the Rome Statute.

²⁰⁶ See ICC ‘Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq’ 13 May 2014, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014>, accessed 19 September 2016.

²⁰⁷ Rule 85 of the RPE, Official Records of the Assembly of States Parties to the Rome Statute, First Session, New York, 3- 10 September 2002, ICC-ASP/1/3 (Part.II-A).

²⁰⁸ Ibid.

²⁰⁹ Paragraph 8 of the UN General Assembly resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly, 21 March 2006, A/RES/60/147 defines victims as persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of

The Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power define victims as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.²¹⁰ The Statute provides that victims can serve as sources of information for the Prosecutor during preliminary examination.²¹¹ In addition, the Prosecutor has to take into consideration the gravity of the crime and the interests of the victims⁴ in determining whether there is reasonable basis to proceed with an investigation.²¹²

Whenever there is a determination by the Prosecutor to proceed with an investigation, victims are allowed to make representations to the Pre-Trial Chamber when the Prosecutor requests for an authorisation to commence an investigation.²¹³ The Statute also provides that the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility of a situation.²¹⁴ In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.²¹⁵ In addition, the Statute provides that where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to, or inconsistent with, the rights of the accused.

international humanitarian law. Where appropriate, and in accordance with domestic law, the term victim⁴ also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.⁴

²¹⁰ UN General Assembly A/RES/40/34 adopted 29 November 1985.

²¹¹ Regulations of the Office of the Prosecutor 2009 (OTP Regulations) ICC-BD/05-01-09, entered into force 23 April 2009, Regulation 16; Article's 15(2) and 41 (1) of the Rome Statute; Rules 46 and 47 of the Rules of Procedure and Evidence; Paragraph 46 of the report of the Court on the strategy in relation to victims ICCASP/8/45, 10 November 2009, available online at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf, accessed 19 September 2016.

²¹² Article 53 (1)(c) of the Rome Statute.

²¹³ Article 15(3) of the Rome Statute; RPE, Rule 50; paragraph 7 – 8 *Situation in the Republic of Kenya, Order to the Victims Participation and Reparation Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute*, ICC-01/09-4, 10 December 2009; Para 112 *Situation in the Republic of Kenya, Request for Authorisation of an investigation pursuant to Article 15*, ICC-01/09-3, 26 November 2009.

²¹⁴ Article 19(3) of the Rome Statute.

²¹⁵ *Ibid.*

Beyond these factors which regulate the exercise of prosecutorial discretion are some accountability mechanisms which can affect the discretion exercised by the ICC Prosecutor and these mechanisms are discussed below.

4.9 The ICC Prosecutor and accountability mechanisms in the Rome Statute

Notwithstanding the fact that prosecutors have discretion to decide whether to investigate or prosecute a crime, there are still accountability mechanisms regulating on the exercise of this right. Even in domestic legal systems, the exercise of prosecutorial discretion is not absolute.²¹⁶ The same accountability mechanisms also apply to international criminal tribunals. The ICC is not an exception as there are accountability mechanisms which serve as a check on the exercise of prosecutorial discretion. These are ICC Pre-Trial Chamber, UNSC and the Assembly of States of Parties.²¹⁷ In addition, this study identifies other accountability mechanisms to the exercise of prosecutorial discretion that are not well addressed in the literature.

4.9.1 Judicial review of prosecutorial discretion

The exercise of prosecutorial discretion is subject to the powers of the Pre-Trial Chamber of the ICC. As earlier noted, when the Prosecutor decides that there is no basis to proceed with an investigation because it is not in the interests of justice, the Prosecutor is under obligation to inform the Pre-Trial Chamber.²¹⁸ After investigation is completed and the Prosecutor determines there is no basis to proceed with prosecution because it is not in the interest of justice, the Prosecutor is required to inform the Pre-Trial Chamber and whoever triggered the investigation²¹⁹ of the reasons for the decision.²²⁰

²¹⁶ See for example, Siyuan Chen 'The limits on prosecutorial discretion in Singapore: Past, present, and future' (2013) 5 *International Review of Law*, 1 - 27.

²¹⁷ Nidal Jurdi *The International Criminal Court and National Courts: A Contentious Relationship* (2011) Ashgate Publishing Limited, Surrey 97 - 99.

²¹⁸ Article 53 (1) (c) of the Rome Statute.

²¹⁹ Either the UNSC under article 13 (b) or a State Party under article 14 of the Rome Statute.

²²⁰ Article 53 (2) (c) of the Rome Statute.

The UNSC or the State Party that referred the matter to the ICC can request a review of the decision of the Prosecutor not to proceed with a prosecution through the Pre-Trial Chamber which in turn can request the Prosecutor to review the decision not to proceed.²²¹ On its own initiative, the Pre-Trial Chamber can review the decision of the Prosecutor not to proceed with an investigation or prosecution based only on the interests of justice. If the Pre-Trial Chamber decides to take this route, the decision of the Prosecutor can only stand if confirmed by the Pre-Trial Chamber.²²² However, if the Pre-Trial Chamber does not initiate a review of the decision not to proceed with an investigation or prosecution of an international crime, the discretion exercised by the Prosecutor remains valid unless contested by the State or the UN Security Council that referred the matter to the ICC.

Despite the oversight function of the Pre-Trial Chamber on the exercise of prosecutorial discretion, the Prosecutor is at liberty to reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.²²³ This means that a decision to proceed with an investigation or prosecution can be suspended or continued as long as there are new facts or information at the disposal of the Prosecutor to merit a reconsideration of an earlier decision.

It should be noted that there are two probable outcomes regarding the intervention of the Pre-Trial Chamber on a decision by the Prosecutor not to proceed with an investigation or prosecution in the interests of justice. If the request is made by the UNSC or a State Party, the Pre-Trial Chamber may review the information and request the Prosecutor to reconsider the decision. The use of ‘_may’ in the Statute means that the Pre-Trial Chamber is not compelled to review the decision of the Prosecutor not to proceed with an investigation and prosecution that is not in the interest of justice. Similarly, the Prosecutor is not compelled to accept the request by the Pre-Trial Chamber to review the decision not to proceed. However, if the review of the decision not to proceed is an initiative of the Pre-Trial Chamber, the Prosecutor’s decision is subject to the confirmation of the Pre-Trial Chamber.

The Statute is silent on what happens if the Pre-Trial Chamber refuses to confirm a decision by the Prosecutor not to proceed with an investigation or prosecution in the interests of justice. However, the Statute uses the words ‘_shall be effective only if confirmed,’ meaning

²²¹ Article 53 (3) (a) of the Rome Statute.

²²² Article 53 (3) (b) of the Rome Statute.

²²³ Article 53 (4) of the Rome Statute.

that there is an obligation on the Prosecutor to reconsider a decision not to proceed. This shows that the discretion of the Prosecutor not to proceed with an investigation or prosecution in the interests of justice is limited by the powers of the Pre-Trial Chamber to confirm the decision or disagree with the Prosecutor and order a re-consideration of the decision.

There are circumstances when a unique investigative opportunity may be available to the Prosecutor to take the testimony or a statement, examine, collect or test evidence of a witness which may not be available subsequently for the purposes of a trial. In any of these circumstances, the Prosecutor is under an obligation to inform the Pre-Trial Chamber of the decision to utilise this opportunity.²²⁴ The prosecutorial discretion exercised by the Prosecutor regarding the existence of a unique investigative opportunity is subject to the limitations imposed by the Statute, to the extent that the Prosecutor has to inform the Pre-Trial Chamber of the decision.

The reason for this disclosure is to ensure, amongst other things, that efficiency and integrity of the proceedings are maintained, including the rights of the defence.²²⁵ The Prosecutor has the discretion to decide on the measures to be adopted during the proceedings. A decision by the Pre-Trial Chamber to impose its initiative on the Prosecutor is subject to an appeal by the Prosecutor if the decision infringes on the discretion of the Prosecutor.²²⁶

4.9.2 Prosecutorial discretion and the Assembly of State Parties of the ICC

The Assemblies of State Parties influences the discretion exercised by the Prosecutor.²²⁷ The ASP is responsible for the election and discipline of senior officials of the Court, including the Prosecutor.²²⁸ The ASP is also responsible for approving the annual budget of the Court, and this function has significant impact on the activities of the Prosecutor. For example, the Committee on Budget and Finance recommended the reduction of the overall budget

²²⁴ Article 56 of the Rome Statute.

²²⁵ Article 56 (1) (b) of the Rome Statute.

²²⁶ Article 56 (3) (b) of the Rome Statute.

²²⁷ Danner *op cit* at 524; Jurdi *op cit* at 99.

²²⁸ See generally Article's 36; 42(4) and 46 of the Rome Statute.

estimates for the office of the Prosecutor for 2014.²²⁹ It is obvious that finance plays a significant role in the administration of justice and if the Prosecutor does not get the necessary funding required for activities, this will negatively influence the independence and the discretion of this Office provided under the Rome Statute.

4.9.3 Prosecutorial discretion and UNSC

The exercise of prosecutorial discretion is influenced by the UNSC.²³⁰ This is because the Rome Statute gives the UNSC the power to defer proceedings currently before the Court, if the proceedings constitute a threat to international peace and security.²³¹ The UN Charter provides a significant role for the UNSC in promoting international peace and security. The ICC complements the efforts of the UNSC through the investigation and prosecution of perpetrators of crimes that threaten international peace and security.²³²

The 1994 version of the Draft Code of Crimes against the Peace and Security of Mankind prepared by the ILC made the jurisdiction of the ICC subject to the approval of the UNSC.²³³ If the provision had been adopted, it would have given the UNSC considerable influence over the activities of the ICC.²³⁴ However, the current article 16 gives the UNSC the power to suspend ongoing investigations. The adoption of article 16 in the Rome Statute has had several implications for the work of the ICC in the exercise of prosecutorial discretion.²³⁵ The

²²⁹ The Prosecutor had requested a working budget of 35.74 million Euros for 2014. However, the Committee on Budget and Finance proposed to cut the budget by 2.2 million Euros. See ASP ‘Report of the Committee on Budget and Finance on the work of its twenty-first session’ 4 November 2013, available online at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-15-ENG.pdf, accessed 19 September 2016.

²³⁰ As noted in chapter one this limitation does not affect the discretion exercised during preliminary examinations.

²³¹ Article 16 of Rome Statute.

²³² Article 39 of the UN Charter.

²³³ Article 23 (3) of the ILC 1994 Draft Statute for an International Criminal Court provides that ‘[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.’

²³⁴ Elizabeth Wilmhurst ‘The International Criminal Court: The Role of the Security Council’ in Mauro Politi and Giuseppe Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 40.

²³⁵ According to Bergsmo and Pejic ‘[t]he drafting history of article 16 gives rise to at least three comments. First, political considerations were not surprisingly given more weight than legal arguments in the determination

power of the UNSC to defer cases before the ICC is not limited by the process through which the cases are referred to the Court. This means that the UNSC can defer cases that were referred to the ICC through the UNSC, State Parties or by the Prosecutor's own initiative. In deferring cases, the UNSC acts under Chapter VII of the UN Charter, which means that there has to be evidence that there is a threat to international peace and security. It is not enough for a State to make a request.

It has been suggested that while the Prosecutor focusses on investigating and prosecuting international crimes, it is the responsibility of the UNSC, as a political body, to determine when an investigation and prosecution will not serve the interests of justice under article 16.²³⁶ In other words, if a decision on deferral is to be made, the proper channel is through the UNSC, which is a political body with the mandate to maintain international peace and security.²³⁷ While this proposition has merit, it is important to note that though the UNSC has the primary responsibility to maintain international peace and security, it does not have exclusive responsibility in the maintenance of international peace and security regarding activities of the ICC.²³⁸

During preliminary examinations, article 53 of the Statute confers on the Prosecutor the power to decide whether there is reasonable basis to proceed with an investigation. Beyond this, the Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.²³⁹ A decision to proceed with an investigation can be rescinded before the commencement of prosecution and a decision not to investigate can also be reversed, if there is evidence to support the change in *status quo*. Therefore, the power to discontinue cases before the ICC is a shared responsibility between the Prosecutor and the UNSC.

of the appropriate role for the [UNSC] in ICC proceedings. Secondly, the [UNSC]'s deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict. Thirdly, article 16 provides an unprecedented opportunity for the [UNSC] to influence the work of a judicial body. Bergsmo and Pejic, *Ibid*, 598.

²³⁶ Kenneth Rodman *op cit* at 120.

²³⁷ *Ibid*.

²³⁸ Sun Kim 'Maintaining the Independence of the International Criminal Court: The Legal and Procedural Implications of an Article 16 Deferral Request' (2011) 29 *Agenda Internacional*, 175 - 212.

²³⁹ Article 53 (6).

Recent developments before the Court make it imperative to reconsider the role of the UNSC in maintaining international peace and security and its impact on the activities of the ICC. For example, the UNSC referred cases in Sudan and Libya to the Court.²⁴⁰ The referrals have been controversial as some permanent members of the UNSC have been accused of using the provisions of the Statute as leverage for political convenience.²⁴¹ This is because other countries like Syria, Afghanistan, Sri Lanka and Iraq have had similar conflicts that should logically necessitate the intervention of the UNSC. However, due to the politicised nature of the UNSC, the possibility of the UNSC referring these countries to the ICC is minimal.

In UNSC resolution 1970, Libya was referred to the ICC.²⁴² The UNSC argued that ‘the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity.’²⁴³

In making the decision to refer the matter to the ICC, the UNSC reiterated the fact that the investigations and prosecution could be delayed by one year if a resolution were adopted to that effect.²⁴⁴ In addition, the resolution was unequivocal in relation to the jurisdiction for crimes that may be committed in Libya by nationals that are not States Parties to the Rome Statute while enforcing the UNSC resolution.²⁴⁵

The involvement of the UNSC in the activities of the ICC has had mixed results. The powers of the UNSC under the UN Charter are positive responses to threats to international peace and security. However, the political nature and composition of the UNSC has resulted in its actions and decisions coming under scrutiny and criticism.²⁴⁶ The relationship between the ICC and the UNSC has affected the AU’s policy towards the ICC because of the concern that

²⁴⁰ See UNSC Resolutions 1593 and 1970 referring the situations in Sudan and Libya to the ICC.

²⁴¹ Dharmendra Chatur ‘A Synergistic Failure between the UN Security Council and the International Criminal Court’ available online at: <http://works.bepress.com/dchatur/7>, 1 - 9 accessed 19 September 2016..

²⁴² The referral includes acts that took place in Libya from 11 February 2011. See resolution 1970 (2011) adopted by the Security Council at its 6491st meeting, on 26 February 2011.

²⁴³ Paragraph 6 of UNSC resolution 1970.

²⁴⁴ Paragraph 12 of UNSC resolution 1970.

²⁴⁵ See Paragraph 6 of the resolution which provides that ‘nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State’.

²⁴⁶ Thomas Weiss ‘The Illusion of UN Security Council Reform’ (2003) 26 *Washington Quarterly*, 147 – 161.

the UNSC can refer non-State parties of the Statute to the ICC. However, the power of the UNSC to refer non-State Parties to the ICC is not part of the responsibility of the Prosecutor and has to be addressed within the UN system.

These mechanisms, if well monitored and implemented, stand a good chance of regulating the activities of the ICC Prosecutor. These mechanisms will aid in making the ICC Prosecutor a three-dimensional neutral prosecutor who is non-biased, non-partisan, and highly principled.²⁴⁷ Although it cannot be guaranteed that the existence of these structures will radically transform the ICC Prosecutor, they will act as accountability platforms that regulate and reduce the possibility of the ICC Prosecutor abusing the discretion provided by the Rome Statute.

4.10 The review of prosecutorial discretion using international human rights law

The accountability mechanisms discussed earlier will help to review the activities of the ICC Prosecutor in the light of the provisions of international human rights law applicable to international criminal law trials. It has to be noted that the discretion exercised by the Prosecutor is subject to the rights of accused persons as provided in the Rome Statute. These rights generally include the rights of persons during investigations,²⁴⁸ the presumption of the innocence of the accused person,²⁴⁹ and the rights of accused persons.²⁵⁰ These rights are available in treaties of international human rights law, namely the International Covenant on Civil and Political Rights²⁵¹ and the International Covenant on Economic, Social and Cultural Rights.²⁵² These international treaties deal specifically with the rights to equality and non-discrimination, which are limitations to the discretion exercised by the Prosecutor.

²⁴⁷Zacharias and Green *op cit* at 886.

²⁴⁸ Article 55 of the Rome Statute.

²⁴⁹ Article 66 of the Rome Statute.

²⁵⁰ Article 67 of the Rome Statute.

²⁵¹ International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

²⁵² International Covenant on Economic, Social and Cultural Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976.

Prosecutorial discretion is limited to the extent that the Prosecutor is not allowed by the Statute to infringe on the rights of the accused person. The decision to charge a person for an international crime does not remove the presumption of innocence until proven guilty. Further, when the Prosecutor has decided to investigate an individual, the person shall not be compelled to incriminate himself or herself or to confess guilt.²⁵³

The Prosecutor is not allowed to subject the accused person to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.²⁵⁴ The accused person should not be subjected to arbitrary arrest or detention, nor be deprived of his or her liberty except on such grounds and in accordance with procedure set out in the Statute.²⁵⁵ Even when proceedings take place at the national level in relation to the investigation and prosecution of international crimes, the rights and privileges of an accused person are not suspended by the discretion exercised by the Prosecutor in relation to questioning and obtaining evidence.²⁵⁶

The presumption of innocence of an accused person is a limitation to the prosecutorial discretion exercised by the Prosecutor. This is because the Statute provides that the accused person is presumed to be innocent until proved guilty before the ICC in accordance with the applicable law.²⁵⁷ Furthermore, it is the responsibility of the Prosecutor to prove the guilt of the accused person.²⁵⁸ This is notwithstanding the determination by the Prosecutor that crimes within the jurisdiction of the ICC have been committed and that there is a reasonable basis to proceed with an investigation and prosecution of crimes within the jurisdiction of the Court. Moreover, to secure a conviction of the accused person, the Prosecutor has to convince the judges beyond reasonable doubt of the guilt of the accused person.²⁵⁹

The exercise of prosecutorial discretion does not allow the Prosecutor to treat accused persons unfairly. In the determination of any charge, the accused shall be entitled to a public

²⁵³ Article 55 (1) (a) of the Rome Statute; Article 14 (3) (g) of the International Covenant on Civil and Political Rights 1966; Christopher Hall ‘Article 55’ in in Otto Triffterer ed. *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 2nd edition (2008) 1193.

²⁵⁴ Article 55 (1) (b) of the Rome Statute.

²⁵⁵ Article 55 (1) (d) of the Rome Statute.

²⁵⁶ Article 55 (2) of the Rome Statute.

²⁵⁷ Article 66 (1) of the Rome Statute.

²⁵⁸ Article 66 (2) of the Rome Statute

²⁵⁹ Article 66 (3) of the Rome Statute.

hearing, which is fair and conducted impartially.²⁶⁰ Furthermore, the Prosecutor has to make available to the defence any evidence that shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.²⁶¹

4.10.1 Prosecutorial discretion and general principles of law

Prosecutorial discretion is subject to general principles of law.²⁶² For example, Prosecutorial discretion is limited by *nullum crimen sine lege*.²⁶³ This means that a person is not criminally liable unless the conduct in question constitutes a crime within the jurisdiction of the Court at the time it took place. Thus, crimes that do not meet the threshold set out in the Statute are beyond the discretionary powers of the Prosecutor. In addition, the Statute provides that the definition of a crime shall be strictly construed and shall not be extended by analogy. In addition, if there is any ambiguity in the definition of a crime, it will be interpreted in favour of the person being investigated, prosecuted or convicted.²⁶⁴ Closely related to the above principle is the *non-retroactivity rationae* which states that no person shall be criminally responsible for a conduct that was not a crime before the entry into force of the Statute.²⁶⁵ In addition, if there is a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply.²⁶⁶

The powers of the Prosecutor to investigate are limited only to natural persons. This is because the Statute provides that the ICC has jurisdiction only over natural persons.²⁶⁷ Therefore, a person who commits a crime within the jurisdiction of the Court shall be

²⁶⁰ Article 67 (1) of the Rome Statute; Kai Ambos ‘The Right of Non-Self-Incrimination of Witnesses before the ICC’ (2002) 155 *Leiden Journal of International Law* 155 – 177.

²⁶¹ Article 67 (2) of the Rome Statute

²⁶² Cote *op cit* at 172 – 73.

²⁶³ Article 22 (1) of the Rome Statute

²⁶⁴ Article 22 (2) of the Rome Statute.

²⁶⁵ Article 24 (1) of the Rome Statute.

²⁶⁶ Article 24 (2) of the Rome Statute.

²⁶⁷ Article 25 (1) of the Rome Statute.

individually responsible and liable for punishment in accordance with the provisions of the Statute.²⁶⁸ Prosecutorial discretion is also limited to the investigation and prosecution of persons above the age of eighteen years at the time of the alleged commission of a crime.²⁶⁹ This means that individuals below eighteen years are not criminally responsible for their actions under the Statute as the Court has no jurisdiction over them.

4.10.2 Prosecutorial discretion and cooperation from states

Although the ICC is an independent international criminal justice institution, its survival and effectiveness is anchored on the co-operation of both State Parties and non-State Parties to the treaty. In fact, part nine of the Statute titled ‘International cooperation and judicial assistance’ provides for effective cooperation between the ICC and State Parties. The Statute provides that State Parties shall cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court as provided in the Statute.²⁷⁰ Officials of the ICC including the Prosecutor have the authority to make requests to State Parties for co-operation depending on the circumstances of the request.²⁷¹ Whenever a request is made by the ICC, the requested State shall keep confidential a request for co-operation and any documents supporting the request, until the disclosure is necessary for execution of the request.²⁷²

Whenever a request is made by the ICC for assistance, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. In addition, the Court may request that any information that is made available in furtherance of the request for assistance shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential

²⁶⁸ Article 25 (2) of the Rome Statute.

²⁶⁹ Article 26 of the Rome Statute.

²⁷⁰ Article 86 of the Rome Statute.

²⁷¹ Article 87 (1) of the Rome Statute.

²⁷² Article 87 (3) of the Rome Statute.

witnesses and their families.²⁷³ Where a State Party fails to comply with a request to cooperate with the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may refer the matter to the Assembly of State Parties or to the UNSC depending on how the initial referral was made.²⁷⁴

The request for assistance is not limited to State Parties. Non-State Parties to the Statute are expected to provide assistance to the ICC on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.²⁷⁵ In addition, where a State is not party to the Statute and entered into an *ad hoc* agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the ASP, or the UNSC if the situation was referred to the Court by the UNSC.²⁷⁶ Furthermore, the court officials including the Prosecutor may ask any inter-governmental organization to provide information or documents. The Court may also ask for other forms of co-operation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.²⁷⁷ Unlike States, which can be reported to the ASP and the UNSC, there is no sanction for an intergovernmental organisation that fails to provide assistance to the ICC upon requests.

According to the Rome Statute, the Prosecutor, in order to establish the truth, may extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute.²⁷⁸ In doing so, the Prosecutor investigates incriminating and exonerating circumstances simultaneously.²⁷⁹ In addition, the Prosecutor is expected to take appropriate measures to ensure effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, to respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and to take into account the nature of the crime, especially where it involves sexual violence, gender violence or violence against children.²⁸⁰

²⁷³ Article 87 (4) of the Rome Statute.

²⁷⁴ Article 87 (7) of the Rome Statute.

²⁷⁵ Article 87 (5) (a) of the Rome Statute.

²⁷⁶ Article 87 (5) (b) of the Rome Statute.

²⁷⁷ Article 87 (6) of the Rome Statute.

²⁷⁸ Article 54 of the Rome Statute.

²⁷⁹ Article 54 (a) of the Rome Statute.

²⁸⁰ Article 54 (b) of the Rome Statute.

The Prosecutor may conduct investigations on the territory of a State when a State has agreed to the requests of the Prosecutor for co-operation.²⁸¹ However, when a State under investigation is unable to respond to the requests of the Prosecutor for co-operation, the Pre-Trial Chamber can authorise the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the co-operation of that State. This is subject to a determination by the Pre-Trial Chamber that the State is clearly unable to execute a request for co-operation due to the absence of any authority or any component of its judicial system competent to execute the request for co-operation.²⁸²

The Statute further provides that the Prosecutor may do any of the following: (a) collect and examine evidence; (b) request the presence of and question persons being investigated, victims and witnesses; (c) seek the cooperation of any State or inter-governmental organisation or arrangement in accordance with its respective competence and/or mandate; (d) enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, inter-governmental organisation or person; (e) agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and (f) take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.²⁸³

The co-operation between the ICC and State Parties is a limitation to the exercise of prosecutorial discretion. This is because it exposes the Prosecutor to a lot of criticism in the course of carrying out the responsibilities within the provisions of the Statute. This dilemma is obvious in situations or countries where the ICC is investigating crimes within the jurisdiction of the Court and also needs the co-operation of the State where investigations are currently ongoing.

Robinson has argued that in situations involving the co-operation of States where the ICC Prosecutor is investigating crimes within the jurisdiction of the Court, the Prosecutor is not likely to escape criticism as every decision taken is bound to be interpreted differently by

²⁸¹ Article 54 (2) (a) of the Rome Statute.

²⁸² Article 57 (3) (d) of the Rome Statute.

²⁸³ Article 54 (3) (a –f) of the Rome Statute.

different parties.²⁸⁴ While this is a fair comment, it also means that the Prosecutor has to act within the provisions of the Rome Statute and weigh options in relation to requests for assistance for States under investigation for international crimes. The Statute clearly provides the duties and powers of the Prosecutor with respect to investigations which also touches on the issues of cooperation with State Parties and non-State Parties to the Statute.

4.11 Conclusion

This chapter has identified and analysed the ICC legal framework and the criteria set out for the exercise of prosecutorial discretion during the conduct of preliminary examinations provided in article 53 of the Rome Statute. It has shown that the Rome Statute provides the needed legal framework on the exercise of prosecutorial discretion during preliminary examinations. The discussions lay the background for the next chapter which discusses the policy documents adopted by the ICC Prosecutor in the interpretation of the discretion exercised during preliminary examinations.

It has been established that during the negotiations for the establishment of the Court, the powers of the Prosecutor were one of the contentious issues that polarised the negotiators. The Rome Statute provides for a unique process for the election of the Prosecutor of the ICC which is different from what is obtainable in national legal systems, or ad-hoc and hybrid tribunals. It has also looked critically at the jurisprudence of the Court in relation to the powers of the Prosecutor including independence of the Prosecutor, removal, discipline and tenure of office which is slightly different when compared with the ad-hoc and hybrid tribunals.

The chapter extensively discussed the legal framework established by the Statute to guide preliminary examinations. This comprises jurisdiction, admissibility (complementarity and gravity), the interests of justice and the interests of victims. It has been noted that irrespective of how the jurisdiction of the ICC is triggered, the Prosecutor has to decide whether there is a legal basis to proceed with an investigation through a preliminary examination.²⁸⁵

²⁸⁴ Robinson *op cit* 324.

²⁸⁵ See Chapter one, paragraph 1.0.

It was further noted that if the decision not to proceed is due to the interests of justice, the Prosecutor must inform the Pre-Trial Chamber. In addition, if Prosecutor decides that there is reasonable basis to proceed with an investigation during *proprio motu* investigations, the authorisation of the Pre-Trial Chamber is required in order to open an investigation.

The chapter notes that the Prosecutor of the ICC occupies a sensitive position in the administration of justice at the ICC. Although the Prosecutor has discretion in carrying out the mandates envisaged in the treaty, there are accountability mechanisms to check the powers of the Prosecutor. These include judicial oversight provided by the Pre-Trial Chamber of the ICC, role of the Assembly of State Parties and the UNSC.

The most controversial of all the limitations is the role of the UNSC, which is generally seen as the source of the conflict between the ICC and the AU in relation to the cases in Libya and Sudan. Furthermore, prosecutorial discretion is subject to accountability mechanisms to the extent that the ICC Prosecutor is obliged to adhere to international human rights law of equality and non-discrimination and to ensure that the general principles of law apply in the exercise of prosecutorial discretion.

Under the one court principle, the Prosecutor is not meant to act alone which means that the responsibilities of the ICC Prosecutor have to take into consideration the roles and powers of other organs of the Court, including the Registrar and the Presidency. One major attribute of the office of the Prosecutor is independence, and that gives the Prosecutor the opportunity to ensure that activities are within the confines of the provisions of the Rome Statute. However, in reality, these issues have not played out exactly as envisaged and will be discussed in detail in subsequent chapters.²⁸⁶

The chapter also notes that the Prosecutor is under an obligation in all cases submitted before the office to conduct an analysis of the available information before deciding whether there is reasonable basis to proceed with an investigation. This is irrespective of the procedure through which the situation was referred to the Prosecutor.

As the chapter has shown, the Prosecutor was initially supportive of suspending investigations and prosecutions of crimes that were not in the interests of justice. However, the release of the policy paper on the interests of justice marked a shift in the policy of the

²⁸⁶ See Chapters Six to Eight for extensive discussions.

Prosecutor.²⁸⁷ This chapter argues that the role of the UNSC under article 16 of the Rome Statute to suspend investigations or prosecutions before the Court does not affect the powers of the Prosecutor under article 53 of the Rome Statute to suspend investigations in the interests of justice.

An overview of discussions in this study is necessary at this stage. It has been established that provisions of the Rome Statute and RPE regulate the exercise of prosecutorial discretion during preliminary examinations. The Rome Statute and the RPE prescribe the substantive provisions of the Rome Statute while the Prosecutor has adopted general principles and policy objectives guiding the process which will be extensively discussed in the next chapter.

²⁸⁷ See Chapter five for further discussions on this issue.

Chapter Five

The Principles and Policy Objectives guiding the exercise of Prosecutorial Discretion during Preliminary Examinations

5.0 Introduction

Previous chapters in this study have laid out the theory and evolution of the practice of prosecutorial discretion from national to international criminal justice systems. They have also discussed the legal framework guiding the exercise of prosecutorial discretion at the ICC, looking specifically at provisions of the Rome Statute as it pertains to the independence, powers and tenure of the ICC Prosecutor. In the exercise of prosecutorial discretion, the ICC Prosecutor has adopted policy documents, guidelines and practices over the years. This chapter analyses the Prosecutor's interpretation of his or her powers during preliminary examination.¹

During the tenure of the former Prosecutor of the ICC, Luis Moreno Ocampo, limited information on preliminary examinations was made available to the public. This created several problems for the office of the Prosecutor, including charges of inability of the Prosecutor to effectively articulate rationale for decisions made.²

The situation gradually changed as the Prosecutor became more transparent about the status of preliminary investigations before the ICC. In addition, the Prosecutor released a draft policy paper on preliminary examinations in October 2010 signifying a major shift in the way preliminary examinations were to be handled.³ However, some scholarly materials written on the conduct of preliminary examinations relied on the draft policy paper.⁴ Which means that

¹The general principles adopted by the office of the Prosecutor guiding the conduct of preliminary examinations are independence, impartiality and objectivity while the policy objectives are transparency, ending impunity by encouraging genuine national proceeding and the prevention of crimes. See paragraphs 25 and 93 of the Policy Paper on Preliminary Examinations.

² Ray Murphy 'Gravity Issues and the International Criminal Court' (2006) 17 *Criminal Law Forum* 281 –315; Côté *op cit* at 171.

³ ICC 'Draft Policy Paper on Preliminary Examinations,' 4 October 2010.

⁴ Caban *op cit*; deGuzman *op cit* .

as at the time the authors made their arguments, the policy paper was still a draft. The current Prosecutor of the ICC, Fatou Bensouda, has made information on how the activities of the office of the Prosecutor are carried out more available to the general public. The publication of the final version of the policy paper on preliminary examinations in November 2013 is just one example.

5.1 The ICC prosecutor and policy documents on the exercise of discretion

The strategies and policies the Prosecutor has adopted have concerned the regulation of the office of the Prosecutor, the definition of the interests of justice, victims' participation, preliminary examination and sexual and gender based crimes.

5.2 Prosecutorial discretion and rules of engagement

As noted in the introductory chapter, several scholars have emphasised the need to adopt guidelines to regulate the exercise of prosecutorial discretion.⁵ Chapter two has also emphasised principled decision making based on clear rules as a crucial element of neutrality. The Prosecutor duly adopted the views of the UN Guidelines on the Role of Prosecutors which provides that 'where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.'⁶

Guidelines will help the ICC Prosecutor to implement provisions of the Statute in a clear, unambiguous and systematic form. In addition, the provision of the guidelines will help observers of the ICC to measure the activities of the Court with the provisions of the guidelines. Furthermore, it will help reduce the criticisms that the ICC operates in a secretive manner. If critics understand how the decisions are made by the Prosecutor, their accusations of bias and partiality will probably decrease. The value of developing guidelines cannot be underestimated. For example, the UN guidelines on the role of prosecutors support the provision of rules and regulations guiding the exercise of prosecutorial discretion.

⁵ See chapter one, paragraph 1.4.

⁶ Paragraph 17 UN Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available online at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>, accessed 19 September 2016.

It will be recalled that in 2009, the AU issued a resolution requesting the ICC Prosecutor to 'review the 2009 regulations and 2007 Policy Paper regarding the guidelines and code of conduct of the exercise of Prosecutorial powers to include factors promoting peace and submit them to the ASP in order to ensure more accountability'.⁷ This request presupposes that the exercise of prosecutorial discretion by the Prosecutor should be regulated by the ASP. In addition, the AU's resolution raises the question as to whether in the exercise of prosecutorial discretion, the Prosecutor should take into consideration factors promoting peace. The answer to this question is fluid.

As already noted in chapter four, article 53 of the Rome Statute provides for factors to be considered before the initiation of investigations. Although 'interests of peace' is not clearly stated in the Statute, the 'interests of justice' can be said to encompass both peace and justice. However, the office of the Prosecutor has vehemently opposed this interpretation by arguing that there is a significant difference between the two concepts.⁸

Different scholars have weighed in on the debate for prosecutorial guidance at the ICC. Schabas has suggested the introduction of 'political guidance' to the Prosecutor as a way of improving the exercise of prosecutorial discretion.⁹ He argues that the lack of 'political guidance' may be one factor that explains the lack-luster performance of the Court in its first decade of activity.¹⁰ However, Schabas did not discuss which organ of the ICC or external body should be responsible for the role of 'political direction or guidance' over the Prosecutor in the exercise of prosecutorial discretion.

It is possible that the ASP may be called upon to play such a role as recommended by the AU. However, the suggestion by the AU did not gain any support amongst State Parties of the Statute. This is because the resolution is seen as an intrusion into the discretionary powers granted to the Prosecutor of the ICC.¹¹

⁷ Report of the 2nd Ministerial Meeting on the Rome Statute of the International Criminal Court 6 November 2009 at Addis Ababa.

⁸ See ICC 'Policy Paper on the Interests of Justice' September 2007 available online at https://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf, accessed 8 January 2016.

⁹ Schabas *Unimaginable Atrocities op cit* at 91.

¹⁰ *Ibid* at 92.

¹¹ Goldston *op cit* at 405.

Another problem with the suggestion of involving the ASP is the political nature of its existence. The ASP is made up of all State Parties to the Rome Statute and can be said to reflect the positions of member States that are parties to the Statute. In terms of its voting pattern, the ASP has a more democratic structure than that of the UNSC with its five permanent members, any one of whom can veto the decision of other members.

One reason why the ASP could fit into such a role is that all members of the ASP are State Parties of the Rome Statute, unlike the UNSC where some members (both permanent and non-permanent) are not State Parties to the Statute. However, as things stand currently, the Statute does not provide for the regulation of the exercise of prosecutorial discretion through the ASP. This makes the recommendation of the AU somewhat superfluous unless the Statute is amended to ensure that the exercise of prosecutorial discretion is regulated by the ASP.

However, the publication of the policy paper on preliminary examinations in November 2013 makes it imperative that an evaluation of the policy paper should be undertaken to understand the procedural factors affecting the conduct of preliminary examinations. The policy paper divides the procedural factors into two main streams: general principles and policy objectives.

5.3 Prosecutorial discretion and policy paper on preliminary examinations

The policy paper adopted by the office of the Prosecutor describes the practice and policy of the ICC during the conduct of preliminary examinations. Its main objective is to assess whether the legal requirement for opening investigations are met. In other words, the Prosecutor weighs the facts and circumstances of a case to determine whether it meets the criteria set in the provisions of the Rome Statute.¹²

The policy paper on preliminary examination is a combination of several legal instruments of the ICC including the Rome Statute, RPE, Regulations of the ICC, Regulations of the office of the Prosecutor, prosecutorial strategies of ICC and other relevant policy documents. In addition, the practical experience gained by the Prosecutor and decisions of the ICC judges have proved beneficial in the process of developing the policy paper.¹³

¹² Paragraph 19 of the policy paper on preliminary examination.

¹³ Ibid.

The policy paper is a document reflecting an internal policy of the office of the Prosecutor and therefore does not give rise to legal rights. Furthermore, it is subject to revisions based on experiences of the Prosecutor and decisions of the Judges of the ICC.¹⁴ Although the policy paper is an internal document, the Prosecutor of the ICC has made it public in the 'interest of promoting clarity and predictability regarding the manner in which it applies the legal criteria set out in the Statute'.¹⁵ The Rome Statute does not require the Prosecutor to declare how prosecutorial discretion is exercised during preliminary examinations, however the need for 'clarity and predictability' as stated by the Prosecutor is a key ingredient of the three-dimensional neutral prosecutor.

The policy paper affirms the fact that a major goal of the ICC is to put an end to impunity for the most serious crimes of concern to the international community by ensuring effective prosecution of international crimes at the national level. It therefore prioritises the primary responsibility of national judicial systems to hold accountable their citizens alleged to have committed international crimes. The activation of the jurisdiction of the Court is only possible in the absence of genuine national proceedings. As already noted in chapter four, although the prosecutor has discretion to open investigations after conducting preliminary examination, that power is subject to the authorisation of the pre-trial Chambers if it is a *proprio motu* investigation.¹⁶

The policy paper recognises the argument already made in this study that the power of the ICC Prosecutor to open investigations is a unique role that distinguishes it from other international tribunals, including the ad-hoc and hybrid criminal justice institutions.¹⁷ This policy paper could be seen as an attempt to create a model policy for the three-dimensional neutral prosecutor as proposed by Green and Zacharias. This prosecutor according to the policy paper pursues general principles and policy objectives that clearly reflect the role of the ICC Prosecutor and envisaged in the Rome Statute. These principles and objectives are discussed extensively below.

¹⁴ Paragraph 20 of the policy paper on preliminary examination.

¹⁵ Paragraph 21 of the policy paper on preliminary examination.

¹⁶ See generally Articles 15(3), 42(1) and 53 (1) of the Rome Statute.

¹⁷ See Chapter Three of the study

5.4 General principles of prosecutorial discretion during preliminary examinations

Although the theory of neutrality identifies three distinct features, the office of the Prosecutor in the policy paper on preliminary examination has two main sub-divisions. These are the general principles guiding the conduct of preliminary examinations and the statutory factors applied at the preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation based on the information available.¹⁸

It is necessary at this stage to examine the applicability of the principle of neutrality to the exercise of prosecutorial discretion during preliminary examinations at the ICC. The principle against bias, an aspect of neutrality, is implicit in the general principle of non-discrimination recognised by the Rome Statute which provides that the application and interpretation of law must be consistent with internationally recognised human rights. This of course must be without any adverse distinction founded on grounds as gender, age, colour, language, religion, or belief, political opinion, national, ethnic or social origin, wealth, birth or other status.¹⁹ There is a relationship between bias and discrimination. If a decision is based on discrimination, it can be impeached on the basis of bias.

5.4.1 Independence during preliminary examinations

The first principle of the policy paper on preliminary examination is the independence of the office of the Prosecutor.²⁰ According to the policy paper, independence means that 'decisions shall not be influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure co-operation'.²¹

As already discussed in chapter four of this study, the independence of the Prosecutor is crucial to the administration of justice. It is what differentiates the Prosecutor of the ICC from prosecutors at the Nuremberg and Tokyo tribunals.²² The Rome Statute guarantees the independence of the Prosecutor from external influences by forbidding the Prosecutor or any member of his or her staff from seeking or acting on instructions from any external source.

¹⁸ Paragraph 35 of the Policy Paper on Preliminary Examination.

¹⁹ See Article 21(3) of the Rome Statute.

²⁰ Article 42 of the Rome Statute.

²¹ Paragraph 26 of the Policy Paper on Preliminary Examination.

²² Chapter four, paragraph 4.3.

The Policy paper states that during preliminary examinations, the Prosecutor has a duty to investigate all sides involved in a conflict and cannot be limited in a manner contrary to the provisions of the Statute.²³ For example, when the Ugandan government submitted a referral to the Prosecutor in December 2003, it was with respect to the activities of the Lord's Resistance Army (LRA).²⁴ However, the former Prosecutor correctly expanded the referral to include investigations into acts committed by both the LRA and government soldiers in the Northern Uganda conflict.²⁵

The preliminary examination of the Darfur situation offered an opportunity for the Prosecutor to demonstrate independence. He consulted several publicly available materials, although he also requested information from those with expertise on the conflict. Even though a list of potential suspects was handed to the Prosecutor by an International Commission of Inquiry, his decision to proceed with an investigation was based on his independent assessment of the conflict situation.

Independence is the hallmark of the Prosecutor as noted in chapter four. Prosecutorial neutrality, related to non-partisanship, encompasses independence from actors within and outside the office of the prosecutor. These actors would likely influence decisions, compromising objectivity in weighing every piece of evidence before a decision is made. In this instance, the Prosecutor of the ICC would deal with a variety of factors and actors, including the states of those under preliminary investigation, ASP members, and also the UNSC members with controlling influence over the activities of the ICC.

5.4.2 Impartiality during preliminary examinations

Impartiality is one of the core principles governing the work of the Prosecutor during preliminary examinations. It involves a fair-minded and objective treatment of persons and issues, free from any bias or influence.²⁶ The Statute provides that the Prosecutor and the

²³ Paragraph 27 Policy Paper on Preliminary Examinations. See generally Rule 44(2) RPE; Arts 12, 13, 14, 15, 42(1) and 54(1)(a) of the Rome Statute.

²⁴ ICC 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC', ICC-20040129-44, 29 January 2004.

²⁵ ICC 'Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda', ICC-OTP-20040729-65, 29 July 2004.

²⁶ Paragraph 29 of the Code of Conduct for the Office of the Prosecutor.

Deputy Prosecutor shall not participate in any matter in which their impartiality might reasonably be doubted on any ground.²⁷ The Policy Paper states that the Prosecutor is expected to be impartial during preliminary examinations and that ‘impartiality’ requires the application of consistent methods and criteria, irrespective of the States or other parties involved.²⁸ Furthermore, geo-political implications, or geographical balance between situations, are not relevant criteria for determining whether or not to open an investigation into a situation under the Statute.²⁹

5.4.3 Objectivity during preliminary examinations

Objectivity relates to the ability of the Prosecutor to investigate equally both incriminating and exonerating circumstances in order to establish the truth in a situation before the ICC.³⁰ Article 54(1) of the Rome Statute refers to the duties and powers of the prosecution during investigations, but the Prosecutor also maintains ‘objectivity’ as a self-regulating principle during preliminary examination.³¹ However, deciding whether the Prosecutor has been objective or otherwise during preliminary examinations is subject to debate. The principle of objectivity requires the Prosecutor to ensure the reliability of the information received, as well as its source.³²

These three principles of independence, impartiality and objectivity reflect the theory of neutrality adopted in chapter two of the study. In addition, a prosecutor that exhibiting the above traits approximates the three-dimensional neutral prosecutor as presented by Green and Zacharias. It can also be added that a combination of independence, impartiality and objectivity should ordinarily lead to neutrality because these principles are the attributes of a plain reading of the word neutral. However, beyond these principles are the policy objectives of the Prosecutor during preliminary examinations, which are discussed in detail below.

²⁷ Article 42(7) of the Rome Statute; Rule 34(1) RPE.

²⁸ Paragraph 28 Policy Paper on Preliminary Examinations.

²⁹ See Paragraph 29 Policy Paper on Preliminary Examinations.

³⁰ Article 54(1) of the Rome Statute; Regulation 34(1) OTP Regulations.

³¹ Paragraph 30 Policy Paper on Preliminary Examinations.

³² Paragraph 31 Policy Paper on Preliminary Examinations.

5.5 Prosecutorial discretion and policy objectives guiding preliminary examinations

The policy objectives that guide the exercise of prosecutorial discretion are transparency, ending impunity through positive complementarity and the prevention of international crimes.

5.5.1 Transparency during preliminary examinations

One of the themes addressed in the policy paper is transparency during preliminary examinations. Transparency is a process through which the Prosecutor promotes a better understanding of preliminary examinations through regular public engagements. According to the policy paper, transparency involves making public the findings of each preliminary examination to all concerned stakeholders, the provision of reasoned decisions either to proceed or not to proceed with an investigation, and the publication of periodic reports showing how decisions on preliminary examinations are made.³³ The main goal of transparency during preliminary examinations is to ensure predictability in the activities of the Prosecutor without raising undue expectations that an investigation will be opened in every preliminary examination conducted by the Prosecutor.³⁴

These provisions represent a welcome departure from the previous policy of the Prosecutor, especially during the tenure of the former Prosecutor Moreno Ocampo, where preliminary examinations were treated as confidential information with little or no information released to the public during the process.³⁵ The lack of transparency in the early years of the operation of the ICC weakened the possibility of using preliminary investigations to spur national proceedings to deter the commission of international crimes within the jurisdiction of the ICC.³⁶

³³ Paragraph 15 of the Policy Paper on Preliminary Examinations.

³⁴ Paragraph 94 of the Policy Paper on Preliminary Examinations.

³⁵ HRW argues that “[w]hile the OTP initially treated these preliminary examinations as confidential, it now routinely makes public the fact that it has initiated the examination and provides information on the different activities it is undertaking to further its analysis such as meetings with national authorities.” See HRW “Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to —Situations under Analysis”, June 2011, 1, available online at <http://www.hrw.org/news/2011/06/16/icc-course-correction>, accessed 11 January 2016.

³⁶ Ibid at 3.

5.5.2 Ending impunity through positive complementarity during preliminary examinations

Positive complementarity is a key policy objective of the Prosecutor during preliminary examinations. It will be recalled from the previous chapter that complementarity is a key factor in the determination of whether or not to proceed with an investigation during a preliminary examination.³⁷ Under the Rome Statute, the Prosecutor has to ensure that a case is admissible using the legal criteria established in the Rome Statute under article 17. However, during a preliminary examination, the Prosecutor is expected to use the proceedings to spur the national government to investigate and prosecute international crimes within the jurisdiction of the Court that occurred in the State concerned. However, when the State remains inactive, unwilling and unable to carry out investigations and prosecutions, the Prosecutor intervenes to ensure there is no impunity for international crimes at national level.³⁸

Positive complementarity has been defined by the Prosecutor as a pro-active policy of co-operation aimed at promoting national proceedings.³⁹ It is regarded as a managerial concept that governs the relationship between the court and domestic jurisdictions on the basis of three cardinal principles: (a) the idea of a shared burden of responsibility, (b) the management of effective investigations and prosecutions, and (d) the two-pronged nature of the cooperation regime.⁴⁰

³⁷ See chapter four of the study.

³⁸ Paragraph 100 Policy Paper on Preliminary Examinations.

³⁹ ICC ‘Prosecutorial Strategy 2009 - 2012’, 1 February 2010, available online at [http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-](http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf)

[D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf](http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf), accessed 19 September 2016; The ASP report of the Bureau on complementarity refers to positive complementarity as ‘all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis’. See paragraph 16 Report of the Bureau on Stocktaking: Complementarity, available online at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf, accessed 11 January 2016.

⁴⁰ Carsten Stahn ‘Complementarity: A Tale of Two Notions’ (2008) 19 *Criminal Law Forum* 87 at 113.

According to Burke-White, positive complementarity is also defined as a process by which the Prosecutor would actively encourage investigation and prosecution of international crimes within the court's jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity.⁴¹ However, that this policy has not been pursued effectively is evident in the manner the ICC Prosecutors have interpreted and applied the principle.

According to Human Rights Watch, the Prosecutor has not used positive complementarity very effectively and its potentials are yet to be fully explored.⁴² This is because the time that it takes to carry out a preliminary examination provides the ICC Prosecutor with opportunities to catalyze national proceedings. This can be understood as a component of 'positive complementarity', that is, active efforts to see the complementarity principle put into practice through national prosecutions of ICC crimes.

5.5.3 Prevention of international crimes during preliminary examinations

The third and final policy paper on preliminary examinations deals with the prevention of international crimes. According to the Policy Paper, the Prosecutor performs an early warning function through public service announcements regarding crimes that appear to fall within the jurisdiction of the ICC.⁴³ The Prosecutor argues publicising ICC activities will help in breaking the circle of impunity by deterring international criminals.⁴⁴ For example, the Prosecutor has intervened in several situations currently under analysis by releasing reports that condemn crimes committed against civilians and threatening prosecution for alleged perpetrators of these crimes.

In the Central African Republic, the Prosecutor argued that deteriorating security situation ... has contributed to the escalation of unlawful killings, sexual violence, recruitment of child

⁴¹ William Burke-White Implementing a Policy of positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59 - 85.

⁴² HRW Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to Situations under Analysis" June 2011, at 2.

⁴³ Paragraph 104 Policy Paper on Preliminary Examinations.

⁴⁴ Paragraph 106 Policy Paper on Preliminary Examinations.

soldiers and other grave crimes, across the country.⁴⁵ In furtherance of the policy of preventing international crimes, the Prosecutor has issued statements in relation to situations in Georgia,⁴⁶ Kenya,⁴⁷ Guinea,⁴⁸ South Korea,⁴⁹ Nigeria,⁵⁰ Côte d'Ivoire⁵¹ and Mali.⁵² The preventive effects of these statements are, however, subject to debate. This is because the use of international criminal courts to deter future criminals is a highly contested issue.⁵³ There is no general agreement on whether the ICC has had any deterrent or preventive effect on future criminals and their collaborators. Payam Akhavan has argued that the ICC's preventive effect is visible in Northern Uganda where the ICC helped to isolate the LRA thereby ending the conflict.⁵⁴ The assertion is disputable to the extent that the ICC has been accused of derailing the proposed peace deal between the LRA and the government of Uganda. For example, regarding the involvement of the ICC in the Juba peace process, Kamari Clarke argues that the arrest warrants issued against the LRA were responsible for the failure of the Juba peace process.⁵⁵

⁴⁵ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to the escalating violence in the CAR, 9 December 2013.

⁴⁶ Prosecutor's statement on Georgia, 14 August 2008..

⁴⁷ OTP statement in relation to events in Kenya, 5 February 2008..

⁴⁸ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the occasion of the 28 September 2013 elections in Guinea, 27 September, 2013. ICC Prosecutor confirms situation in Guinea under examination, 14 October 2009..

⁴⁹ ICC Prosecutor: Alleged war crimes in the territory of the Republic of Korea under preliminary examination, 6 December 2010.

⁵⁰ ICC _OTP Statement on Electoral Violence in Nigeria' 21 April 2011.

⁵¹ Statement by ICC Prosecutor Luis Moreno-Ocampo on the situation in Côte d'Ivoire, 21 December 2010, ICC-OTP-20101221-PR617; Statement by ICC Prosecutor Luis Moreno-Ocampo on official visit to Côte d'Ivoire, 14 October 2011.

⁵² Statement by ICC Prosecutor concerning Mali, 28 January 2013; Statement from the Office of the Prosecutor of the International Criminal Court, 24 April 2012.

⁵³ Payam Akhavan _Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7- 31.

⁵⁴ Payam Akhavan _The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 *American Journal of International Law* 403- 421.

⁵⁵ The Juba peace process was initiated by the former Vice-President of South Sudan, Riek Machar between the Government of Uganda and the LRA. The deliberations were inconclusive as the leader of the LRA Joseph Kony refused to sign the final peace deal. See Kamari Clarke _Kony 2012, the ICC, and the Problem with the Peace-and-Justice Divide' (2012) 106 *Proceedings of the Annual Meeting of the American Society of International Law* 309 - 313.

From the foregoing discussion, it can be argued that the publication of the policy paper on preliminary examination is a positive development for the office of the Prosecutor as it was a significant shift for the office in the way preliminary examinations were carried out. In addition, the policy paper on preliminary examination recognised the fact that there was need for public scrutiny of the activities of the office leading to greater predictability of its actions. The policy paper also supports the argument for guidelines regulating the conduct of preliminary examinations.

However, as has been noted in this chapter, the publication of the policy paper on preliminary examination has not totally removed the criticisms against the ICC for the conduct of preliminary examinations and what informs the decision to proceed. In addition, some of the reports produced under the policy paper on preliminary examination are yet to define clearly how the Prosecutor evaluates the decision whether to open an investigation or not. Beyond the policy paper discussed above are other documents that regulate the exercise of prosecutorial discretion; they are discussed below and possible linkages are made to the policy paper on preliminary examination.

5.6 Other policy papers regulating the exercise of prosecutorial discretion

As already noted, there are several other policy papers that are relevant to the exercise of discretion beyond the policy paper on preliminary examinations. These are discussed below and their applicability to the issues under discussion are highlighted.

5.6.1 The policy paper on the interests of justice

In September 2007, Moreno Ocampo's administration adopted a policy paper on the meaning and interpretation of the interests of justice in article 53 of the Rome Statute.⁵⁶ According to this policy paper, 'the issue of the interests of justice ... represents one of the most complex aspects of the Treaty. It is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly), but there is no clear guidance on what the content of the idea is.'⁵⁷ During negotiations for the adoption

⁵⁶Policy Paper on the Interests of Justice, September 2007.

⁵⁷ ICC Policy Paper on the Interests of Justice September 2007, 2.

of the Rome Statute, there was no consensus on the meaning of the interests of justice and the term has been subjected to different interpretations.⁵⁸

The policy paper deviated slightly from an earlier position taken by Moreno Ocampo on the meaning and interpretation of article 53 of the Statute. For instance, at the early stages of the investigation of international crimes committed in some situations in Africa, the Prosecutor stated that he had the discretion under article 53 of the Statute to discontinue investigations that were not in the interests of justice. For example, in April 2005, the former Prosecutor announced that he was considering suspending investigations in the Northern Uganda conflict for that reason.⁵⁹

Furthermore, during his speech to the UNSC in December 2005, Moreno Ocampo noted the importance of making an assessment under article 53 of the Rome Statute in the prosecution of international crimes in the Darfur conflict. He rightly stated that article 53(2)(c) gives the Prosecutor the discretion to consider whether a prosecution was in the interests of justice. He further stated that in the consideration of the interests of justice in relation to the Darfur conflict, the Prosecutor would consider the views of witnesses and victims of international crimes and observe various national and international efforts to achieve peace and security.

⁵⁸ For example, Michael Scharf argues that article 53 of the Rome Statute, 'reflect[s] creative ambiguity' which could potentially allow the Prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court.' See Michael Scharf 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 507 - 528; Manhoush Arsanjani 'International Criminal Court and National Amnesty Laws: The Future of the International Criminal Court' (1999) 93 *American Journal of International Law* 65 - 68; HRW 'The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute' 1 – 25, 1 June 2005.

⁵⁹ According to Yves Sorokobi, the then spokesperson of the office of the Prosecutor: 'If it is in the interest of justice to proceed with a peace agreement, the ICC is ready to suspend its investigation. The prosecutor was putting in simple terms what has always been the policy of the ICC. Any decision to suspend the investigation depends on judicial review and must be carried out according to specified guidelines. Article 53 of the Rome Statute ... covers such a situation. The ICC continually assesses the developments on the ground in all its investigations, and if it becomes apparent that continuing the investigation is not in the interests of justice, the necessary action will be taken.' UN Integrated Regional Information Networks 'Uganda: ICC could Suspend Northern Investigations – Spokesman', 18 April 2005; Louise Parrott 'The Role of the International Criminal Court in Uganda: Ensuring that the Pursuit of Justice does not come at the Price of Peace' (2006) 1 *Australian Journal of Peace Studies* 1 - 29; Katherine Southwick 'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court (2005) 1 *Yale Journal of International Affairs* 105 - 119.

Ocampo also noted that his office had contacted several organisations as a prelude to making an ‘interests of justice’ assessment.⁶⁰

However, Moreno Ocampo’s later approach to the interests of justice changed from earlier propositions. This is because the former Prosecutor differentiated between the interests of peace and interests of justice.⁶¹ In the policy paper on the interests of justice published in 2007 earlier referred to, Moreno Ocampo acknowledges the complementary role of national judicial systems through domestic prosecutions and alternative justice mechanisms in the pursuit of a broader justice.⁶² However, in relation to the discretion given to the prosecutor under article 53 of the Rome Statute, the policy paper argues that there is a difference between the interests of justice and interests of peace.⁶³

In making this statement, the policy paper differentiates between the interests of justice and interests of peace by placing peace and justice in different compartments. The statement further alludes to article 16 of the Rome Statute which provides that the UNSC may invoke its powers under Chapter VII of the UN Charter to defer investigations by the ICC.⁶⁴ The former Prosecutor also argued that the interests of justice should not be used as a conflict management tool as this move would be contrary to the role of the Prosecutor in the Statute.⁶⁵ The former Prosecutor further stated that the feasibility of conducting effective investigation

⁶⁰ ICC ‘Address by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, to the United Nations Security Council’ 13 December 2005, 1- 7.

⁶¹ UN News Centre ‘International Criminal Court already Changing Behaviour, says Prosecutor’ where the former Prosecutor, Luis Moreno Ocampo, argued that ‘[p]eace negotiations can be long and complicated. But I can’t be involved in their aspects ... The Security Council has noted that lasting peace requires justice and it’s my role to help in that. My duty is to end impunity and to contribute to the prevention of future crimes.’ 2 July 2007.

⁶² ICC ‘Policy Paper on the Interests of Justice’, September 2007.

⁶³ Ibid.

⁶⁴ Article 16 provides that ‘no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.’ See Ademola Abass ‘The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court’ (2005) 40 *Texas International Law Journal*, 264 - 297.

⁶⁵ Paragraph 69 of the Policy Paper on Preliminary Examinations provides that ‘the concept of the interests of justice should not be perceived to embrace all issues related to peace and security. In particular, the interests of justice provision should not be considered a conflict management tool requiring the Prosecutor to assume the role of a mediator in political negotiations: such an outcome would run contrary to the explicit judicial functions of the Office and the Court as a whole.’ See Policy Paper on Preliminary Examinations, November 2013.

is not a relevant factor to be considered during preliminary examinations. This means that weighing feasibility as a separate self-standing factor, moreover, could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC intervention.⁶⁶

The former Prosecutor also stated that there is a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional.⁶⁷ The arguments by Moreno Ocampo that the use of interests of justice to defer the investigation and prosecution of international crimes should be an exceptional option are very persuasive.⁶⁸ However, it should be noted that the Statute does not differentiate between the pursuit of justice and peace. The preamble of the Rome Statute recogni[ses] that ... grave crimes threaten the peace, security and well-being of the world.⁶⁹ Justice and peace are inter-related and the two concepts cannot be pursued in isolation.⁷⁰

⁶⁶ Ibid at 70.

⁶⁷ Paragraph 71 Policy Paper on Preliminary Examinations.

⁶⁸ There is a difference between the interests of justice during preliminary examinations and during investigations. The Statute gives the Prosecutor a freer hand during investigations to consider the interests of justice before commencing prosecution of international crimes. See Art 53(1)(c) and 2(c) of the Rome Statute.

⁶⁹ Paragraph 3 of the Preamble to the Rome Statute.

⁷⁰ For example, the former UN Secretary General, Kofi Annan stated that justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Report of the Secretary General to the UNSC The Rule of Law and Transitional Justice in Conflict and Post – Conflict Societies S/2004/616, 23 August 2004; Kai Ambos The Legal Framework of Transitional Justice Study Prepared for the International Conference Building a Future on Peace and Justice, Nuremberg, 25 – 27 June 2007. Furthermore, the current UN Secretary-General, Mr Ban Ki-moon, has also argued that fighting impunity and pursuing peace are not incompatible objectives – they can work in tandem, even in an on-going conflict situation. This requires us to address very real dilemmas, and the international community must seize every opportunity to do so. See the Message from Mr Ban Ki-moon, Secretary-General of the United Nations, for the Meeting on Building a Future on Peace and Justice in Kai Ambos, Judith Large and Marieke Wierda (eds) *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (2009) (emphasis in the original). The former Prosecutor of the ICC acknowledges the interaction between peace and justice by stating that peace and justice are integrated; but they do not necessarily follow a linear peace-then-justice trajectory. Luis Moreno Ocampo Integrating the Work of the ICC into Local Justice Initiatives (2006) 21 *American University International Law Review* 497 - 503.

Some Non-Governmental Organisations (NGOs) support Moreno Ocampo's view that the interests of justice in article 53 of the Statute should be given a restrictive interpretation.⁷¹ For example, HRW argues that the '[Prosecutor] should adopt a strict construction of the term 'interests of justice' in order to adhere to the context of the Statute, its object and purpose, and to the requirements of international law.'⁷² A failure to prosecute would be contrary to the object and purposes of the Statute.⁷³

HRW argues that it is the UNSC and not the Prosecutor that is empowered to act when an investigation or prosecution of international crimes is a threat to peace and security.⁷⁴ HRW also argues that giving the Prosecutor the power to make decisions based on political developments undermines the independence and integrity of the ICC.⁷⁵ In addition, HRW questions the interpretations of participants at the Rome conference who argue that the interests of justice in article 53 of the Statute give the prosecutor an opportunity to recognise alternative justice mechanisms in the prosecution of international crimes.⁷⁶

In an open letter to the Prosecutor of the ICC, AI argues that article 53 of the Rome Statute does not give the Prosecutor the power to suspend investigations and that only the UNSC acting under article 16 of the Rome Statute has such powers.⁷⁷ AI is also of the view that the

⁷¹ These NGOs include HRW, Amnesty International (AI) and International Federation for Human Rights (FIDH), Steering Committee members of the Coalition for the International Criminal Court (CICC). According to the CICC '[t]he Coalition's Steering Committee is comprised of a core group of member organisations which provide policy and program coherence for the Coalition's efforts and activities.' The Steering Committee members are: Adaleh Center for Human Rights Studies; AI; Andean Commission of Jurists; Asian Forum for Human Rights and Development (FORUM-ASIA); Asociación Pro Derechos Humanos (APRODEH-Perú); Civil Resource Development and Documentation Centre (CIRDDOC); FIDH; Georgian Young Lawyers Association (GYLA); Human Rights Network-Uganda (HURINET-Uganda); HRW; Justice Without Frontiers (JWF); No Peace Without Justice; Parliamentarians for Global Action; The Redress Trust; Women's Initiatives for Gender Justice; World Federalist Movement-Institute for Global Policy (WFM-IGP).

⁷² HRW 'Policy Paper: The Meaning of "Interests of Justice" in article 53 of the Rome Statute' June 2005, 2.

⁷³ Ibid at 5. HRW argues that 'the prosecutor may not fail to initiate an investigation or decide not to proceed with the investigation because of national efforts, such as truth commissions, national amnesties, or traditional reconciliation methods, or because of concerns regarding an on-going peace process, since that would be contrary to the object and purpose of the Rome Statute.'

⁷⁴ Ibid. Paragraph 69 Policy Paper on Preliminary Examinations.

⁷⁵ HRW Policy Paper *op cit* at 8.

⁷⁶ Ibid at 4.

⁷⁷ See AI 'Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the Concept of the Interests of Justice', AI Index: IOR 40/023/2005, 17 June 2005.

suspension of investigations by the Prosecutor under article 53 of the Rome Statute would be prejudicial to the right of victims.⁷⁸ Furthermore, AI argues that the suspension of investigations would affect the perception of the general public in relation to the independence of the Prosecutor from external diplomatic or political pressure.⁷⁹ Another NGO, FIDH argues that in any decision not to prosecute, the prosecutor will have to account for the inevitably negative impact that a potential decision not to investigate or not to prosecute could have for the end of impunity, the prevention of the most serious crimes of international concern, and the lasting respect for and enforcement of international justice.⁸⁰

The views espoused by these NGOs have been endorsed by Errol Mendes.⁸¹ Mendes further argues that the UNSC is better equipped to deal with the issue of justice and security as provided under the Rome Statute in order to avoid the ICC becoming enmeshed in politically charged situations.⁸² On the other hand, Pavel Cabal argues that entrust[ing] interests of peace” into the hands of the ICC might be even politically problematic.⁸³ He further argues that these political issues concerning the interests of peace” should be dealt with by the competent political organs (above all the UNSC) which should not try to make their life easier” by relying on the actions of the Prosecutor – who should insist on his non-political, judicial role.⁸⁴

Article 16 of the Rome Statute empowers the UNSC to defer investigations and prosecutions of the ICC in the interest of international peace and security.⁸⁵ However, it is suggested that the deferral of cases should not be exercised only by the UNSC under article 16 of the Rome Statute but should be expanded to accommodate the role of the Prosecutor in article 53 in a shared division of labour between the prosecutor and the UNSC. In addition, there is the

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ See FIDH Comments on the Office of the Prosecutor's Draft Policy paper on the Interest of Justice”, 14 September 2006.

⁸¹ Errol argues that in determining whether to begin an investigation or prosecution...there is the strongest of presumptions in favour of seeking accountability for the most serious of crimes.’ See Errol Mendes *Peace and Justice at the International Criminal Court: A Court of Last Resort* (2010) 33.

⁸² Ibid at 34.

⁸³ Pavel Caban Preliminary Examinations by the Office of the Prosecutor of the International Criminal Court’ (2011) *Czech Yearbook of Public & Private International Law* 199 - 216.

⁸⁴ Ibid.

⁸⁵ Henry Lovat Delineating the Interests of Justice’ (2006) 35 *Denver Journal of International Law and Policy* 275 - 286.

political difficulty of obtaining a UNSC resolution. The conflict in Syria is a case in point where members of the UNSC have failed to agree on a resolution to refer the situation in Syria to the ICC due to the veto powers exercised by Russia and China.⁸⁶

5.6.2 The regulations of the office of the prosecutor

The regulations of the office of the Prosecutor is another document that regulates the exercise of prosecutorial discretion during preliminary examinations and was alluded to in the policy paper discussed earlier in the chapter. The regulations entered into force on 23 April 2009.⁸⁷ These regulations have been adopted pursuant to provisions of the Statute and RPE.⁸⁸ The regulations provide that in all operational activities of the office of the Prosecutor, whether at headquarters and in the field, the Prosecutor shall ensure that its members maintain their full independence and do not seek or act on instructions from any external source.⁸⁹

The regulation also provides that the Prosecutor shall make public its Prosecutorial Strategy and shall contribute to the Court's strategic plan.⁹⁰ In addition, the Prosecutor is expected to publicise policy papers that reflect the key principles and criteria of the prosecutorial strategy.⁹¹ The regulations also provide that the office of the Prosecutor shall disseminate information of its activities to, and respond to enquiries from, States, international organisations, victims, non-governmental organisations and the general public, with a particular focus on the communities affected by the work of the office, as appropriate in co-ordination with the registry.

In addition, this document requires the office of the Prosecutor to sometimes ensure compliance with its statutory obligations and the decisions of the Chambers regarding

⁸⁶ HRW 'UN Security Council: Vetoes Betray Syrian Victims' In Face of Mounting Pressure, Russia, China Block ICC Referral' 22 May 2014, available online at <http://www.hrw.org/news/2014/05/22/un-security-council-vetoes-betray-syrian-victims>, accessed 17 September 2016.

⁸⁷ Regulations of the Office of the Prosecutor entered into force on 23 April 2009. ICC-BD/05-01-09.

⁸⁸ Article 42 (2) of the Rome Statute and Rule 9 RPE.

⁸⁹ Regulation 13 of the Regulations of office of the Prosecutor.

⁹⁰ Regulation 14 (1) of the Regulations of office of the Prosecutor.

⁹¹ See Regulation 14(2) of the Regulations of the office of the Prosecutor. These are Policy Paper on Sexual and Gender-Based Crimes (2014); Policy Paper on Preliminary Examinations (2013); Policy Paper on Victims' Participation (2010); Policy Paper on the Interests of Justice (2003); Policy Paper on the Office of the Prosecutor and Annex to the Policy Paper: Referrals and Communications (2003).

confidentiality, and the safety and well-being of victims, witnesses, Office staff and other persons at risk on account of their interaction with the Court.⁹² Furthermore, the regulations instruct the office of the Prosecutor to contribute to the outreach strategies and activities of the ICC in general.⁹³ Regarding the rights of victims within the jurisdiction of the ICC, the regulations provide that the office of the Prosecutor shall coordinate with the Victims Participation and Reparations Section of the Registry in seeking and receiving the views of the victims at all stages of work in order to be mindful of and to take into account their interests.⁹⁴

The regulations provide that preliminary examination and evaluation of a situation by the Prosecutor may be initiated on the basis of: (a) any information on crimes, including information sent by individuals or groups, States, intergovernmental or non- governmental organisations; (b) a referral from a State Party or the Security Council; or (c) a declaration pursuant to article 12, paragraph 3 by a State which is not a Party to the Statute.⁹⁵ However, when a situation has been referred to the Prosecutor, he or she shall provide notice and other information to the Presidency in accordance with regulation 45 of the Regulations of the Court.⁹⁶

During the examination of information on crimes pursuant to the *proprio motu* powers, the Prosecutor shall make a preliminary distinction between: (a) information relating to matters which manifestly fall outside the jurisdiction of the Court; (b) information which appears to relate to a situation already under examination or investigation or forming the basis of a prosecution, which shall be considered in the context of the ongoing activity; and (c) information relating to matters which do not manifestly fall outside the jurisdiction of the Court and are not related to situations already under analysis or investigation or forming the basis of a prosecution, and which therefore warrant further examination in accordance with Rule 48 RPE.⁹⁷

⁹² Regulation 15 (1) of the Regulations of the office of the Prosecutor.

⁹³ Regulation 15 (2) of the Regulations of the office of the Prosecutor.

⁹⁴ Regulation 16 of the Regulations of the office of the Prosecutor.

⁹⁵ Regulation 25 (1) of the Regulations of the office of the Prosecutor.

⁹⁶ Regulation 25 (2) of the Regulations of the office of the Prosecutor.

⁹⁷ Regulation 27 of the Regulations of the office of the Prosecutor.

The regulations provide that the Prosecutor shall send an acknowledgement in respect of all information received on crimes to those who provided the information. In addition, the Prosecutor may decide to make public such acknowledgement, subject to the Prosecutor's duty to protect the confidentiality of such information pursuant to Rule 46 RPE and regulation 21 of the ICC.⁹⁸ In addition, the Prosecutor may decide to make public the Office's activities in relation to the preliminary examination of information on crimes under article 15, paragraph 1 and 2, or a decision under Article 15(6) that there is no reasonable basis to proceed with an investigation. In doing so, the office shall be guided *inter alia* by considerations for the safety, well-being, and privacy of those who provided the information or others who are at risk on account of such information in accordance with Rule 49 (1) RPE.⁹⁹ In addition, whenever the Prosecutor intends to submit a request under Article 15(3) to the Pre-Trial Chamber, he or she shall provide notice and other information to the Presidency in accordance with regulation 45 of the regulations of the Court.¹⁰⁰

Before the Prosecutor can initiate an investigation or prosecution, the office shall produce an internal report analysing the seriousness of the information and considering the factors set out in article 53(1)(a)-(c), namely issues of jurisdiction, admissibility (including gravity), as well as the interests of justice, pursuant to Rules 48 and 104 RPE. The report shall be accompanied by a recommendation on whether there is a reasonable basis to initiate an investigation.¹⁰¹

In order to assess the gravity of the crimes allegedly committed in the situation, the Office shall consider various factors including their scale, nature, manner of commission, and impact.¹⁰² Based on the report, the Prosecutor shall determine whether there is a reasonable basis to proceed with an investigation.¹⁰³ The evaluation of the report shall continue for as long as the situation remains under investigation. In addition, when a preliminary examination is conducted in accordance with Article 53 (2), the provisions of the regulation are also applicable.¹⁰⁴ When a situation has been referred to the Prosecutor pursuant to Article 13(b) and the Prosecutor has determined that there would be a reasonable basis to

⁹⁸ Regulation 28(1) of the Regulations of the office of the Prosecutor.

⁹⁹ Regulation 28(2) of the Regulations of the office of the Prosecutor.

¹⁰⁰ Regulation 28(3) of the Regulations of the office of the Prosecutor.

¹⁰¹ Regulation 29 (1) of the Regulations of the office of the Prosecutor.

¹⁰² Regulation 29 (2) of the Regulations of the office of the Prosecutor.

¹⁰³ Regulation 29 (3) of the Regulations of the office of the Prosecutor.

¹⁰⁴ Regulation 29 (4) of the Regulations of the office of the Prosecutor.

initiate an investigation, the Prosecutor shall notify the UNSC through the Secretary-General of the United Nations.¹⁰⁵

In acting pursuant to Article 53 (1)(c) and 2(c), the Prosecutor shall base his or her decision on an internal report on the interests of justice submitted to Executive Committee of the office of the Prosecutor for consideration and approval. If the decision not to proceed is based solely on Article 53(1)(c) or 2(c), the Prosecutor shall promptly inform the Pre-Trial Chamber in accordance with Rule 105 (4 – 5) and 106.¹⁰⁶

Several points can be made from the discussions above on the regulations of the office of the Prosecutor of the ICC. The regulations form part of the tools used by Prosecutor during the process of deciding whether there are reasonable basis to open an investigation. Therefore, it is an important policy paper in the case studies discussed subsequently. The regulations insist on the independence of the Prosecutor and other officers of the office which is also a principle adopted for the three-dimensional neutral prosecutor in the theoretical framework used in this study. The regulation differentiates alternative ways through which preliminary examinations can be activated. The legal framework guiding the regulations is rooted in the provisions of the Rome Statute and RPE. Finally and as already noted, it is part of the core policy papers for the exercise of discretion during preliminary examination, used before the official adoption of the policy paper on preliminary examinations in 2013.

Although the regulations of the office of the Prosecutor can be seen as a policy of the office, it is part of the journal of the ICC and therefore the Prosecutor is under obligation to make its provisions public since it is a legal text of the ICC. A distinction needs to be made regarding the policies and strategies of the office of the Prosecutor and the official journal of the ICC.¹⁰⁷

¹⁰⁵ Regulation 30 of the Regulations of the office of the Prosecutor.

¹⁰⁶ Regulation 31 of the Regulations of the office of the Prosecutor.

¹⁰⁷ The official journal of the ICC was created pursuant to regulation 7 of the Regulations of the Court and contains the following texts and amendments there to: (a)The Rome Statute; (b)The Rules of Procedure and Evidence; (c)The Elements of Crimes; (d) The Regulations of the Court; (e)The Regulations of the Office of the Prosecutor; (f)The Regulations of the Registry; (g)The Code of Professional Conduct for counsel; (h)The Code of Judicial Ethics; (i)Staff rules of the International Criminal Court;(j) The Staff Regulations; (k)The Financial Regulations and Rules; (l)The Agreement on the Privileges and Immunities of the International Criminal Court; (m)Agreement between the International Criminal Court and the United Nations; (n)The Headquarters

The regulation of the office of the Prosecutor provides that the ICC Prosecutor shall develop and apply a consistent and objective method for the evaluation of sources, information and evidence.¹⁰⁸ In addition, the Prosecutor has to take into account the credibility and reliability of the sources, information and evidence, and shall examine information and evidence from multiple sources as a means of bias control. In addition to several other provisions, the regulations of the office of the Prosecutor make provision for the exercise of discretion during preliminary examinations and evaluation of information.

5.6.3 The code of conduct for the office of the Prosecutor

The code of conduct for the office of the Prosecutor is another policy paper used during preliminary examinations. It was adopted in September 2013 under the leadership of Fatou Bensouda. Its main objective is to put into operation the mandate and responsibilities of the office of the Prosecutor.¹⁰⁹ Despite the importance of a code of conduct for the office of the Prosecutor, the former Prosecutor, Moreno Ocampo was very reluctant to adopt one, fueling the suspicion that there was lack of clarity and predictability in the activities of the office of the Prosecutor.¹¹⁰

In accordance with Article 42 of the Statute, the office of the Prosecutor acts independently as a separate organ of the Court in the execution of its mandate. Members of the office of the Prosecutor shall exercise their functions free of any external influences, inducements, pressures, threats or interference, direct or indirect.¹¹¹ In addition, impartiality is one of the core principles governing the work of the Office. Impartial conduct encompasses the fair-minded and objective treatment of persons and issues, free from any bias or influence.¹¹² Members of the office of the Prosecutor are expected not to participate in any matter in which their impartiality might reasonably be doubted on any ground, and shall request to be excused from any matter as soon as grounds for disqualification arise.¹¹³

Agreement with the Host State; (o)Any other material as decided by the Presidency in consultation with the Prosecutor and/or the Registrar.

¹⁰⁸ Regulation 24 of the Office of the Prosecutor, IC-BD/05-01-09, entered into force 23rd April 2009.

¹⁰⁹ ICC _Code of Conduct for the Office of the Prosecutor_ 5 September 2013.

¹¹⁰ Milan Markovic _The ICC Prosecutor's Missing Code of Conduct_ (2011) 47 *Texas International Law Journal* 201 – 236.

¹¹¹ Section 21 of the Code of Conduct for the Office of the Prosecutor.

¹¹² Section 29 of the Code of Conduct for the Office of the Prosecutor.

¹¹³ Section 31 of the Code of Conduct for the Office of the Prosecutor.

The code of conduct is an important policy document of the office of the Prosecutor. It clearly adopts some of the principles in the theory of neutrality already discussed in chapter two. These include independence, impartiality, objectivity, non-bias, non-partisanship etc. Thus, a Prosecutor that adheres to the provisions of the code of conduct will probably conform to the model of the three-dimensional neutral prosecutor.

5.6.4 The prosecutor's strategic plan

The Prosecutor's Strategic plan published in October 2013 is the current policy of the Prosecutor dealing with strategies and policies of the Prosecutor and was developed under the leadership of Fatou Bensouda, who is the current Prosecutor of the ICC. It reviews previous prosecutorial strategies and adopts new ones to meet the changing and challenging environment in which the Prosecutor operates. These strategic plans and policies are relevant sources when interpreting the obligations on the Prosecutor under the Rome Statute. In addition, these documents benefitted from public consultations which enhanced their quality, outputs and acceptability.¹¹⁴ It is easily noticeable in the strategic plan that there is a renewed interest in improving the conduct of preliminary examinations, necessitating the review of previous prosecutorial policies.

The change in strategy led to the adoption of six strategic goals reflecting the importance of preliminary examinations in the activities of the ICC.¹¹⁵ The plan to conduct impartial, independent, high-quality, efficient and secure preliminary examinations, investigations and prosecutions' presupposes that the criminal justice process of the Prosecutor commences with

¹¹⁴ The ICC organises a yearly ICC-NGO dialogue where issues relating to the administration of justice are discussed. In addition, during the yearly Assembly of States Parties of the ICC, officials of the ICC including the Prosecutor, are invited to discuss ongoing preliminary examinations, investigations and general activities of the Court.

¹¹⁵ The current strategic goals of the Prosecutor are to: (1) Conduct impartial, independent, high-quality, efficient and secure preliminary examinations, investigations and prosecutions; (2) Further improve the quality and efficiency of the preliminary examinations, the investigations and the prosecutions. (3) Enhance the integration of a gender perspective in all areas of [our] work and continue to pay particular attention to sexual and gender based crimes and crimes against children. (4) Enhance complementarity and co-operation by strengthening the Rome System in support of the ICC and of national efforts in situations under preliminary examination or investigation. (5) Maintain a professional office with specific attention to gender and nationality balance, staff quality and motivation, and performance management and measurement. (6) Ensure good governance, accountability and transparency. See ICC 'Strategic plan June 2012-2015' 11 October 2013, 1 – 43.

preliminary examinations.¹¹⁶ This is the connection the previous Prosecutor of the ICC failed to make.

However, the adoption of a strategy is very different from its implementation. The development is an acknowledgement that the success of the activities of the Prosecutor will not entirely depend on the number of investigations and prosecutions conducted but the ability to conduct preliminary examinations. In fact, the former Prosecutor, Moreno Ocampo had argued that the success of the ICC should not be measured by the number of cases that get to the Court but by the ability of the ICC to spur domestic judicial institutions into action.¹¹⁷

5.8 Conclusion

This chapter has analysed the policy paper on preliminary examination and other critical policy documents adopted by the office of the Prosecutor. The policy paper on preliminary examination is derived from provisions of the Rome Statute and RPE and other policies like the policy paper on the interests of justice, regulations of the office of the Prosecutor and code of conduct for staff of the office of the Prosecutor.

The policy paper on preliminary examination articulates the understanding of the ICC Prosecutor on the meaning and application of the interests of justice and clearly deviates from an earlier understanding and interpretation given by the former Prosecutor. As noted, this interpretation tries to differentiate between the interests of justice and peace but fails to show how this differentiation applies in practice, as it ignores already developed linkages between the pursuit of peace and interests of justice.

The Regulation of the office of the Prosecutor provides for the independence of staff of the office of the Prosecutor by insisting that staff of the office of the Prosecutor should not seek or act on instructions from an external source. In addition, the regulations provide that the Prosecutor should make the prosecutorial strategy of the office public and also contribute to

¹¹⁶ Ibid.

¹¹⁷ Paragraph 10 of the Report on Prosecutorial Strategy 2006; ICC ‘Election of the Prosecutor, Statement by Mr. Moreno Ocampo’, ICC-OTP-20030502-10, 22 April 2003; Carsten Stahn ‘The Future of International Criminal Justice’, The Hague Justice Portal 2009, 1-11.

the overall strategy of the ICC. The regulations also provide information on how preliminary examinations should be carried out.

The code of conduct of the office of the Prosecutor provides for the conduct of the staff of the Prosecutor. The code amongst other things provides for the independence and impartiality of the office of the Prosecutor. In addition, staff members are expected not to engage in any conduct or participate in any matter in which their impartiality might be in question. The current strategic plan adopted by the office of the Prosecutor plans to improve the conduct of preliminary examinations which will necessitate a review of previous prosecutorial policies adopted by the office.

The chapter also noted that the policy paper delineates the principles and policy objectives which govern the exercise of discretion. The principles are (a) independence, (b) impartiality and (c) objectivity, while the policy objectives are: (a) transparency, (b) ending impunity through positive complementarity, and (c) preventing international crimes during preliminary examinations.

From the foregoing, it is clear that the publication of the policy paper on preliminary examination by the Prosecutor, Fatou Bensouda, is an improvement in the activities of the former Prosecutor, Moreno Ocampo, as the factors and policy objectives that guide the discretion exercised during preliminary examination are now made public. However, there are still difficulties as the communication of the office of the Prosecutor in relation to these policies and how they galvanise national consciousness in the investigation and prosecution of international crimes is not yet clearly stated. In addition, the approach of the Prosecutor does not clearly prioritise positive complementarity, which is a major principle behind the setting-up of the ICC. The concluding chapter of this study offers recommendations on how these weaknesses can be remedied.

A principle of the theory of neutrality is that the prosecutor should engage in non-partisan decision making which can be attributed to the general principles of independence and objectivity in the policy paper on prosecutorial discretion. According to the policy paper on preliminary examinations, independence means that _decisions shall not be influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure co-operation.¹¹⁸

¹¹⁸ Paragraph 26 of the Policy Paper on Preliminary Examination.

The independence of the activities of the Prosecutor is crucial in the administration of justice.¹¹⁹ It is what differentiates the Prosecutor of the ICC from prosecutors at the Nuremberg and Tokyo tribunals. The Rome Statute guarantees the independence of the Prosecutor from external influences. It also forbids the Prosecutor or any member of his or her staff from seeking or acting on instructions from any external source.¹²⁰

During preliminary examinations, the Prosecutor must investigate all sides involved in a conflict and cannot be limited in a manner contrary to the provisions of the Statute.¹²¹ For example, when the Ugandan government submitted a referral to the Prosecutor in December 2003, it was with respect to the activities of the Lord's Resistance Army (LRA).¹²² However, the former Prosecutor subsequently expanded the referral to include investigations into acts committed by the LRA and government soldiers in the northern Uganda conflict.¹²³

Independence of the Prosecutor also means that decisions shall not be influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure cooperation.¹²⁴ The preliminary examination of the Darfur situation offered an opportunity for the Prosecutor to demonstrate independence. He consulted several publicly available materials, although he also requested for information from those with expertise on the conflict. Even though a list of potential indictees was handed to the Prosecutor by an International Commission of Inquiry, his decision to proceed with an investigation was based on his independent assessment of the conflict situation.

Another principle of neutrality argues that prosecutors should base their decisions and activities on readily identifiable and consistently applied criteria.¹²⁵ It is argued that the adoption of policy papers by the office of the Prosecutor of the ICC tries to achieve this aim.

¹¹⁹ Paragraph 21 of the Code of Conduct of the Office of the Prosecutor.

¹²⁰ Article 42 of the Rome Statute.

¹²¹ Paragraph 27 Policy Paper on Preliminary Examinations. See generally Rule 44(2) RPE; Article's 12, 13, 14, 15, 42(1) and 54(1)(a) of the Rome Statute.

¹²² ICC 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC', ICC-20040129-44, 29 January 2004.

¹²³ ICC 'Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda', ICC-OTP-20040729-65, 29 July 2004.

¹²⁴ Paragraph 26 Policy Paper on Preliminary Examinations.

¹²⁵ Ibid.

However, the question is whether there is a legal obligation for prosecutors to apply consistent and readily identifiable criteria in the exercise of discretion.

While it is desirable for the ICC Prosecutor to be consistent in using identifiable criteria, the discretion on what modalities to adopt is still within the powers of the Prosecutor. In addition, although some countries have made public the criteria for the exercise of discretion in their jurisdiction, that decision whether to do so is within the powers of the prosecutor unless there is a law or constitutional provision that mandates the prosecutor to make the criteria for the exercise of prosecutorial discretion public. Even when these documents are made public, they only serve a limited purpose and cannot guarantee rights to potential litigants.

In this instance, the adoption of the policy paper on preliminary examination achieves the purpose of making public the procedure of exercising prosecutorial discretion during preliminary examinations. However, it should be noted that the Rome Statute does not place an obligation on the Prosecutor to make public the criteria under which decisions are made during preliminary examinations. The criticisms and the sensitive nature of the office of the Prosecutor has made this development inevitable.

There is a clear convergence between the policy papers discussed here and the theory of neutrality adopted as the framework for this study. Although there are variations in the ways these principles and policies are used, these are to a large extent minimal. As already noted in chapter two, another issue that may be problematic is the fact that the arguments presented by Green and Zacharias were modeled on the American legal system. This is because, issues of death sentence and plea bargain which features prominently in the United States Criminal Justice system is not applicable to the ICC. This challenge is also minimal as the study has argued that the ICC is an amalgam of different legal systems as discussed in Chapter three. Therefore, the use of a theory advanced for a domestic legal system for an international justice institution is not problematic, as long as the parameters of comparison are clearly defined.

It will be recalled that the aim of this study is to explore the extent and scope of prosecutorial discretion during preliminary examination and a key question to be answered is how the ICC Prosecutor has understood and applied this key discretion.¹²⁶ In order to answer this question systematically, the theory of neutrality was adopted which argues that a three-dimensional

¹²⁶ Chapter one, paragraph 1.3

neutral prosecutor should be non-biased, non-partisan and principled.¹²⁷ In addition, the prosecutor is expected to be independent, objective and non-political.¹²⁸

The policy paper adopted by the ICC Prosecutor discussed extensively in this chapter argues that the Prosecutor should be independent, impartial and objective. In addition, the Prosecutor should be transparent, end impunity using positive complementarity, and prevent the commission of crimes during preliminary examination. The question arises as to whether there a common denominator between the two propositions. This study argues that there are several of them.

A three-dimensional neutral prosecutor as proposed by Green and Zacharias cannot be unbiased, non-partisan and principled without being independent, objective and impartial, as stated in the policy paper on preliminary examinations. In addition, the ICC Prosecutor cannot be transparent, end impunity through positive complementarity and prevent international crimes during preliminary examinations without been independent, objective and non-political, as extensively discussed by Green and Zacharias.

It is submitted that the policies and principles used in the theory of prosecutorial neutrality and policy paper on preliminary examination are used interchangeably. They are connected and aim at the highest ethics of prosecutorial discretion and therefore can be used to evaluate the activities of the Prosecutor of the ICC in the case studies discussed in subsequent chapters of this thesis.

Despite the adoption of the policies and principles described above, it does not seem as if things have changed much. Preliminary examination is still being conducted in a mechanical manner that makes both the public and even the office of the Prosecutor lose the significance of the opportunity. Preliminary examinations should be used to show the importance of the ICC and its deterrent effect. They should also be used to galvanise support for national prosecution of crimes under the principle of positive complementarity.¹²⁹

¹²⁷ Chapter two, paragraph 2.3.1

¹²⁸ Ibid.

¹²⁹ See Claire Grandison ‘Maximizing the Impact of ICC Preliminary Examinations’ (2012) 19 *Human Rights Brief* 49, available online at <http://hrbrief.org/2012/02/maximizing-the-impact-of-icc-preliminary-examinations/>, accessed 11 January 2016.

It is this 'greater impact outside the court room' that the ICC Prosecutor should aim at achieving in the exercise of discretion during preliminary examinations. The present conduct of these examination does not have that result, as several opportunities are lost due to the inability of the Prosecutor to articulate a coherent policy and implement it with a practical and understandable decision-making process.

The next chapter introduces the first case studies, which are those of Uganda and the Central African Republic. The preliminary examinations were initiated through self-referrals by the governments of Uganda and the Central African Republic.

Chapter Six

Self-Referrals and the Exercise of Prosecutorial Discretion during Preliminary Examinations in Uganda and Central African Republic

6.0 Introduction

This chapter is about the first case study, focussing on the preliminary examinations conducted in Uganda and the Central African Republic (CAR). As was pointed out in the introduction, the two case studies were chosen because they are self-referrals, meaning that the situations were brought to the attention of the Prosecutor of the ICC by the governments concerned.¹ It should be noted that by March 2016, seven preliminary examinations had been commenced through self-referrals. These include preliminary examinations on the Central African Republic I and II, the Comoros,² the Democratic Republic of the Congo, Mali, South Korea and Uganda.³ Four of these resulted in a decision to proceed with an investigation; those in respect of the Comoros and South Korea did not proceed to the investigation stage.⁴

Uganda and the CAR provide a good template to carry out comparative analysis of the activities of the ICC Prosecutor in the two countries. The two situations were referred to the ICC by the states concerned. This means that the Uganda and CAR activated the jurisdiction of the Court. In addition, the preliminary examination in the two countries gives an opportunity to evaluate the similarities and differences in approach between the former and current ICC Prosecutors. Focusing on these two cases also allows for discussions on the preliminary examinations carried out on situations that were referred by the UNSC or

¹ see Chapter one, paragraph 1.6.

² The self-referral by Comoros refers partly to the conflict between Israel and Palestine and relates specifically to the incidents that took place aboard a vessel registered in Comoros. Article 12 (3) of the Rome Statute provides that the Court may exercise jurisdiction in the State on whose territory the conduct in question occurred, or if the crime was committed on board a vessel or aircraft, in the State of registration of that vessel or aircraft.

³ See Annexure I of the study for details of all preliminary examinations conducted from 2002 to 2015. See also ICC 'Preliminary Examinations' available online at https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx, accessed 6 February 2016.

⁴ Ibid

initiated by the Prosecutor using *proprio motu* powers. These case studies are discussed further in subsequent chapters of the study.

The two previous chapters of the study looked at the legal and theoretical basis of prosecutorial discretion. In addition, the chapters inquired whether the Rome Statute provide sufficient guidance on the exercise of prosecutorial discretion. The objective of this chapter and subsequent ones in the study is to investigate how the Prosecutor has exercised discretion in practice. The critical questions examined are how has the Prosecutor understood and applied prosecutorial discretion during preliminary examinations, and whether the Prosecutor's understanding and practice during preliminary examinations is legally defensible? The key contribution of this chapter is to evaluate the consistency of the ICC Prosecutor in the application of the Rome Statute and the policies adopted in relation to State Parties referral.

6.1 Historical context of the Northern Uganda conflict

For a proper understanding of the case study on Uganda, it is pertinent to give a background to the conflict that resulted in the self-referral of the case to the ICC. The conflict in Uganda is deeply rooted in the politics of instability and inequality in Uganda caused by colonial politics, military dictatorships and poor administration by civilian governments.⁵ The conflict raged for almost two decades with little international attention and was referred to by Jan Egeland in 2003 as ‘the biggest forgotten, neglected humanitarian emergency in the world today’.⁶ The involvement of the ICC after 2003 changed the dynamics of the conflict. It also brought attention to the plight of victims, especially women and children who had borne the brunt of the war for several years.

Christian missionaries arrived in Buganda kingdom in 1870 and Uganda became a British protectorate in 1894.⁷ The country gained independence from the British government in 1962

⁵ Hema Chatlani —“Uganda: A Nation in Crisis” (2007) 37 *California Western International Law Journal*, 277 - 297.

⁶ Agence France-Presse ‘Uganda War in northern Uganda world's worst forgotten crisis: UN Report’ 11 November 2003 available online at <http://reliefweb.int/report/uganda/war-northern-uganda-worlds-worst-forgotten-crisis-un>, accessed 6 February 2016.

⁷ Chris Dolan *Social Torture: The Case of Northern Uganda, 1986 – 2006* (2009) New York and Oxford: Berghahn Books 41.

and is a member of the East African Community. The British colonial government has been accused of using a divide and rule strategy in Uganda. While they favoured the south for economic and political favours, the north was reserved as a breeding ground for Uganda's future military engagements.⁸ While southern Uganda was economically viable, the north was impoverished and militarised. According to International Crisis Group, '[t]he post-colonial governments of Milton Obote and Idi Amin found this formula politically expedient, which in turn further fuelled ethnic polarisation and the militarisation of politics'.⁹

Milton Obote, the former Prime Minister (1962–70) and President of Uganda (1966–71, 1980–85), used the military as a means of political control, including the sacking of the Kabaka of Buganda, the traditional leader and constitutional monarch of the Buganda region of modern Uganda.¹⁰ Idi Amin, who later became the Head of State after a coup d'état against Obote, also used the military to suppress any dissent.¹¹ The return of Obote from 1980–1985 after a general election worsened the situation as the military became more politicised, escalating the political and economic tension between the South and the North.¹²

When General Tito Okello Lutwa removed Milton Obote from power in 1985, he was helped by Acholi soldiers who had found their voice back into the Uganda political power struggle.¹³ However, this romance was short-lived as Yoweri Kaguta Museveni overthrew the Okello government with his National Resistance Movement (NRM) in January 1986.¹⁴ This was

⁸ Refugee Law Project 'Behind the Violence: Causes, Consequences and the Search for Solutions to the war in northern Uganda' February 2004, *Refugee Law Project Working Paper No. 11 at 10*, available online at http://www.refugeelawproject.org/working_papers/RLP.WP11.pdf, accessed 11 January 2016.

⁹ International Crisis Group (ICG) 'Northern Uganda: Understanding and Solving the Conflict' ICG Africa Report 14 April 2004, 2.

¹⁰ Aili Tripp 'The Politics of Constitution Making in Uganda' in Laurel Miller and Louis Aucoin (eds) *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010) Washington DC: US Institute of Peace Press, 160.

¹¹ Francis Ssekandi and Cos Gitta 'Protection of Fundamental Rights in the Uganda Constitution' (1994) 26 *Columbia Human Rights Law Review* 191 at 196.

¹² Frances Stewart and Meghan O'Sullivan 'Democracy, Conflict and Development - Three Cases' June 2008, *Queen Elizabeth House Working Paper* 1- 38.

¹³ Ernest Welker 'South Africa in Context' (1985) 25 *Economic Education Bulletin*, 1 - 19.

¹⁴ Sverker Finnstrom 'Wars of the Past and War in the Present: The Lord's Resistance Movement/ Army in Uganda' (2006) 76 *Africa*, 200.

despite a peace agreement signed between government of Tito Okello and the NRM led by Yoweri Museveni.¹⁵

After the fall of Tito Okello's government, the soldiers who had supported him, known as the Uganda National Liberation Army (UNLA), retreated across the border into the Sudan in July 1986, fearing that there would be a massacre of those who stayed at the seat of power in Kampala. The activities of the NRM soldiers when they reached northern Uganda exacerbated an already dire situation. The NRM soldiers were accused of carrying out executions and massive human rights atrocities against the population in northern Uganda. UNLA soldiers harboured ill feelings against the NRM leadership for not keeping to the terms of the peace agreement signed in Kenya and because of the atrocities committed in northern Uganda.¹⁶ Most of the UNLA soldiers re-emerged in northern Uganda as the Uganda People's Democratic Army (UPDA) and established a political wing known as Uganda People's Democratic Movement (UPDM).¹⁷

A peace agreement signed in Gulu in 1988 ended most of their rebellion against the NRM government.¹⁸ However, it also led to the breakup of the UPDA as some members were interested in the peace process, while others did not want to negotiate peace with the NRM government. One commentator believes that some members of the UPDA who refused to surrender to the NRM joined forces with Alice Auma 'Lakwena' and her Holy Spirit Movement (HSM).¹⁹ However, when the HSM was defeated, the Lord's Resistance Army (LRA) led by Joseph Kony emerged as the foremost rebel group in Uganda.

6.1.1 Uganda's Self-referral and the LRA Conflict

The escalation of the conflict between the LRA and Uganda forces in 2002 prompted the President of the Government of Uganda in December 2003 to refer the case concerning the

¹⁵ The Uganda Peace Talks Agreement for the Restoration of Peace to the Sovereign State of the Republic of Uganda between the Government of Uganda and the National Resistance Movement, 17 December 1985.

¹⁶ Nidal Jurdi *The International Criminal Court and National Courts: A Contentious Relationship* (2011) Surrey and Burlington: Ashgate, 136.

¹⁷ Ibid at 137.

¹⁸ Ibid.

¹⁹ Ibid at 137.

LRA to the ICC.²⁰ Although the conflict had lasted for more than a decade before 2002, it is important to note that the jurisdiction of the ICC only commenced after the Rome Statute entered into force in July 2002.

After the preliminary examination and conclusion of investigation, the Prosecutor applied to the Pre-trial chambers for the issuance of arrest warrants. Subsequently, Pre-Trial Chamber II of the ICC issued a warrant of arrest unsealed in October 2005 against five LRA commanders following a request made by the Prosecutor in May 2005.²¹

According to the ICC Prosecutor, Joseph Kony is allegedly criminally responsible for 12 counts of crimes against humanity and 21 counts of war crimes.²² His deputy, Vincent Oti is also charged with committing crimes against humanity and war crimes.²³ Late Okot

²⁰ ICC –President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC” 29 January 2004; Mohammed El Zeidy ‘The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC’ (2005) 5 *International Criminal Law Review* 83 - 120; Payam Akhavan ‘The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court’ (2005) 99 *American Journal of International Law* 403 - 421; Payam Akhavan ‘Self-Referrals before the International Criminal Court: Are States the Villains or Victims of Atrocities’ (2010) 21 *Criminal Law Forum*, 103 - 120.

²¹ ICC ‘Warrant of Arrest unsealed against five LRA Commanders’ 14 October 2005. *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05. The case against Raska Lukwiya was terminated in July 2007 due to the confirmation of his death in August 2006. See the decision of Pre-Trial Chamber II, ICC-02/04-01/05-248 of 11 July 2007.

²² According to the ICC, Joseph Kony is allegedly criminally responsible for twelve counts of crimes against humanity of murder - article 7(1)(a); enslavement - article 7(1)(c); sexual enslavement – article 7(1)(g); rape - article 7(1)(g); inhumane acts of inflicting serious bodily injury and suffering - article 7(1)(k); and, twenty-one counts of war crimes (murder - article 8(2)(c)(i); cruel treatment of civilians – article 8(2)(c)(i); intentionally directing an attack against a civilian population – article 8(2)(e)(i); pillaging - article 8(2) (e)(v); inducing rape – article 8(2)(e)(vi); forced enlistment of children - 8(2)(e)(vii)). See Art 25(3)(a) and 25(3)(b) of the Rome Statute.

²³ According to the ICC, Vincent Oti is allegedly criminally responsible for eleven counts of crimes against humanity (murder - article 7(1)(a); sexual enslavement – article 7(1)(g); inhumane acts of inflicting serious bodily injury and suffering - article 7(1)(k)); and, twenty-one counts of war crimes (inducing rape – article 8(2)(e)(vi); intentionally directing an attack against a civilian population – article 8(2)(e)(i); forced enlistment of children - 8(2)(e)(vii); cruel treatment of civilians – article 8(2)(c)(i); pillaging - article 8(2)(e)(v); murder - article 8(2)(c)(i)). There are unconfirmed reports that Vincent Otti, LRA’s second in command was executed in October 2007 on Joseph Kony’s orders. However his name is still retained in the ICC case. See Ronald Atkinson ‘From Uganda to the Congo and Beyond: Pursuing the Lord’s Resistance Army (2009) New York: International Peace Institute, 12.

Odhiambo was charged with two counts of crimes against humanity and eight war crimes.²⁴ On 10 September 2015, Pre-trial Chamber II terminated proceedings against Late Okot Odhiambo following the forensic confirmation of his death on 27 October 2013.²⁵ Dominic Ongwen was originally charged with three crimes against humanity and four war crimes.²⁶ He was surrendered to the ICC custody in January 2015 and in December 2015, the ICC Prosecutor charged Dominic Ongwen with 70 more counts than those set out in the warrant of arrest issued in July 2005.²⁷ Of all the LRA members indicted by the ICC, Ongwen is the only one currently facing trial..

6.1.2 The CAR conflict and the intervention of the ICC

Two preliminary examinations have been carried out in the CAR. The first was under Luis Moreno Ocampo, the first Prosecutor and the second under Fatou Bensouda, the current Prosecutor.²⁸ The crimes under examination were committed between 2003 and 2014. They involved killing, looting and rape, which occurred during intense fighting in October – November 2002 and in February-March 2003 for situation I and between December 2012 and August 2014 for situation II.²⁹ To understand the contexts in which the alleged crimes were committed, it is important to discuss briefly how events in the CAR have unfolded.

6.1.3 Background history to the CAR conflict

The CAR is a former French colony which gained independence from France on 13 August 1960. CAR shares borders with Chad, Sudan, South Sudan, the Democratic Republic of the

²⁴ According to the ICC, the accused person is charged with two counts of crimes against humanity (murder - article 7(1)(a); enslavement - article 7(1)(c)); and, eight counts of war crimes (murder - article 8(2)(c)(i) ; intentionally directing an attack against a civilian population – article 8(2)(e)(i); pillaging - article 8(2)(e)(v); forced enlisting of children - 8(2)(e)(vii)).

²⁵ Situation in Uganda In the case of the *Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo*, Decision terminating proceedings against Okot Odhiambo, CC-02/04-01/05 10 September 2015.

²⁶ These include three counts of crimes against humanity (murder - article 7(1)(a); enslavement - article 7(1)(c); inhumane acts of inflicting serious bodily injury and suffering - article 7(1)(k)); and, four counts of war crimes (murder - article 8(2)(c)(i)); cruel treatment of civilians – article 8(2)(c)(i); intentionally directing an attack against a civilian population – article 8(2)(e)(i); pillaging - article 8(2)(e)(v)).

²⁷ *The Prosecutor v. Dominic Ongwen* Prosecution's submission of the document containing the charges, the pre-confirmation brief, and the list of evidence, ICC-02/04-01/15, 21 December 2015.

²⁸ See Chapter one, paragraph 1.5.

²⁹ Ibid; See also paragraph 1 of Article 53(1) Report of CAR II Situation.

Congo, Congo Brazzaville and Cameroon.³⁰ CAR is one of the poorest countries in the world and depends mostly on foreign aid while political instability and armed conflict have plagued the country since 2001.³¹ The first preliminary examination related to incidents that happened between October 2002 and March 2003, involving forces loyal to either one of two former presidents of CAR: Ange-Félix Patassé and General François Bozizé.³² As a result of the conflict, General Bozizé removed President Patassé from power in 2003 and dominated the political landscape for several years until his leadership was challenged in 2012, leading to the second preliminary examination conducted by the ICC Prosecutor.

In August 2012, an armed rebel movement, Séléka, emerged as a coalition of militant political and armed groups representing Muslims in the North-East and other groups dissatisfied with President Bozizé, including some of his former close associates.³³ It is alleged that several Sudanese and Chadian nationals joined Séléka to launch a military offensive that ultimately resulted in the ouster of President Bozizé on 24 March 2013 through a coup d'état. President Bozizé went into exile while Michel Djotodia, the Séléka leader, was appointed President.³⁴

However, when several members of Séléka started committing various atrocities in and around Bangui, another rebel group ‘anti-Balaka’ emerged to counter the activities of the Séléka group. The conflict later metamorphosed into sectarian violence as Séléka groups attacked mainly Christians while the ‘anti-Balaka’ attacked mainly Muslim groups. The conflict involved gross human rights abuses amounting to international crimes.

6.1.4 The CAR self-referral to the prosecutor of the ICC

As a State Party to the Rome Statute, the CAR government referred the conflicts at different times to the ICC Prosecutor. In the letter of referral of Situation I, the government requested the Prosecutor to investigate crimes within the jurisdiction of the Court committed anywhere

³⁰ Paragraph 32 of the Preliminary report of the International Commission of Inquiry on the Central African Republic, submitted pursuant to Security Council resolution 2127 (2013), S/2014/373, 26 June 2014.

³¹ Paragraph 9 of the Article 53 Report of the Prosecutor on CAR II Situation.

³² This preliminary examination resulted in the indictment of Jean-Pierre Bemba Gombo by the ICC. See *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05 -01/08.

³³ Séléka in the local Sango language means an ‘alliance’. See Paragraph 9 of Article 53 Report.

³⁴ Paragraph 9 - 10 of Article 53 Report on CAR.

on the territory of CAR since 1 July 2002, the date of the entry into force of the Rome Statute'.³⁵ In the report published by the Prosecutor, it was announced that investigations would go ahead after the conduct of preliminary examinations. In addition, the Prosecutor stated that all the conditions for the opening of investigation had been fulfilled and therefore, the opening of the investigation was in accordance with the provisions of the Rome Statute. As stated in Chapter four, before an investigation is opened the Prosecutor has to be satisfied that the Court has jurisdiction over the case,³⁶ and that the case is admissible before the court, which entails inquiry into gravity and complementarity.³⁷ Furthermore, the Prosecutor will also consider whether the opening of an investigation will be in the interests of justice.³⁸ These factors will be considered below to ascertain whether the criteria set-out by the Rome Statute and the policy on preliminary examination adopted by the Prosecutor were followed during the processes in situations I and II in the preliminary examinations conducted in the CAR when compared with what obtained in the Uganda situation.

6.2 Analysis of the Prosecutor's exercise of discretion in Uganda

In terms of temporal jurisdiction, the ICC has jurisdiction over the crimes committed in Uganda from the time Uganda ratified the Statute. This is because Uganda is a State Party to the Rome statute. In relation to territorial and personal jurisdiction, the alleged crimes were committed in the territory of a State Party and against citizens of Uganda. Regarding material jurisdiction, crimes within the jurisdiction of the Court were committed. For example, in the arrest warrants issued against LRA officials, they are accused of crimes against humanity and war crimes.³⁹ In addition, the case was referred by Uganda which is one of the ways that the jurisdiction of the Court can be activated.

Line Gissel has claimed that preliminary examination in the Uganda situation commenced shortly after the Prosecutor was sworn into office.⁴⁰ This statement has to be taken into

³⁵ ICC 'Prosecutor receives referral concerning Central African Republic' ICC-OTP-20050107-86, 7 January 2005.

³⁶ Chapter four, paragraph 4.4.

³⁷ Ibid.

³⁸ Ibid.

³⁹ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05.

⁴⁰ Line Gissel *Judicialising Peace: The International Criminal Court's Impact on Political Settlements in Kenya and Uganda* (2014) Aarhus: Forlaget Politica, 208.

context. Although the Prosecutor had started collecting evidence on the patterns of crimes in the Northern Uganda situation before it was referred in December 2003, the preliminary examination commenced after Uganda made the official referral. This is because the procedures to be followed during *proprio motu* investigation and self-referral are different. For example, the Prosecutor has to apply to the Pre-Trial Chamber for authorisation to conduct an investigation, while a referral by a State Party dispenses with the need for authorisation from the Pre-Trial Chamber. Therefore, a self-referral preliminary examination is activated by the state, while in a *proprio motu* referral, the preliminary examination is activated by the ICC Prosecutor.

There have been conflicting stories on the referral. However, it seems the Prosecutor of the ICC had encouraged the President of Uganda to refer the matter. The problem with this development is that the Prosecutor of the ICC was accused of bias when he was seen with the President of Uganda at a Press Conference in London to announce the referral.⁴¹ The ICC Prosecutor was also accused of siding with the government of Uganda, notwithstanding the crimes they committed against the civilian population.⁴²

The Rome Statute encourages States to refer crimes within the jurisdiction of the Court to the Prosecutor. However, it becomes problematic in cases where the Prosecutor has actively encouraged a State to make a referral because the Prosecutor's neutrality in the investigation processes becomes suspect. It could be argued that this is what happened in Uganda. Uganda initially wanted the Prosecutor to concentrate investigations on crimes committed by the LRA, thereby using the ICC as leverage in its war with the LRA. The Prosecutor subsequently announced that he was investigating all sides in the conflict. However, there is no evidence that any government soldier has been indicted by the Prosecutor.⁴³

⁴¹ Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006) New York: Zed Books, 96.

⁴² William Schabas *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court* (2008) 6 *Journal of International Criminal Justice* 731-761.

⁴³ Kasaija Apuuli *The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda* (2006) 4 *Journal of International Criminal Justice*, 179 at 185; David Lanz *The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace vs Justice* May 2007, The Fletcher School of Diplomacy available online at http://reliefweb.int/sites/reliefweb.int/files/resources/EC66215A0071F156C12573910051D06D-Full_Report.pdf, accessed 6 February 2016.

The Uganda preliminary examination was also complicated by the peace negotiation process that was happening at the same time, which led to the Prosecutor to conduct the investigations without publicity. The reason for this decision was to avoid creating the impression that the ICC was interfering with the peace negotiations. The downside of this decision was that Ugandans knew little, if anything, about what the ICC was doing.

When it became obvious that the peace negotiations had been stalled, the ICC Prosecutor issued indictments against LRA rebels. However, the ICC could not arrest those indicted, because the ICC relied on Ugandan soldiers and officials in neighboring countries to make the arrests. The fact that the indictments that the Prosecutor issued did not name any soldiers from the Ugandan army raised a problem of perceived bias on the part of the ICC.

6.2.1 The prosecutor's intervention in the LRA conflict

As already noted in Chapter four, a self-referral activates the process of preliminary examination.⁴⁴ This means the Prosecutor has to confirm if the ICC has jurisdiction, whether admissibility criteria have been met (i.e complementary and gravity), and whether opening an investigation is in the interest of justice.⁴⁵ The involvement of the ICC in the LRA conflict raised several issues. There was a genuine dilemma for the ICC Prosecutor whether to conduct preliminary examination publicly during peace negotiations. Either decision was bound to have a disadvantage. The second issue is that the ICC indictments were made in respect of crimes over which immunity had been granted under the Uganda Amnesty Act, which was a locally driven process.⁴⁶ However the Prosecutor is not bound to implement the provisions of a domestic law. It can only be of concern to him if proceeding with the indictments will not be in the interests of justice.

⁴⁴See chapter four, paragraph 4.5.1.

⁴⁵ Ibid.

⁴⁶ Refugee Law Project ‘Whose Justice: Perceptions of Uganda’s Amnesty Act 2000: The Potential for Conflict Resolution’ February, 2005, *Refugee Law Project Working Paper No. 15* available at http://www.refugeelawproject.org/working_papers/RLP.WP15.pdf, accessed 2 March 2016.

6.2.2 Analysis of the prosecutorial discretion in CAR

As a State Party to the Rome Statute, the ICC has jurisdiction over crimes committed in the CAR since the entry into force of the Rome Statute on 1 July 2002.⁴⁷ Therefore, since the government of CAR referred the situations to the ICC in December 2004 and May 2014 in accordance with the provisions of the Rome Statute, the Prosecutor is under obligation to commence a preliminary examination.⁴⁸ Jurisdiction can be divided into temporal, subject-matter, and either territorial or personal jurisdiction.⁴⁹ Temporal jurisdiction or jurisdiction *ratione temporis* means that the ICC can only investigate crimes committed within CAR from July 2002 when the Rome Statute entered into force.⁵⁰ This requirement was satisfied to the extent that the referral was made in December 2004 for situation I which covers the period within which the alleged crimes were committed and May 2014 for situation II.

Jurisdiction *ratione materiae* or subject matter jurisdiction means that the alleged crimes must be within the jurisdiction of the ICC.⁵¹ The Prosecutor argued that crimes in CAR were committed during a non-international armed conflict that occurred from 2002-2003 in situation I and from 2012 – 2014 for situation II.⁵² For situation I, there were attacks against civilians which followed a failed coup attempt. In addition, there was a pattern of massive rapes and other acts of sexual violence perpetrated by armed individuals while sexual violence was a central feature of the conflict.⁵³ However, in situation II the abuses were mainly triggered during confrontations between the Séléka and anti-Balaka rebel groups and retaliatory attacks carried out by both groups against the civilian population.⁵⁴ The ICC had both territorial and personal jurisdiction of the alleged crimes in CAR.⁵⁵ This means that crimes within the jurisdiction of the ICC were committed on the territory of a State Party or by a national of a State Party, which in this case is CAR.

⁴⁷ ICC ‘Background Situation in the Central African Republic’ ICC-OTP-BN-20070522-220-A_EN, The Hague, 22 May 2007, 1 – 4.

⁴⁸ Paragraph 3 of Article 53 (1) Report of the Office of the Prosecutor on CAR II Situation.

⁴⁹ See chapter four, paragraph 4.4.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² ICC ‘Background to CAR’ 2; See also Paragraph 14 of Article 53(1) Report of CAR II Situation.

⁵³ Ibid.

⁵⁴ Paragraph 11 – 13 Article 53(1) Report of CAR II Situation.

⁵⁵ Chapter four, paragraph 4.4.

6.2.3 The effects of the self-referral in CAR

The armed conflict in CAR that took place between October 2002 and March 2003 was between the armed forces of CAR loyal to the former President Ange-Félix Patassé, allied with combatants of the *Mouvement de Libération du Congo* (MLC) led by Jean-Pierre Bemba Gombo from the Democratic Republic of Congo. The troops were confronted by a rebel movement led by François Bozizé, former Chief-of-Staff of the CAR armed forces, who became President of CAR from 2003 to 2013.⁵⁶

Only Jean-Pierre Bemba Gombo is charged for crimes related to that conflict.⁵⁷ However, in a related case, Bemba and his defence lawyers have appeared before the ICC since 29 September 2015 for offences against the administration of justice allegedly committed in connection with the original case.⁵⁸

6.3 The Prosecutor and complementarity in Northern Uganda

The issue of complementarity during a preliminary examination is a contested one. The complementarity principle involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Prosecutor.⁵⁹ The Prosecutor's report on the preliminary examination in Uganda does not contain details of the evaluation conducted to ascertain whether Uganda was unwilling or unable to prosecute locally. In the referral to the ICC, Uganda did not state that there was a total or substantial collapse or unavailability of its judiciary. However, the Ugandan Government stated that it was unable to arrest and prosecute members of the LRA.⁶⁰

⁵⁶ Situation in the Central African Republic, *the Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

⁵⁷ See *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05 -01/08.

⁵⁸ See *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13. According to the Prosecutor of the ICC, the offences which were allegedly committed between the end of 2011 and 14 November 2013 in various locations, include corruptly influencing witnesses by giving them money and instructions to provide false testimony, presenting false evidence and giving false testimony in the courtroom, all perpetrated in various ways including: by committing, soliciting, inducing, aiding, abetting or otherwise assisting in their commission.

⁵⁹ Paragraph 6 of the Report on Preliminary Examination Activities, November 2013.

⁶⁰ Alhagi Marong 'Unlocking the Mysteriousness of Complementarity: In Search of a Forum Conveniens for Trial of the Leaders of the Lord's Resistance Army' (2011) 40 *Georgia Journal of International and*

6.3.1 The Prosecutor and complementarity in CAR

As shown in Chapter four, the Rome Statute provides that the Prosecutor should consider whether a case is or would be admissible under article 17 of the Statute which provides for complementarity and gravity.⁶¹ Although the Statute does not provide guidance on how the inquiry on complementarity and gravity has to be conducted, it is argued that the Prosecutor has to be satisfied that the requirements of admissibility are fulfilled during a preliminary examination before an investigation can commence.⁶² In situation I in CAR, the Prosecutor alleged that these factors were fulfilled but did not go into enough details on how that decision was reached. In addition, the Prosecutor did not differentiate between the issues of gravity and complementarity to show clearly how the requirements in the Rome Statute were fulfilled.

The Prosecutor stated that CAR had conducted ‘investigations and preliminary court hearings’ regarding the alleged crimes committed in CAR.⁶³ Furthermore, the Prosecutor stated that in November 2005, a team of investigators and analysts were sent to Bangui, the capital of CAR, ‘to collect additional information on, and carry out an in-depth assessment of those proceedings’.⁶⁴ The report of the Prosecutor did not make public an analysis of the information collected in relation to gravity and complementarity. However, a statement from the *Cour de Cassation*, the highest criminal court in CAR, may have contributed to the decision of the Prosecutor to open an investigation in CAR.

In a decision of 11 April 2006, the *Cour de Cassation* rejected in part the Prosecutor’s appeal against the decision of the Criminal Chamber of the Court of Appeal in Bangui of 16 December 2004, which held that only the ICC was capable of trying the serious crimes

Comparative Law 67 – 103; Michael Otim and Marieke Wierda ‘Justice at Juba: International Obligations and Local Demands in Northern Uganda’ in Nicholas Waddell and Phil Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (2008) The Royal African Society, 21 – 28.

⁶¹ See chapter four, paragraph 4.6 .

⁶² *Ibid.*

⁶³ ICC ‘Background to CAR I Situation’ 3.

⁶⁴ *Ibid.*

committed in the CAR since 1 July 2002.⁶⁵ Support for this argument is found in a reference in the report of the Prosecutor which noted ‘the position of the *Cour de Cassation* of CAR in April 2006 indicating that in relation to the alleged crimes the national authorities were unable to carry out the necessary criminal proceedings, in particular to collect evidence and obtain the accused’.⁶⁶ Furthermore, the Office of the Prosecutor had publicly stated that it was waiting for the decision of the *Cour de Cassation* to decide whether to open an investigation in CAR, on the basis of the complementarity principle contained in the Statute of the ICC.⁶⁷

It is argued that the decision of the *Cour de Cassation* lent credence to the decision of the Prosecutor to initiate investigations in situation I. However, a self-referral on its own presupposes that a State is unable or unwilling to investigate and prosecute a crime under the principle of complementarity. Although a self-referral could ordinarily make things easier for the Prosecutor, the legal requirements of the Rome Statute need to be followed and the Prosecutor is expected to show how the preliminary examination was conducted and the reasons for opening an investigation.

Unlike in situation I, in situation II Fatou Bensouda, by then the Prosecutor, issued a report, clearly setting out issues of admissibility including those of complementarity and gravity. For instance, the Prosecutor argued that although limited proceedings had been launched against some individuals, ‘the prosecutors and police generally lack the capacity and security to conduct investigations and apprehend and detain suspects.’⁶⁸ Furthermore, the Prosecutor argued that the referral from the CAR authorities indicated that the national judicial system was not able to conduct the necessary investigations and prosecutions successfully.⁶⁹ The Prosecutor also stated that no other State with jurisdiction over the crimes committed in CAR had conducted national proceedings in relation to crimes allegedly committed during the conflict, thus that responsibility lay with the ICC.⁷⁰

⁶⁵ FIDH ‘The *Cour de Cassation* confirms the incapacity of the national justice system to investigate and prosecute serious crimes. The Prosecutor of the International Criminal Court must open an investigation into the situation in the Central African Republic’ 13 April 2006.

⁶⁶ ICC ‘Background on CAR’.

⁶⁷ FIDH *op cit*.

⁶⁸ Paragraph 25 of the Article 53 (1) Report in CAR II Situation.

⁶⁹ *Ibid*, paragraph 26.

⁷⁰ *Ibid*, paragraph 27.

The foregoing shows that the preliminary examination conducted under Fatou Bensouda followed the policy paper on preliminary examination while that of the former Prosecutor clearly did not. A mitigating factor as earlier discussed is that the policy paper was adopted during Fatou Bensouda's tenure. It does seem that the publication of the policy paper means that the current Prosecutor sees it as an obligation owed to the general public and has made effort to communicate it effectively.

6.3.3 The Prosecutor and gravity in Uganda situation

The Prosecutor did not give information on how the evaluation of gravity was arrived at in the Uganda situation and it is not clear how the gravity of the crimes allegedly committed by the LRA officials is higher than the crimes committed by the UPDF soldiers.⁷¹ The Prosecutor consistently stated that the crimes committed by the LRA were graver than those committed by the UPDF.⁷² However, it is not clear from his analysis whether he was referring to quantitative or qualitative gravity. As this distinction was critical to the decision whether to charge government soldiers and rebel soldiers without distinction, one expected the Prosecutor to justify the focus on rebel soldiers, if only in order to prevent questions of bias. To date, the ICC has not yet brought any charges against government forces despite allegations to that effect.⁷³

6.3.4 The Prosecutor and gravity in the CAR situation

The Prosecutor was specific about the use of sexual violence by parties to the conflict in situation I. However, the Prosecutor's report on Situation I did not explain how the crimes met the gravity threshold established by the Rome Statute. By contrast, in Situation II in CAR, the Prosecutor carefully analysed the scale, nature manner and impacts of the crimes

⁷¹ William Schabas 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 *Criminal Law Forum* 5 – 33.

⁷² Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties, 28 November – 3 December 2005, The Hague, 28 November 2005.

⁷³ Human Rights Watch 'Uganda: Army and Rebels Commit Atrocities in the North' - International Criminal Court Must Investigate Abuses on Both Sides, 20, September 2005; Human Rights Watch 'Uprooted and Forgotten Impunity and Human Rights Abuses in Northern Uganda' September 2005 Vol. 17, No. 12(A); IRIN ' Amnesty and Peace groups urge ICC to probe government army too' 3 February 2004.

and concluded that, on the information available, there was a basis for launching a formal investigation against members of both Séléka and anti-Balaka.⁷⁴

Although the Prosecutor is yet to issue arrest warrants, it is noticeable in the report made public that both parties to the conflict were implicated in the crimes that fall within the jurisdiction of the ICC. Fatou Bensouda's analysis of CAR situation II is different from the way Moreno Ocampo managed CAR situation I and the Uganda referral.

6.3.5 The Prosecutor and the interests of justice in Uganda

The Rome Statute provides that the Prosecutor must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.⁷⁵ The Prosecutor's current interpretation of interests of justice under article 53 of the Rome Statute limits its application.⁷⁶ This means that the outcome of peace negotiations does not affect the decision of the Prosecutor on whether to initiate an investigation or not. Although the decision may seem reasonable, it is complicated when parties to a conflict are willing to negotiate peace and the ICC is seen as the stumbling block to the consummation of such a peace deal. For the northern Uganda conflict, there is no clear evidence that the ICC scuttled any peace deal between the Ugandan Government and the LRA, because the peace negotiations happened after the Prosecutor had concluded the preliminary examination.

The Prosecutor's current opinion on peace negotiations does not affect his decision to initiate investigation in the Northern Uganda conflict after the completion of the preliminary examination. The UNSC is best suited to decide whether to suspend an investigation in the Ugandan situation after a successful completion of the peace process using article 16 of the Rome Statute and acting under Chapter VII of the UN Charter. However, if the Uganda situation was a *proprio motu* referral like Kenya and Côte d'Ivoire, the provisions of article 53 as earlier discussed will apply. There is shared division of labour already discussed in Chapter five of the study.⁷⁷ However, this is a subsequent decision that does not affect the preliminary examination.

⁷⁴ Paragraphs 255 – 264 of Article 53(1) Report of CAR Situation II.

⁷⁵ Article 53 (1)(c) of the Rome Statute.

⁷⁶ See Chapter four, paragraph 4.7.

⁷⁷ Chapter five, paragraph 5.6.1.

6.3.6 The Prosecutor and the interests of justice in CAR

Unlike the other elements of jurisdiction and admissibility, there is no obligation for the Prosecutor to show that an investigation is in the interest of justice.⁷⁸ Rather, the Prosecutor is required to state when an investigation is not in the interests of justice. When this occurs, the Prosecutor is under obligation to inform the Pre-Trial Chamber.⁷⁹

In situation I, the Prosecutor decided after a thorough analysis ‘that there was no reason to believe an investigation would not serve the interests of justice’.⁸⁰ As part of the assessment, the Prosecutor listened to victims’ views and considered their interests. Furthermore, the Prosecutor stated that victims had expressed interest in the involvement of the ICC in the investigation of the crimes committed in CAR.⁸¹ This clearly shows that there was general support for the opening of an investigation among the victim population in CAR. In situation II, the Prosecutor also determined that opening an investigation was in the interests of justice. The argument was basically the same as that raised in situation I, that, based on the assessment of the situation, (including through a mission to the CAR of May 2014), the Prosecutor concluded that there were no substantial reasons to believe that an investigation into the Situation in the CAR II would not serve the interests of justice.⁸²

From the foregoing, it is clear from the discussions in the Article 53 report that the Prosecutor made efforts to ensure that the issues of complementarity were clearly dealt with and the circumstances which prompted the intervention of the Court were properly and clearly delineated. It can easily be argued that the mere fact that a State referred a situation to the ICC pre-supposes that admissibility issues are not in contention. However, this is not the case and the Prosecutors in situation I and II clearly carried out preliminary examinations to ensure that there was reasonable basis on which to commence investigations.

A noticeable difference is that while the issues in situation I were not clearly delineated and thoroughly discussed, the situation II report tried within possible means to fill the gap that was lacking in the preliminary examination conducted in situation I. In supporting the reason for the publication of the reports of preliminary examinations conducted under her, the

⁷⁸ See chapter four, paragraph 4.7.

⁷⁹ Ibid.

⁸⁰ ICC ‘Background: Situation in the Central African Republic’ 3.

⁸¹ Ibid.

⁸² Paragraphs 265 – 266 of Article 53(1) Report of the CAR II Situation.

current Prosecutor argues that she is not required to publicise reports when acting pursuant to a referral under article 53(1).⁸³ However, she decided to do so in the interests of promoting clarity with respect to the statutory activities and decisions involved in conducting a preliminary examination.⁸⁴ One cannot but agree with the Prosecutor on the need for effective public information and clarity, even though the publication of article 53 report is not a statutory obligation in the Rome Statute.

A clear difference is noticeable in the two situations. While Bensouda complied with the policies that she had adopted, there is nothing to measure Ocampo's decision as his criteria were based on provisions of the Rome Statute and policy papers which were not as well articulated as Bensouda's.

6.4 Application of the general principles during the preliminary examinations

As already noted in Chapter five, the general principles adopted by the ICC Prosecutor during preliminary examinations are independence, impartiality and objectivity.⁸⁵ In addition, these principles are related to the theory of prosecutorial neutrality mentioned in Chapter two which includes non-bias, non-partisanship and principled decision making.⁸⁶ These issues are further elaborated below in relation to how the principles and policies were respected in practice.

6.4.1 Independence and impartiality of the Prosecutor in Uganda

Although there is no clear evidence that the Prosecutor was not independent in the conduct of the preliminary examination in Uganda, the circumstances surrounding the referral and the joint press conference issued with the President of Uganda to announce the referral has been noted as impacting on the perception of partiality on the part of the Prosecutor.⁸⁷ Although the former Prosecutor may argue that he acted within the provisions of the Rome Statute by

⁸³ Paragraph 1 of the Executive Summary of Article 53 Report of the Situation II.

⁸⁴ Ibid.

⁸⁵ Chapter five, paragraph 5.4.

⁸⁶ Chapter two, paragraph 2.1.1 - 2.1.3.

⁸⁷ HRW 'Lack of Accountability' 2005, available at <http://www.hrw.org/reports/2005/uganda0905/6.htm> , accessed 2 March 2016.

not restricting investigations to LRA officials alone, the inability to indict UPDF soldiers is a nagging issue in the relationship between the Prosecutor and the government of Uganda. It is noteworthy that the accountability mechanism imposed by the Rome Statute regarding cooperation between States has already been mentioned in the legal framework that was extensively discussed in Chapter four.⁸⁸

Co-operation with a State Party that referred a matter to the ICC can be interpreted in different ways. First, cooperation with a State Party can be seen as fulfilling the obligations in the Rome Statute. However, if the State is under preliminary examination and there is the likelihood that different parties to the conflict may have committed crimes, it becomes difficult to state with certainty that the co-operation between the ICC and a referring State does not affect the independence of the Prosecutor. Darryl Robinson argues that there are situations where the activities of the Court are subject to criticism, irrespective of decisions of the Prosecutor.⁸⁹ If the Prosecutor does not effectively co-operate with a State Party (in this instance Uganda), an effective link that will encourage preliminary examination will be missing. However, inability to show that both parties to a conflict have committed crimes exposes the Prosecutor to attacks of partiality.

The onus is on the Prosecutor to show that activities and decisions of the office are independent and not influenced by a referring State Party. This is because the policy paper on preliminary examination clearly states that the scope of the Prosecutor's examination cannot be limited in a manner contrary to the Rome Statute.⁹⁰ Where a referral is accompanied by supporting documentation that identifies potential perpetrators, the Prosecutor is not bound or constrained by the information contained therein when conducting investigations in order to determine whether specific persons should be charged.⁹¹ The same principle applies during preliminary examinations, which means that in making a determination whether to proceed with an investigation or not, the Prosecutor's decision is not based only on the information supplied by the referring State.

⁸⁸ See chapter four, paragraph 4.9.

⁸⁹ Darryl Robinson 'Inescapable Dyads: Why the ICC Cannot Win' (2015) 28 *Leiden Journal of International Law* 323 - 347.

⁹⁰ Paragraph 27 of the policy paper on preliminary examination.

⁹¹ *Ibid.*

However, under impartiality, the issue for determination is whether the Prosecutor applied consistent methods and criteria, irrespective of the States or parties involved or the person(s) or group(s) concerned in determining whether to proceed with an investigation or not.⁹² The answer to this question is tied to the issue of the gravity of crimes committed by UPDF soldiers and LRA rebels. The Prosecutor's argument that the gravity of the crimes committed by the LRA is greater than those committed by UPDF is a simplistic way of explaining the dilemma in the Northern Uganda conflict. This lack of clarity in the measurement of gravity between UPDF soldiers and LRA combatants is a sticky point in the activities of the Prosecutor in Uganda.

It is therefore argued that the Prosecutor was independent but did not act in a way that would have allayed perceptions of impartiality in relation to the preliminary examination conducted in Uganda. This is because it is not clear from the facts whether a thorough investigation of the activities of the UPDF was conducted. One argument that may be made about this is that the Prosecutor needed the cooperation of the Uganda government to be able to operate freely in the country. But that also had its clear limitations to the extent that it was clearly impossible for the Prosecutor to investigate UPDF soldiers effectively.

6.4.2 Independence and impartiality of the Prosecutor in CAR

As already discussed in Chapter five of the study, both the Rome Statute and policy paper on preliminary examination provide for the independence of the Prosecutor.⁹³ In both Situations I and II, it is clear that decisions of the Prosecutor were not influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure cooperation of any State Party to the Rome Statute. Although the report of the preliminary examination carried out in CAR II situation clearly showed the steps followed by the Prosecutor, the fact that the Prosecutor did not do the same in Situation I did not cast doubt on the independence enjoyed by the Prosecutor during the process.

Impartiality is one of the core principles governing the work of the Prosecutor during preliminary examinations. It involves a fair-minded and objective treatment of persons and issues, free from any bias or influence.⁹⁴ In addition, the Prosecutor is expected to be impartial during preliminary examinations. Impartiality requires the application of consistent

⁹² Paragraph 28 of the policy paper on preliminary examination.

⁹³ See chapter five, paragraph 5.4.1.

⁹⁴ See also paragraph 29 of the Code of Conduct for the Office of the Prosecutor.

methods and criteria, irrespective of the States or other parties involved.⁹⁵ The Prosecutor did not make public the preliminary examination conducted in CAR Situation I. That makes it difficult to evaluate his decision on this preliminary examination. On the other hand, in Situation II, the report was clear on the methodologies adopted by the Prosecutor during the preliminary examination and the consistent methods followed in analysing the crimes committed by both Séléka and anti-Balaka rebel forces.⁹⁶

6.4.3 Objectivity of the Prosecutor in Uganda

The Rome Statute provides that Prosecutor will investigate incriminating and exonerating circumstances equally in order to establish the truth.⁹⁷ The same principle of objectivity is applied at the preliminary examination stage in relation to information that could form the basis of a determination to proceed with an investigation.⁹⁸ As information evaluated at the preliminary examination stage is largely obtained from external sources, the Prosecutor is obliged to pay particular attention to the assessment of the reliability of the source and the credibility of the information.⁹⁹

The present Prosecutor argues that standard formats for analytical reports, standard methods of source evaluation, and consistent rules of measurement and attribution in its crime analysis are used during preliminary examinations. These are aimed at ensuring internal and external coherence. In addition, information from diverse and independent sources is used as a means of bias control.¹⁰⁰ Furthermore, the Prosecutor seeks to ensure that, in the interests of fairness, objectivity and thoroughness, all relevant parties are given the opportunity to provide information during preliminary examination.¹⁰¹

However, the Prosecutor did not demonstrate clearly how these principles and policies were applied in the preliminary examination conducted in Northern Uganda. In addition, the difficulty in getting information on the policies of the Prosecutor in conducting the

⁹⁵ Ibid; See also paragraph 28 Policy Paper on Preliminary Examinations.

⁹⁶ See generally the Article 53 report on CAR II Situation Report.

⁹⁷ Article 54(1) of the Rome Statute.

⁹⁸ Paragraph 30 of the policy paper on Preliminary Examination.

⁹⁹ Paragraph 31 of the policy paper on Preliminary Examination.

¹⁰⁰ Paragraph 32 of the policy paper on Preliminary Examination.

¹⁰¹ Paragraph 33 of the policy paper on preliminary examination.

preliminary examination in Uganda led to several assumptions on why the Prosecutor decided there was reasonable basis to commence an investigation.

6.4.4 Objectivity of the Prosecutor in CAR

The guiding principles of objectivity have already been discussed in Chapter five.¹⁰² Objectivity requires the Prosecutor to ensure the reliability of the information received, as well as its source.¹⁰³ It has to be noted that during preliminary examinations, the Prosecutor receives information from different sources. The ability to collect evidence relating to the crimes committed by all parties is key to the principle of objectivity. Furthermore, ensuring the reliability of information received as well as its source makes it easier for the Prosecutor to conduct a reliable preliminary examination.

In a response to the request by Pre-Trial Chamber III for an update on the status of the preliminary examinations conducted by the Prosecutor in situation I, the Prosecutor used the opportunity to inform the Chamber of materials that had been gathered, how they were gathered and reasons for the delay in making a determination.¹⁰⁴ However, an observation that has to be made here is that it took the intervention of Pre-Trial Chamber III for the Prosecutor to disclose sources of evidence procedures to ensure that accurate information had been gathered during the preliminary examination assessment. In contrast, Article 53(1) Report of the situation II clearly delineated information on crimes committed by parties to the conflict, levels of involvement and modes of participation.¹⁰⁵ It can be concluded therefore that there is a marked difference between the objectivity shown by the former Prosecutor in the CAR I preliminary examination and that conducted by the current Prosecutor in Situation II. However, this difference does not imply that the former Prosecutor was not objective in situation I. It only shows that there was a higher level of objectivity in the preliminary examination in Situation II.

¹⁰² See chapter five, paragraph 5.4.3

¹⁰³ Ibid.

¹⁰⁴ Paragraph 12 – 20 of the Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05, 15 December 2006.

¹⁰⁵ Paragraphs 48 – 76 of Article 53(1) Report of Situation in CAR II.

6.5 Application of the policy objectives used by the Prosecutor during preliminary examinations

The policy objectives are used by the Prosecutor during preliminary examinations. These include transparency, positive complementary and the prevention of crimes.¹⁰⁶ As mentioned in discussion in Chapter two, there are correlations between the policy objectives and the theory of neutrality discussed in that chapter.¹⁰⁷ These issues are addressed below.

6.5.1 Transparency of the Prosecutor in Uganda

The policy objectives adopted by the Prosecutor are aimed at providing the public with regular information.¹⁰⁸ In addition, the objectives aim to contribute to the ending of impunity, by encouraging genuine national proceedings, and to the prevention of crimes.¹⁰⁹ As already noted, the early preliminary examinations carried out by the former Prosecutor in Uganda did not provide public information as expected.

Although there is no legal obligation on the Prosecutor to inform the public about the status of preliminary examinations, having an effective public information system increases the transparency of the activities of the Prosecutor. This is clearly spelt out in the policy paper on preliminary examination adopted by the current ICC Prosecutor. She argues that making the status of a preliminary examination public will enable the office to carry out its mandate without raising undue expectations that an investigation will necessarily be opened, while at the same time encouraging genuine national proceedings and contributing towards the prevention of crimes.¹¹⁰

There is no official report on the preliminary examination carried out in Uganda. The former Prosecutor has tried to justify the decision to proceed in Uganda in different fora.¹¹¹ However, it seems his statements are more or less geared towards countering arguments that were made by scholars who have argued that the Prosecutor was not transparent in

¹⁰⁶ Chapter five, paragraph 5.5.

¹⁰⁷ Chapter two, paragraph 2.1.

¹⁰⁸ Paragraph 93 of the policy paper on preliminary examination.

¹⁰⁹ Ibid.

¹¹⁰ Paragraph 94 of the policy paper on preliminary examination.

¹¹¹ See for examples, 'The Statement by the Chief Prosecutor on the Uganda Arrest Warrants', The Hague, 14 October 2005; 'The Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal meeting of Legal Advisors of Ministries of Foreign Affairs', New York, 24 October 2005.

Uganda.¹¹² I agree with these scholars to the extent that the Prosecutor failed to exhibit transparency in relation to the indictment of LRA soldiers and did not find the same level of gravity in the crimes committed by UPDF soldiers. In addition, the inability of the Prosecutor to show publicly how the preliminary examination was conducted is clearly responsible for this conclusion.

6.5.2 Transparency of the Prosecutor in CAR

According to the Prosecutor and as earlier discussed, transparency involves making public the findings of each preliminary examination.¹¹³ However, the fact that the CAR government had to go to Court to request information from the Prosecutor on the status of the preliminary examination conducted in CAR I shows that the Prosecutor did not find it necessary to make preliminary examination public until the process was completed.¹¹⁴ Pre-Trial Chamber III in its decision stated that:

[A]lmost two years have passed since the Prosecutor received the referral of the Government of the Central African Republic and publicly announced his preliminary examination of the CAR situation; and since the referral of the CAR situation to the Prosecutor the latter has given no information on the status of his preliminary examination of such situation¹¹⁵

In addition, the Court argued that even after CAR had requested information on the status of the preliminary examination, the Prosecutor was unable to provide adequate or satisfactory information on the status of the preliminary examination conducted in CAR.¹¹⁶ It should be further noted that even when preliminary examinations were concluded by the former

¹¹² Kamari Clarke *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009) 237; William Schabas 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice*, 731-761; Adam Branch 'The Paradoxes of Protection: Aligning Against the Lord's Resistance Army' (2012) 5 *African Security* 160 – 178; Adam Branch 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21 *Ethics and International Affairs* 179 – 198.

¹¹³ see also paragraph 97 Policy Paper on Preliminary Examinations.

¹¹⁴ Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05, 30 November 2006.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

Prosecutor, only very little information was disclosed to the public, fuelling suspicion that extraneous factors were taken into consideration in the decision to begin an investigation after the preliminary examination.¹¹⁷ There is a marked difference between Ocampo and Bensouda, and this is clearly captured in the examinations conducted in situation I and situation II. While the former had less information for the public, the later was able to publish reports and make them accessible to a wide range of stakeholders in the activities of the Court.

From the foregoing, it is clear that the differences between the two case studies hinge in part on the identity of the incumbents and their experiences on the ICC. However, we also know that the guidelines and policies have evolved over time between the tenures of the two Prosecutors. Therefore, the differences can be seen both in the personality of the Prosecutors and the way and manner policies and principles on prosecutorial discretion were adopted and implemented. Although Fatou Bensouda was Moreno Ocampo's Deputy Prosecutor, it is also possible to argue that they entered the position of ICC Prosecutor at different times, around nine years apart. Those years saw the development of different attitudes about the judicial processes the ICC handled, leading to different attitudes and expectations. Moreno Ocampo was the pioneer, Bensouda followed, having observed what he had had to deal with and hearing the criticism of not only Ocampo, but of the ICC system generally.

6.5.3 Ending impunity through positive complementarity in Uganda

The current Prosecutor of the ICC, Fatou Bensouda argues that due to the global nature of the Court and the complementarity principle, a significant part of the preliminary examination is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes.¹¹⁸ This is because the complementary nature of the Court requires national judicial authorities and the ICC to function together.¹¹⁹ However, the effort made by the former Prosecutor to encourage judicial activities at the national level during the preliminary examination carried out in Uganda is not very clear.

¹¹⁷ William Schabas 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice*, 731-761.

¹¹⁸ Paragraph 100 of the policy paper on preliminary examination.

¹¹⁹ Ibid.

The former Prosecutor has been criticised in the way and manner he handled preliminary examinations. For example, William Schabas considers former Prosecutor's initial efforts were at best aimed at ensuring that the ICC had jurisdiction over the conflicts instead of encouraging States to carry out their primary responsibilities.¹²⁰ This is not far from the truth. Uganda clearly stated that its judicial system was capable of holding LRA rebels accountable but was unable to do so due to inability of the UPDF to capture them.

However, although the Ugandan Government subsequently established the International Crimes Division of the Uganda Court in 2008, this court did not exist at the time of the preliminary examinations and so cannot be said to be a sign that Uganda had the capacity to hold her citizens accountable.¹²¹ Another action that would have shown that Uganda had the capacity to investigate and prosecute her citizens is the domestic implementation of the Rome Statute as a national law. However, this process was only completed just before the Review Conference of the ICC in 2010 which means that as at the time the preliminary examination was conducted, there was no clear strategy by the Ugandan government to confront impunity.¹²²

It seems Uganda's interest in referring the LRA conflict was to galvanise international support to isolate the LRA, starve them of support and make them vulnerable for UPDF soldiers. When these expectations did not happen and there were subsequent prospects for negotiating peace between the LRA and the government of Uganda, the commitment made by the Ugandan government to the ICC did not stop the peace process. Uganda also promised to withdraw the referral if there was any agreement between the government and the rebels. This was clearly meant to undermine the efforts of the ICC to ensure there was no impunity for international crimes.

¹²⁰ William Schabas 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 *Criminal Law Forum* 5 – 33

¹²¹ More details on the International Crimes Division of the Uganda High Court can be found online at <http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html>, accessed 6 February 2016.

¹²² See the Uganda International Criminal Court Act of 24 June 2010 Acts Supplement No. 6.

6.5.4 Ending impunity through positive complementarity in CAR

The ICC Prosecutors have adopted a policy of positive complementarity which is aimed at spurring domestic action to end impunity through investigation and prosecution of international crimes that are within the jurisdiction of the Court.¹²³ The views of the current Prosecutor have not changed from the policies of the former Prosecutor on the role of the ICC in activating positive complementarity. This means at best, that the ICC will continue to play a limited role in its ability to encourage and facilitate the investigation and prosecution of international crimes at local levels.

6.5.5 Prevention of international crimes in Uganda

During preliminary examinations, the Prosecutor seeks to perform an early warning function through collection of open source information on alleged crimes that appear to fall within the jurisdiction of the Court.¹²⁴ This enables the Prosecutor to react promptly to upsurges of violence by reinforcing early interaction with States, international organisations and non-governmental organisations in order to verify information on alleged crimes, to encourage genuine national proceedings and to prevent reoccurrence of crimes.¹²⁵ In addition, the preliminary examination enables the Prosecutor to issue public, preventive statements in order to deter the escalation of violence and further committing of crimes and to put perpetrators on notice about individual criminal responsibility for international crimes.¹²⁶

The extent to which this objective was carried out in Uganda is subject to debate. This is mainly due to lack of information from the former Prosecutor. For instance, critical legal scholars have chronicled the failure of the Prosecutor to investigate the crimes committed by the UPDF and to encourage the government to prosecute those culpable in the atrocities committed against civilians.¹²⁷ As already discussed, the former Prosecutor's argument is that

¹²³ Chapter five, paragraph 5.5.2.

¹²⁴ Paragraph 104 of the policy paper on preliminary examination.

¹²⁵ Paragraph 105 of the policy paper on preliminary examination.

¹²⁶ Paragraph 106 of the policy paper on preliminary examinations.

¹²⁷ Zazhary Lomo 'Why the International Criminal Court must withdraw Indictments against the Top LRA Leaders: A Legal Perspective' *The Sunday Monitor Uganda*, 20 August 2006; Sarah Nouwen, 'Complementarity in Uganda: Domestic diversity or international imposition?' in Carsten Stahn and Mohammed El-Zeid *The International Criminal Court and Complementarity: From Theory to Practice* (2011) Cambridge University Press, New York: 1120 – 1154; Sarah Nouwen, and Wouter Werner 'Doing Justice to

the crimes committed by UPDF soldiers were not of comparable gravity with the crimes committed by LRA rebels. However, there is no evidence that the former Prosecutor clearly supported the investigation and prosecution of UPDF soldiers as envisaged in the policy paper. In fact, no indictments were ever issued against UPDF soldiers by Uganda government or the ICC.

6.5.6 Prevention of international crimes in CAR

A major policy objective adopted by the Prosecutor during preliminary examinations is the prevention of international crimes.¹²⁸ However, as events in the CAR have shown, the early warning function of the Prosecutor through public service announcements did not prevent the commission of subsequent crimes in CAR. This is because if the threat of prosecution by the first preliminary examination was successful, it would have deterred subsequent escalation of violence that led to Situation II. The public service announcements of the Prosecutor in Situation I and II included limited visits to CAR and release of press statements about ongoing violence.¹²⁹

The ICC has to design public service announcements that clearly bring closer to the population, the possibility of prosecution for perpetrators of international crimes. In addition, the usage of social media and other traditional and non-traditional means of information dissemination have to be adopted. For example, the Prosecutor could record statements to be aired on local television and radio stations in countries where preliminary examinations are conducted, to warn of prosecution for violent crimes.

6.6 Principles, objectives and the three-dimensional neutral prosecutor

It has to be recalled that the original theory of neutrality was based on the American legal system. However, in Chapter two, it was expanded to apply to proceedings at the ICC, noting the differences and similarities between the domestic and international criminal justice systems. As already noted in Chapter two of this study, the theory of prosecutorial neutrality

the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 *European Journal of International Law* 941 – 965.

¹²⁸ Chapter five, paragraph 5.5.3.

¹²⁹ See for example, Paragraph 2 of Article 53(1) Report of the Situation in CAR II, 24 September 2014.

has three broad dimensions: non-bias, non-partisanship and principled decision making.¹³⁰ In relation to non-bias, the prosecutor is expected to avoid making decisions based on the race, gender and ethnicity of the accused person. In addition the three-dimensional prosecutor is expected to have the public interest at heart in every decision whether to prosecute or not.¹³¹ In this instance, it seems that both ICC Prosecutors have tried to operate within the ambits of the ICC legal framework in the exercise of discretion during preliminary examinations.

In terms of non-partisanship, the three-dimensional prosecutor is expected to arrive at decisions, independent of both internal and external forces. In addition, the prosecutor is expected to be objective in weighing evidence before making a decision whether to proceed with an investigation or not. However, the way information was relayed to the public distinguished the procedure of Moreno Ocampo from that of Fatou Bensouda.

A third principle of the theory of neutrality is that prosecutors should base their decisions and activities on readily identifiable and consistently applied criteria.¹³² Bensouda seems to have followed on this principle while the former Prosecutor Moreno Ocampo did not. Although he made some of the decisions public, there was no thorough legal analysis on how the decisions were made, unlike Bensouda, who made public the policy paper and also tried to follow the criteria laid down in the paper.

While both Prosecutors acknowledge that the exercise of discretion during the preliminary examination is within the powers of the ICC Prosecutor, Bensouda has carried out her own examination in a way that more nearly fits the threshold of a three-dimensional prosecutor as discussed by Green and Zacharias.

6.7 Conclusion

Using the theory of neutrality discussed extensively in Chapter two, the analysis of the situations in Uganda and CAR, both self-referrals, shows that the Prosecutor's methods concerning preliminary examinations has evolved over time. The manner in which the preliminary examination in the two situations was handled differed in some important ways. While Moreno Ocampo, the first Prosecutor, was not able to articulate clearly the procedure

¹³⁰ See chapter two, paragraph 2.1

¹³¹ See chapter two, paragraph 2.1.1

¹³² See Chapter two, paragraph 2.1.3

used in the preliminary examination in Uganda and in the CAR Situation I, Fatou Bensouda adopted the policy paper on preliminary examination and showed how she used it to arrive at her actions and decisions in CAR Situation II.

In terms of the substantive decisions taken, this chapter has argued that the Prosecutor was correct in concluding or assuming that both situations concerning Uganda and CAR fell within the jurisdiction of the ICC. Furthermore, the Prosecutor was correct in concluding that the admissibility criteria, namely complementarity and gravity, were met in the CAR situations I and II. However, the chapter has argued that in respect of the Uganda situation, the former Prosecutor failed to substantiate the decision that the crimes committed by government forces did not meet the threshold of gravity needed to trigger ICC jurisdiction and charges.

Regarding the application of the principle whether it was in the interests of justice that the preliminary investigation and full investigation took place, it has been shown that the policy paper adopted by the former Prosecutor holds that there is a difference between the ‘interests of peace’ and ‘interests of justice’, meaning that the Prosecutor is not concerned with peace negotiations and probable outcomes. However, these concepts are related and are difficult to separate in some cases during preliminary examinations.

On the general principles and policy objectives adopted by the Bensouda’s administration, it has been noted that there is a divergence between the activities of the former Prosecutor and the present Prosecutor regarding the policy paper on preliminary examination. One conclusion is that the former Prosecutor did not follow the policy paper on preliminary examination.

It is argued that the ICC Prosecutors applied restrictive interpretations to the provisions of the Rome Statute regarding the principle of positive complementarity during preliminary examinations, especially in Uganda. Since the policy paper was released in November 2013, evaluating the former Prosecutor based on the policy that was adopted by his successor in 2013 for an activity carried out in 2004 may be problematic. However, as already noted in the introductory chapter of this study, the draft policy paper was released in 2010 and contained many of the issues discussed in the current policy.¹³³ Furthermore, the policy paper has its roots in the provisions of the Rome Statute. Therefore, the former Prosecutor clearly

¹³³ Chapter one, paragraph 1.5.

endorsed most of the principles that later became the policy paper on preliminary examination.¹³⁴

The next chapter discusses the preliminary examinations carried in the Sudan and Libya through UNSC referrals. This is pursuant to the provision of the Rome Statute that the UNSC can refer a situation to the ICC acting under Chapter VII of the UN Charter.¹³⁵

¹³⁴ Ibid.

¹³⁵ See chapter one, paragraph 1.6.

Chapter Seven

The UNSC Referrals and the Situations in Sudan and Libya

7.0 Introduction

This chapter examines how the prosecutor exercised discretion regarding the preliminary examinations into the situations in Sudan and Libya. The situation in Sudan was referred to the ICC by the UNSC based on the recommendations of a report commissioned by the UN Secretary-General pursuant to a resolution of the UNSC.¹ On the other hand, the Libya situation was referred to the ICC by the UNSC based on the need to protect lives and properties as a result of the conflict that erupted in Libya. The chapter highlights the similarities and differences in the process of initiating investigations in these two situations.

7.1 UNSC referrals and conflicts in Sudan and Libya

As earlier noted in Chapter four, the UNSC can refer situations to the ICC acting under Chapter VII of the UN Charter.² Although Sudan and Libya are not States not party to the Rome Statute, the UNSC referred them to the ICC Prosecutor for preliminary examinations thereby conferring the Court with jurisdiction.³ At the end of the examinations on the two situations, the ICC Prosecutor decided that there was a reasonable basis to believe that crimes within the jurisdiction of the ICC had been committed in both situations and decided to open investigations into both.

¹ UNSC Resolution 1564 of 18 September 2004; Christine Byron *‘Comment on the International Commission of Inquiry on Darfur to the United Nations’* (2005) 5 *Human Rights Law Review* 351 –360; Mathilde van Haren *‘The Report of the International Commission of Inquiry on Darfur and Genocidal Intent – A Critical Analysis’* (2006) 53 *Netherlands International Law Review* 205 – 245.

² Chapter four, paragraph 4.5.3.

³ *Ibid.*

7.1.1 Background history of the conflict in Darfur, Sudan

The Darfur conflict commenced in February 2003 with the attack and capture of Gulu, the capital of Jebel Marra province by the Sudan Liberation Movement/Army (SLM/A).⁴ The rebels were later joined by the Justice and Equality Movement (JEM) in attacking government soldiers and installations in Darfur, marking the beginning of a conflict that has lasted for a decade. The SLM/A and JEM recorded early victories against the government of Sudan.⁵ The rebels were mainly from the Fur, Massalit and Zaghawa tribes in Darfur.

The attack by the armed opposition on government facilities prompted the Sudanese government to change its strategy by recruiting Janjaweed militias to fight the rebels in a counter-insurgency arrangement.⁶ The militia unleashed terror and unprecedented human rights abuses against the civilian population with the support of the Sudanese military. The abuses involved arson, looting of properties, killing unarmed civilians, raping women and girls as part of a planned and organised attack orchestrated by the Sudanese government in furtherance of its counter-insurgency activities. In the process, several women became pregnant as a result of rape by both government soldiers and Janjaweed militias.⁷

The Sudanese government and the armed rebels have been involved in several peace negotiations. As part of this process, they have signed several peace protocols, declarations and agreements aimed at ending the Darfur conflict.⁸ However, none of these efforts has

⁴ Dawit Toga _The African Union Mediation and the Abuja Peace Talks_ in Alex de Waal (ed) *War in Darfur and the Search for Peace* (2007) 214.

⁵ Usman Tar _Old Conflict, New Complex Emergency: An Analysis of Darfur Crisis, Western Sudan (2006) 15 *Nordic Journal of African Studies* 406 at 417.

⁶ Mamdani *op cit* at 249.

⁷ Paragraph 66 Report of the UN High Commissioner for Human Rights on the Darfur Conflict.

⁸ The Doha Document for Peace in Sudan acknowledges the existence of the following peace agreements: the Humanitarian Ceasefire Agreement on the Conflict in Darfur & Protocol on the Establishment of Humanitarian Assistance in Darfur of 2 and 8 April, 2004, N'Djamena, Chad; the Agreement with the Sudanese Parties on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur of 28 May 2004, Addis Ababa, Ethiopia; the Protocol between the Government of Sudan, The Sudan Liberation Movement / Army and the Justice and Equality Movement on the Improvement of the Humanitarian Situation in Darfur of 9 November, 2004, Abuja, Nigeria; the Protocol between the Government of Sudan, The Sudan Liberation Movement / Army and the Justice and Equality Movement on the Enhancement of the Security Situation in Darfur in accordance with the N'Djamena Agreement of 9 November, 2004, Abuja, Nigeria; the

resulted in the resolution of the conflict. The crimes committed in the Darfur conflict have been called genocide by some people.⁹ Women and children have borne the brunt of the insurgency by Darfur armed movements and the government of Sudan's counter-insurgency, implemented mainly through the Janjaweed militia.¹⁰ The Darfur conflict has been compared to the genocide that occurred in Rwanda in 1994 because of the ethnic nature of the conflict.¹¹ The rebels in the Darfur conflict have also committed atrocities. It was the AU's involvement in the implementation of the Darfur Peace Agreement, which was discredited by the armed movements, that led to the subsequent attack of the AU by the JEM and SLM/A in the town of Haskanita in Darfur.¹²

As already noted, Sudan is not a State Party to the Rome Statute. The Sudanese Government signed the treaty in September 2000 but is yet to ratify it.¹³ However, the Rome Statute

Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur of 5 July, 2005, Abuja, Nigeria; the Darfur Peace Agreement (DPA) of 5 May, 2006, Abuja, Nigeria; the Goodwill Agreement between the Government of Sudan and the Justice and Equality Movement, 17 February 2009, Doha, Qatar; the Framework Agreement between the Government of Sudan and the Justice and Equality Movement, 23 February 2010, Doha, Qatar; the Framework Agreement between the Government of Sudan and the Liberation and Justice Movement, 18 March 2010, Doha, Qatar; the Ceasefire Agreement between the Government of Sudan and the Liberation and Justice Movement, 18 March 2010, Doha, Qatar.

⁹ Colin Powell 'The Crisis in Darfur', testimony before the Senate Foreign Relations Committee Washington, District of Columbia, 9 September, 2004, available online at <http://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm>, accessed 2 March 2016; Glenn Kessler and Colum Lynch 'US Calls Killings In Sudan Genocide', *The Washington Post* Friday, 10 September 2004, available online at <http://www.washingtonpost.com/wp-dyn/articles/A8364-2004Sep9.html>, accessed 2 March 2016; Robert Barnidge 'The United Nations and the African Union: Assessing a Partnership for Peace in Darfur' (2009) 14 *Journal of Conflict & Security Law* 93 - 113.

¹⁰ David Mickler 'Darfur's Dread: Contemporary State Terrorism in the Sudan' in Richard Jackson, Eamon Murphy and Scott Poynting *Contemporary State Terrorism: Theory and Practice* (2010) 35.

¹¹ Rebecca Hamilton *Fighting for Darfur: Public Action and the Struggle to Stop Genocide* (2011) 49.

¹² African Confidential 'AU Investigation of Haskanita Attack in Darfur', October 2007, available online at http://www.africa-confidential.com/special-report/id/18/AU_investigation_of_Haskanita_attack_in_Darfur, accessed 2 March 2016; Abdelbagi Jibril 'Past and Future of UNAMID: Tragic Failure or Glorious Success?' (2010) *Human Rights and Advocacy Network for Democracy Briefing Paper*, 12, available online at http://migs.concordia.ca/links/documents/Past_and_Future_of_UNAMID.pdf, accessed 2 March 2016.

¹³ Lee Stone and Max du Plessis 'The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries', available online at <http://docplayer.fr/12554063-The-implementation-of-the-rome-statute-of-the-international-criminal-court-in-african-countries.html>, accessed 19 September 2016.

provides that the UNSC can refer non-States Parties to the ICC, acting under Chapter VII of the UN Charter.¹⁴ The UNSC referred the Darfur conflict to the ICC on 31 March 2005.¹⁵

7.1.2 Background history to the Libyan conflict

The Arab Spring of 2011 caused the change of government in several Arab countries. However, none was as dramatic and consequential as that of Libya and the involvement of the ICC. Muammar Mohammed Abu Minyar Gaddafi had ruled Libya since 1969, taking power through a *coup d'etat*, and was in control of every facet of Libya through his children and cronies.¹⁶ Gaddafi was accused of human rights abuses and ruling Libya with an iron fist. Protests which initially started in Benghazi snowballed to other cities in Libya and resulted in an armed confrontation between government soldiers loyal to Gaddafi and his children, and the armed opposition movement. The AU and other countries tried to intervene in Libya through peace negotiations but these efforts proved abortive as the armed opposition wanted Gaddafi to leave power entirely. In the process casualties were recorded on both sides of the conflict. The government of Libya also targeted unarmed protesters which resulted in the deaths of civilians.

While the unrest continued in Libya, there were calls for the ICC to intervene. However, the ICC had no basis to intervene at that point as Libya was not a State Party and therefore the ICC had no jurisdiction over the alleged international crimes that were happening in Libya. However, there were possibilities, and this was pointed out by the Prosecutor in a Press Release on 23 February 2011 where he argued, that:

'The decision to do justice in Libya should be taken by the Libyan people. Currently, Libya is not a State Party to the Rome Statute. Therefore, intervention by the ICC on the alleged crimes committed in Libya can occur only if the Libyan authorities accept the jurisdiction of the Court, (through article 12(3) of the Rome Statute). In the absence of such a step, the United Nations Security Council can decide to refer the

¹⁴ See chapter four, paragraph 4.5.3. See also Article 13(b) of the Rome Statute.

¹⁵ UNSC Resolution 1593 of 31 March 2005.

¹⁶ Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI ICC-01/11, 16 May 2011.

situation to the Court. The Office of the Prosecutor will act only after either decision is taken.’¹⁷

The UNSC subsequently referred the situation in Libya from 15 February 2011 to the ICC.¹⁸ In the referral, the UNSC resolved that:

‘The Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.’¹⁹

In addition, the resolution excluded the investigation or prosecution of nationals, current or former officials or personnel from a State outside Libya, that is not a State Party to the Rome Statute for all acts or omissions as a result of the decision of the UNSC unless such exclusive jurisdiction had been waived by the State concerned.²⁰

The UNSC also invited the Prosecutor to address it every six months on actions taken pursuant to the resolution. Furthermore, the resolution also limited the expenses incurred in connection with the referral, including investigations or prosecutions to States Parties to the Rome Statute and those States that wished to contribute voluntarily.²¹

After the referral by the UNSC, the Prosecutor issued another statement welcoming the referral and stating that a preliminary examination would be conducted to ‘decide whether an investigation into alleged crimes against humanity committed in Libya since 15 February 2011 should be opened’.²² This confirms earlier discussions of the rule that, irrespective of how the jurisdiction of the ICC is triggered, there is an obligation by the Prosecutor to

¹⁷ Statement by ICC Prosecutor Luis Moreno-Ocampo on Libya 23 February 2011. The statement by the Prosecutor corroborates our earlier discussion in the study that the ICC can only have jurisdiction over non-States Parties if the country in question accepts the jurisdiction of the Court (as happened in *Cote d’Ivoire*) or the Situation is referred to the ICC by the UNSC acting under Chapter VII of the UN Charter.

¹⁸ UNSC Resolution 1970 (2011) adopted 26 February 2011.

¹⁹ *Ibid*, paragraph 5.

²⁰ *Ibid*, paragraph 6.

²¹ *Ibid*, paragraph 8.

²² Statement by the Office of the Prosecutor on situation in Libya on 28 February 2015.

conduct a preliminary examination to decide whether there are reasonable grounds to believe that crimes within the jurisdiction of the Court have been committed.²³ This inquiry relates to the issues of jurisdiction, admissibility (complementarity and gravity) and interests of justice as already discussed in Chapter four of the study.²⁴ These are discussed extensively below.

7.2 Preliminary examinations in Darfur and Libya conflicts

Both preliminary examinations under review in this chapter were conducted by the former ICC Prosecutor, Moreno Ocampo.

7.2.1 The Prosecutor and jurisdiction in Sudan

The Sudanese government has consistently contested the exercise of jurisdiction over Sudanese nationals by the ICC.²⁵ However, the ICC clearly has jurisdiction over the crimes committed in Darfur since these crimes were committed after the entry into force of the Rome Statute.²⁶ The referral by the UNSC states that the investigations of the Prosecutor should cover events that happened after 1 July 2002.²⁷ The fact that Sudan was not a State party to the Statute raises the issue whether Sudan was and is bound by the decisions of the UNSC.

The Statute provides that situations of States not party to the treaty can be referred to the ICC.²⁸ This is clearly what happened in the case of Sudan. However, Sudan has claimed that it is not bound by a statute that it has not ratified. This argument is based on the Vienna Convention on the Law of Treaties (VCLT), which provides that a ‘treaty does not create either obligations or rights for a third State without its consent’.²⁹ However, since Sudan is a member of the UN, it is bound by the decision of the UNSC when acting under Chapter VII

²³ See Chapter four, paragraph 4.5.2.

²⁴ See Chapter four, paragraph 4.4 - 4.7.

²⁵ Laura Barnett ‘The International Criminal Court: History and Role’, 4 November 2008, Canadian Parliamentary Information and Research Service, 22.

²⁶ Article 11 (1) of the Rome Statute.

²⁷ Paragraph 7 of the UNSC Res 1593.

²⁸ Article 13(b) of the Rome Statute.

²⁹ Article 34 of the Vienna Convention on the Law of Treaties 1969.

of the UN Charter.³⁰ Membership of the UN in this instance presupposes acceptance of the decisions of the UNSC in the maintenance of international peace and security. In addition, as a signatory to the Rome Statute, Sudan is bound not to take actions that defeat the object and purpose of the treaty.³¹ Furthermore, the UN Charter clearly states that Member States of the UN ‘agree to accept and carry out the decisions of the Security Council’ in accordance with the provisions of the Charter.³²

At the conclusion of the preliminary examination three months after the UNSC referred the matter to his office, the former Prosecutor decided to open an investigation.³³ In deciding to proceed with an investigation, the former Prosecutor argued that he had consulted several documents from other sources and interviewed 50 experts on the Darfur conflict.³⁴ This may be considered an explanation for the length of time it took the Prosecutor to decide whether to open an investigation in the Darfur conflict.

Based on the information that was available, the Prosecutor concluded that there was a reasonable basis to proceed with an investigation.³⁵ The Prosecutor reiterated that his investigation into the Darfur conflict would be ‘impartial and independent, focusing on the individuals who bear the greatest criminal responsibility for crimes committed in Darfur’.³⁶ The decision to proceed with an investigation was announced through a one-page press release without dealing substantially with the statutory factors considered during preliminary examination.³⁷ The first report of the Prosecutor to the UNSC, however, listed the factors

³⁰ Dapo Akande ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities’ (2009) 7 *Journal of International Criminal Justice*, 333 – 352.

³¹ Article 18 of the VCLT. See also Renee Dopplick ‘Sudan: ICC Prosecutor to Charge a Sitting Head of State’ *Inside Justice Postings* 11 July 2008, available online at <http://www.insidejustice.com/law/index.php/intl/2008/07/11/p89>, accessed 2 March 2016.

³² Article 25 of the UN Charter. See also Dapo Akande ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1 *Journal of International Criminal Justice* 618 – 650; Dapo Akande ‘Are there Limits to the Powers of the Security Council?’ (2007) 5 *Journal of International Law & Policy*, 2 – 11.

³³ ICC ‘The Prosecutor of the ICC Opens Investigation in Darfur’, 6 June 2005, ICC-OTP-0606-104.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

considered during preliminary examinations,³⁸ but the report was not clear on how the ICC legal framework was applied in arriving at the decision to proceed with an investigation. In the report presented to the UNSC, it is not clear how jurisdiction, admissibility and interests of justice were applied in making a determination to proceed.³⁹

7.2.2 The Prosecutor and jurisdiction in Libya

Jurisdiction is an important aspect of preliminary examination and the Prosecutor has to be satisfied that temporal, subject-matter, and either territorial or personal jurisdiction standards are satisfied before an investigation can commence.⁴⁰ It will be recalled that the ICC entered into force in July 2002 and the crimes in question took place in February 2011. This clearly shows that the requirement of jurisdiction *rationae temporis* was satisfied.⁴¹

As to whether the crimes suspected to have been committed in Libya fall within the subject matter jurisdiction of the ICC, in the report to the UNSC pursuant to Resolution 1970, the Prosecutor argued that there were reasonable grounds to believe that crimes against humanity had been committed in Libya.⁴² In addition, the Prosecutor argued that war crimes had been committed when the conflict developed into a non-international armed conflict.⁴³

³⁸ First Report of the Prosecutor of the ICC to the Security Council pursuant to UNSC 1593 (2005) 29 June 2005.

³⁹ OTP Press Release on Darfur *op cit*.

⁴⁰ Chapter four, paragraph 4.4.

⁴¹ Chapter four, paragraph 4.4.3. See also Article 11 of the Rome Statute.

⁴² These include murder under Article 7(1)(a) of the Rome Statute; Imprisonment or other severe deprivation of physical liberty under Article 7(1)(e) of the Rome Statute; Other inhumane acts under Article 7(1)(k) of the Rome Statute; Torture under Article 7(1)(f); Persecution under Article 7(1)(h) of the Rome Statute; Rape under Article 7(1)(g) of the Rome Statute and Deportation or forcible transfer under Article 7(1)(d) of the Rome Statute. See Paragraphs 11 - 12 of the First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSC Resolution 1970 (2011).

⁴³ The Prosecutor argued that the following War Crimes were committed during the conflict: Violence to life and person, under Article 8(2)(c)(i) of the Rome Statute; intentionally directing attacks against civilians not taking a direct part in hostilities under Article 8(2)(e)(i) of the Rome Statute and Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives, under Article 8(2)(e)(iv) of the Rome Statute. See Paragraph 12 of the First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSC Resolution 1970 (2011).

Another determination that has to be made is whether crimes within the jurisdiction of the Court were committed on the territory of a State Party or by the national of a State Party.⁴⁴ As already noted, Libya is not a State Party to the Rome Statute, However, the Statute provides that the UNSC can refer States not party to the ICC acting under Chapter VII of the UN Charter.⁴⁵ Therefore, it can be concluded with regard to article 25 of the UN Charter that UNSC Resolution 1970 is binding on Libya as a member of the UN Charter. This resolution empowers the ICC to exercise jurisdiction over the situation in Libya regarding the events of February 2011.⁴⁶

7.2.3 The Prosecutor and complementarity in Sudan

As already noted, the inquiry into the admissibility of a situation involves inquiries into complementarity and gravity.⁴⁷ In relation to the Sudan, the Prosecutor announced the decision to conduct a preliminary examination into the situation in Sudan in June 2005.⁴⁸ In the statement, the Prosecutor argued that there was ‘sufficient information to believe that there are cases that would be admissible in relation to the Darfur situation’.⁴⁹ The Prosecutor also pointed out that the decision was not an indictment of the Sudanese legal system, but based on the absence of domestic criminal proceedings relating to the situation.⁵⁰

However, the Government of the Sudan in the same month of June 2005 announced the establishment of the Special Criminal Court for Events in Darfur (SCCED) in response to the announcement by the Prosecutor about the opening of investigations in Darfur.⁵¹ The jurisdiction of SCCED included acts constituting crimes under the Sudanese Penal Code and other penal codes, charges relating to violations cited in the report of the Commission of

⁴⁴ See Chapter four, paragraph 4.4.

⁴⁵ See Chapter four, paragraph 4.5.3; Article 13 (b) of the Rome Statute.

⁴⁶ Paragraph 50 of the Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11, 16 May 2011.

⁴⁷ See Chapter four, paragraph 4.6.

⁴⁸ See ICC ‘Letter to Judge Claude Jorda from the Prosecutor of the ICC’, 1 June 2005.

⁴⁹ Report of the Prosecutor to the UNSC at 4.

⁵⁰ Ibid.

⁵¹ See Letter dated 18 June 2005 from the *Charge d’affaires* a.i of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council S/2005/403, 22 June 2005, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2005/403, accessed 27 January 2014; See also UN Office for the Coordination of Humanitarian Affairs - Integrated Regional Information Networks (IRIN) ‘Sudan: Judiciary Challenges ICC over Darfur Cases’, 24 June 2005.

Inquiry, and any charges pursuant to any other law, as determined by the Chief Justice of Sudan.⁵² Furthermore, in November 2005, the Sudan established two additional chambers for the SCCED and created special investigative committees to oversee the activities of SCCED.

These bodies were the Judicial Investigations Committee, the Special Prosecutions Commissions, the Committees against Rape, the Unit for Combating Violence against Women and Children and the Committee on Compensation.⁵³ These committees aimed at addressing the crimes in Darfur.⁵⁴ The Decree that established the SCCED was amended in November 2005 to include ‘international humanitarian law’ in the jurisdiction of the SCCED while two additional seats were established for Nyala and El Geneina.⁵⁵

At the time preliminary examinations were conducted on the Darfur situation, Sudan had not conducted any trials relating to the referral by the UNSC. This is because cases brought before the SCCED did not mirror the international crimes committed in Darfur. In fact, the cases at SCCED were seen as a ploy by the Sudanese government to circumvent ICC’s jurisdiction.⁵⁶

Later on, several other developments occurred in the Sudanese criminal justice system. For example, in 2009, Sudan amended its Criminal Act of 1991 through the efforts of the Arab League, introducing international crimes into the Sudanese Penal Code.⁵⁷ Despite this development, there are still flaws in the Sudanese criminal justice system. For example, the Armed Forces Act of 2007, while criminalising serious violations of international humanitarian law and human rights law, also provides for immunity to members of the armed forces which can only be waived by the President.

⁵² Article 5 of the Decree Establishing the Special Criminal Court on the Events in Darfur, June 7, 2005 reprinted in UN Document S/2005/403.

⁵³ ICC ‘Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)’ 14 June 2006.

⁵⁴ Suliman Baldo ‘Sudan: Impact of the Rome Statute and the International Criminal Court’, June 2010 International Centre for Transitional Justice Briefing Paper on the Review Conference, 3.

⁵⁵ Omer Elagab ‘The Darfur Situation and the ICC: An appraisal’ (2008) 1 *Journal of Politics and Law* 43 – 60.

⁵⁶ HRW ‘Lack of Conviction: The Special Criminal Court on the Events in Darfur’ June 2006.

⁵⁷ Paragraph 15 of the Prosecutor’s statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)’ 4 December 2009.

The Sudanese Criminal Procedure Act (CPA) prohibits investigations and proceedings outside Sudan for any citizen that may have committed the crimes in the amended 2009 Criminal Act of 1991. The CPA also prohibits anyone in Sudan from assisting in the extradition of any Sudanese for the prosecution of war crimes, crimes against humanity and genocide.⁵⁸ Sudan did not meet the threshold established by the Rome Statute for the Prosecutor to decide not to proceed with an investigation. In addition, some of the efforts embarked upon by the Sudanese government occurred after the Prosecutor had already decided to proceed with an investigation. Therefore in the evaluation of evidence during preliminary examination in Sudan, the activities carried out by the Sudanese government do not in any way affect the decision to proceed with an investigation.

From the foregoing, it is clear that the Sudanese legal system did not meet the complementarity test to the extent that at the time the preliminary examination was conducted, there was no evidence that it was investigating any of the crimes that the ICC Prosecutor had indicated interest in pursuing.

7.2.4 The Prosecutor and complementarity in Libya

The Prosecutor during preliminary examination has to consider whether the case is or would be admissible under article 17 of the Rome Statute.⁵⁹ Admissibility is divided into complementarity and gravity. Complementarity is the process through which the Prosecutor defers to national jurisdictions in the investigation and prosecution of international crimes.⁶⁰

In the Libya situation, the Prosecutor argued that, based on the preliminary examination carried out, the situation was admissible because there were no ongoing investigations or prosecutions by any State in relation to the conflict in Libya. The Prosecutor argued that the case was of sufficient gravity to justify any action by the Court.⁶¹ In the report to the UNSC, the Prosecutor stated that both Gaddafi and his son Sayf Al-Islam had called for the establishment of a national commission to investigate the protests and unrest, including a UN commission to investigate the origin and consequences of the conflict. However, none of

⁵⁸ Baldo *op cit* at 3.

⁵⁹ Chapter four, paragraph 4.6.

⁶⁰ Chapter four, paragraph 4.6.1.

⁶¹ Paragraph 51 of the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11, 16 May 2011.

these materialized during the period under study.⁶² Clearly, the situation was admissible, as there was no credible evidence that the Libyan government was investigating the crimes allegedly committed during the unrest.

7.2.5 The Prosecutor and gravity in Sudan

As already noted in Chapter four, gravity is a factor to be considered during preliminary examination.⁶³ However, the report of the Prosecutor to the UNSC centred on the issue of complementarity. There is no mention of gravity regarding admissibility issues. This confirms that at the initial stages of developing the criteria for conducting preliminary examinations, gravity did not play any important role in the factors identified by the Prosecutor.⁶⁴ However, this omission does not by itself contradict the fact that the gravity of the crimes committed in the Darfur conflict meets the gravity requirements of the ICC. The following reports discussed below are used to illustrate the gravity of the crimes committed in the Darfur conflict.

In May 2004, the United Nations High Commissioner for Human Rights (UNHCHR) released a report which concluded that war crimes and crimes against humanity were committed by the Sudanese soldiers and the Janjaweed militia armed by the government as part of its counter-insurgency campaign.⁶⁵ According to the UNHCHR, '[i]n certain areas of Darfur, the Janjaweed have supported the regular armed forces in attacking and targeting civilian populations suspected of supporting the rebellion, while in other locations it appears that the Janjaweed have played the primary role in such attacks with the military in support'.⁶⁶ The report of the UNHCHR recommended the setting up of an international commission of inquiry to determine the culpability of the Sudanese government in relation to the crimes committed in Darfur.⁶⁷

⁶² Paragraph 13 of the Prosecutors Report to the UNSC on the Libyan Situation.

⁶³ Chapter four, paragraph 4.6.2.

⁶⁴ William Schabas 'Prosecutorial Discretion v Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 731 at 737; Ray Murphy 'Gravity Issues and The International Criminal Court' (2006) 17 *Criminal Law Forum* 281 – 315; Mohamed El Zeidy 'The Gravity Threshold under the Statute of the International Criminal Court' (2008) 19 *Criminal Law Forum* 35 – 57.

⁶⁵ Report of the United Nations High Commissioner for Human Rights and Follow Up to the World Conference on Human Rights: Situation of human rights in the Darfur region of the Sudan' E/CN.4/2005/3 7 May 2004.

⁶⁶ Ibid at 6.

⁶⁷ Paragraph 103 UNHCR report on Darfur *op cit* .

In the same month under review in 2004, the African Charter on Human and Peoples' Rights (ACHPR) adopted a resolution deploring 'on-going gross human rights violations in the Darfur region of Sudan'.⁶⁸ The resolution welcomed the decision of the Sudanese government to facilitate a fact-finding mission by the ACHPR to carry out on-the-spot assessment of human rights abuses in Darfur.⁶⁹ The ACHPR fact-finding mission took place in July 2004.⁷⁰ In the report issued in September 2004, the ACHPR confirmed that the Darfur conflict commenced when two rebel groups, SLM/A and the JEM, took up arms against the Sudanese government.

The ACHPR Darfur report noted that the counter-insurgency campaign of the government exacerbated the conflict as the Sudanese government recruited Janjaweed militia that targeted civilians with the support of Sudanese military officers.⁷¹ The report found that all parties to the conflict had committed human rights abuses, but stated that the Janjaweed were responsible for the massive human rights violations of those living in the IDPs camps.⁷² The report further found that attacks by the Sudanese soldiers and allied Janjaweed militias on the civilian population amounted to war crimes and crimes against humanity.⁷³

The report recommended that the government of Sudan 'should disarm all irregular armed groups, in particular the Janjaweed militia, the Pashtun, the Torabora, the Pashmerga, and any such militias operating illegally within Darfur'.⁷⁴ It called on the government of Sudan

⁶⁸ ACHPR 'Resolution on Darfur' adopted during the 35th Ordinary Session of the ACHPR held in Banjul from 21st May – 4th June 2004, in Banjul, The Gambia, available online at <http://www.achpr.org/sessions/35th/resolutions/68/>, accessed 2 March 2016. The African Commission on Human and Peoples' Rights (ACHPR) established by the African Charter was adopted in 1981 in Banjul, The Gambia. The ACHPR has contributed to the promotion and protection of human rights in the continent despite some limitations. The human rights violations in Darfur have been of interest to the ACHPR during its public sessions. The ACHPR has adopted several resolutions and statements on human rights developments in Darfur since the beginning of the conflict.

⁶⁹Ibid.

⁷⁰ ACHPR 'Report of the African Commission on Human and Peoples' Rights' Fact-Finding Mission to the Republic of Sudan' EX.CL/364 (XI) Annex III, available at http://www.achpr.org/files/sessions/41st/mission-reports/sudan/misrep_factfind_sudan_2004_eng.pdf, accessed 2 March 2016..

⁷¹ Ibid, paragraph 110.

⁷² Ibid, paragraph 121.

⁷³ Ibid, paragraph 123.

⁷⁴ Ibid, paragraph 141.

and the rebel movements to consider human rights abuses and humanitarian situation on the civilian population, arising out of the delay in adopting a peace agreement on the Darfur conflict.⁷⁵ The report concluded by calling on the government of Sudan and the rebel movements to resolve their differences through negotiations, in the interest of peace and for the protection of victims in Darfur.⁷⁶ It recommended the setting up of an international commission of inquiry to investigate government officials in the military and police including Janjaweed militias in relation to international crimes committed in Darfur.⁷⁷

The report was presented to the AU without any follow up from the Commission and nothing was heard about the report thereafter. The report highlighted serious violations of human rights that took place in Darfur. It is also noteworthy that the report concluded categorically that war crimes and crimes against humanity had been committed in Sudan. However, it did not elaborate on the elements of war crimes and crimes against humanity committed in Darfur.⁷⁸ Furthermore, the report requested the Sudanese government to investigate the crimes allegedly committed in Darfur, protect its citizens and hold those responsible for the crimes accountable.

Another report that discussed the Darfur conflict is the report of the International Commission of Inquiry on Darfur (ICID).⁷⁹ Some of the main responsibilities of the ICID were to find out if the crime of genocide had been committed, identify the perpetrators, and recommend appropriate action to ensure accountability that will end impunity.⁸⁰ The ICID's report confirmed the ethnic nature of the conflict by stating that the _vast majority of the

⁷⁵ Ibid, paragraph 153.

⁷⁶ Ibid,

⁷⁷ Ibid, paragraph 137.

⁷⁸ See for example Elements of Crimes of the ICC available online at <http://www2.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>, accessed 2 March 2016.

⁷⁹ The ICID was set-up pursuant to the UNSC Resolution 1564 of 18 September 2004.

⁸⁰ The ICID's terms of reference were: (1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide have occurred; (3) to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur; and (4) to suggest means of ensuring that those responsible for such violations are held accountable. See the ICID report.

victims of all of these violations are from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called ‘African’ tribes.’⁸¹

The report stated that though the government of Sudan had not pursued a policy of genocide in its counter-insurgency campaign, ‘in some instances individuals, including government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis’.⁸² The report further stated that it was for ICC judges to determine whether the allegations by the Prosecutor could be proved or not. Furthermore, the ICID argued that the determination that no genocide had occurred should not detract from the fact that crimes against humanity and war crimes had been committed in Darfur Sudan, as ‘international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide’.⁸³

The Janjaweed militias have been accused of complicity with the government forces to commit international sex crimes of mass rape and other sexual crimes in Darfur. The ICID found several incidents of mass rape and sexual crimes committed against women and girls in Darfur.⁸⁴

In addition, the ICID stated that international sex crimes committed in Darfur may have been under-reported owing to the sensitive nature of the issue.⁸⁵ The ICID report also recommended that the UNSC refer the Darfur conflict to the ICC, asserting that the referral would help restore peace in the region. A list of those allegedly responsible for the crimes in Darfur was forwarded to the Secretary-General of the UN in a sealed envelope for onward transmission to the ICC or a competent prosecutor to ensure accountability.

A combination of these reports may have swayed the Prosecutor in the decision to proceed with an investigation. This is because these reports clearly argue that the gravity of the crimes committed in Darfur met the threshold in the Rome Statute. Therefore, it can be safely

⁸¹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004 Geneva, 25 January 2005, available online at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf, accessed 2 March 2016.

⁸² Paragraph 641 of the ICID Report, 2005.

⁸³ Executive Summary II of the ICID Report.

⁸⁴ Paragraph 334 of the ICID Report 2005.

⁸⁵ Paragraph 336 ICID Report 2005.

concluded that although the Prosecutor did not discuss the issue of gravity, the reports discussed above which the Prosecutor had access to prove that the crimes in issue had met the gravity threshold.

7.2.6 The Prosecutor and gravity in Libya

Regarding the issue of gravity in Libya, the Prosecutor argued that in referring the situation to the ICC, the UNSC highlighted the gravity of the situation which clearly meets the threshold criteria of gravity required by Rome Statute.⁸⁶ In relation to other elements of gravity, the Prosecutor was of the opinion that the required gravity was met. For instance, regarding the manner and nature of the crimes, the Prosecutor argued that shooting at peaceful protesters in Tripoli and other cities in Libya were systematic, following the same *modus operandi* in multiple locations and executed through Libyan security forces. In addition, the Prosecutor argued that the persecution of protesters appeared to be systematic and implemented in different cities while war crimes were apparently committed as a matter of policy.⁸⁷

With regard to the scale of the conflict, the Prosecutor argued that the efforts to cover up the crimes by the Libyan government made it difficult to ascertain the precise number of victims. This is because dead bodies were removed from streets and hospitals and buried secretly. In addition, medical personnel were not allowed to document the number of dead and injured persons admitted to the hospitals after the violent clashes between government forces and protesters began.⁸⁸ Furthermore, security forces were allegedly stationed in the hospitals and arrested injured protestors who sought medical treatment. The Prosecutor also argued that there was information showing that some protestors sought medical attention in private homes and did not bring injured or dead persons to the hospitals to avoid arrest and victimisation. Furthermore, victims of rape were reportedly arrested and subjected to harassment by security forces.⁸⁹

The Prosecutor concluded that the total number of persons that died during the conflict is up to 10 000, according to the Libyan Interim National Council (INC). In addition, the

⁸⁶ Paragraph 16 of the Report to the UNSC.

⁸⁷ Paragraph 17 of the Report to the UNSC.

⁸⁸ Paragraph 18 of the Report to the UNSC.

⁸⁹ Ibid.

Prosecutor further argued that more than 50 000 persons were wounded, according to the INC.⁹⁰ Furthermore, the Prosecutor stated that the number of those displaced included approximately 535 000 migrant workers, refugees and asylum seekers, and 327 342 Libyans internally displaced as estimated by the UN. However, other organizations place the total of those displaced at 475 000.⁹¹

7.2.7 The interests of justice in Sudan

The interest of justice requirement is a vital component of preliminary examinations. The interest of justice principle is considered by the Prosecutor when there is a positive determination of jurisdiction and admissibility.⁹² The Prosecutor argued that the concept of interests of justice should not be perceived to embrace all issues related to peace and security.⁹³ The Prosecutor further argued that when there is a conflict between the interests of justice and interests of peace, the best way to seek for a deferral is through article 16 of the Rome Statute.⁹⁴ However, the report of the Prosecutor to the UNSC did not go into detail regarding the interactions between peace and justice in the Darfur conflict. Although the AU has requested that the UNSC defer the referral in the interests of justice, the UNSC is yet to act on the request.⁹⁵

Regarding the interests of justice, the UNSC Resolution 1593 contemplates alternative justice mechanisms to complement criminal prosecutions in the resolution of the Darfur conflict. The resolution:

'Emphasises the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes

⁹⁰ Paragraph 19 of the Report to the UNSC.

⁹¹ Paragraph 20 of the Report to the UNSC

⁹² Chapter four, paragraph 4.7.

⁹³ Paragraph 67 of the Policy Paper on Preliminary Examinations

⁹⁴ Ibid. See also Kenneth Rodman 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court' (2009) 22 *Leiden Journal of International Law* 99 at 120.

⁹⁵ Benson Olugbuo 'The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa' (2014) 7 *African Journal of Legal Studies*, 351–379.

and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary.⁹⁶

Undoubtedly, the UNSC has an important role to play regarding the invocation of article 16 of the Rome Statute to suspend the activities of the ICC. However, this action does not effectively remove the powers conferred on the ICC Prosecutor.

The Prosecutor may be justified by insisting that issues relating to peace should be handled only by the UNSC in relation to UNSC referrals. Peace and justice should be complementary and not mutually exclusive in resolving the on-going Darfur conflict. Some scholars have argued that the intervention of the ICC in the Darfur conflict would derail peace negotiations and resolution of the conflict.⁹⁷ The AU has also called on the UNSC to defer the ICC referral using article 16 of the Rome Statute.⁹⁸ However, article 16 of the Statute does not suspend the prosecutorial discretion granted to the Prosecutor in article 53 of the Statute. At the time of conducting the preliminary examination, there was no evidence to show that the initiation of an investigation was not in the interests of justice.

7.2.8 The interests of justice in Libya

In the Libyan situation, the Prosecutor decided that there were no serious reasons to believe that the investigation would not serve the interests of justice.⁹⁹ The Prosecutor is not expected to show reasons why an investigation is not in the interest of justice. The interests of justice are only considered when the requirements of jurisdiction and admissibility are met.¹⁰⁰ While jurisdiction and admissibility are positive requirements, the interests of justice provide a potentially countervailing consideration that may give a reason not to proceed. As earlier

⁹⁶ Paragraph 5 of UNSC resolution 1593.

⁹⁷ Julie Flint and Alex de Waal 'To Put Justice before Peace Spells Disaster for Sudan', 5 March 2009, *The Guardian*, available online at <http://www.guardian.co.uk/commentisfree/2009/mar/06/sudan-war-crimes>, accessed 6 August 2012; Julie Flint and Alex de Waal 'Justice Off Course In Darfur', 28 June 2008 *The Washington Post*, available online at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062702632.html>, accessed 2 March 2016.

⁹⁸ Paragraph 11 of the Communiqué of the 142nd Meeting of the Peace and Security Council, PSC/MIN/Comm (CXLII); Simon Weldehaimanot 'Arresting Al-Bashir: The African Union's Opposition and the Legalities' (2011) 19 *African Journal of International and Comparative Law* 208 -235.

⁹⁹ Paragraph 21 of the Report of the UNSC.

¹⁰⁰ Paragraph 67 of the Policy Paper on Preliminary Examinations.

noted, the Prosecutor is not required to establish that an investigation serves the interests of justice. Rather, the Prosecutor has argued that she will proceed unless there are specific circumstances which provide substantial reasons to believe that the interests of justice are not served by an investigation at that time.¹⁰¹ It is also argued that the referral by the UNSC shows that the conflict was a threat to international peace and security and therefore it can only be in the interest of justice for investigations to commence.

From the foregoing, it is clear that the factors within the ICC framework, namely; jurisdiction, admissibility (complementarity and gravity) and the interests of justice were met during the preliminary examinations conducted in Sudan and Libya. It is also important to note that the involvement of the UNSC raised the stakes of the conflict. This is because a referral by the UNSC presupposes a threat to international peace and security.

7.3 General principles during preliminary examinations

As noted in Chapter two of the study, there is a correlation between the theory of neutrality adopted in this study and the general principles developed by the office of the Prosecutor.¹⁰² While the theory of neutrality is concerned with non-bias, non-partisanship and principled decision making, the general principles during preliminary examinations discuss independence, impartiality and objectivity. It is submitted that these attributes of a three-dimensional neutral prosecutor are interchangeable and will be discussed bearing in mind the theory of prosecutorial neutrality extensively discussed in Chapter two, and policies adopted by the ICC Prosecutor discussed in chapter five of the study. Furthermore, it is important to recall that the theory of neutrality was originally conceptualised for the American criminal justice system. However, the theory was retooled in Chapter two to accommodate proceedings at the ICC noting the similarities and differences between the domestic and international criminal justice systems.

7.3.1 The Prosecutor and independence in Sudan

The independence of the Prosecutor in the Darfur conflict is not in question. Despite the fact that the situation was referred by the UNSC, the Prosecutor conducted an independent assessment of evidence available to determine whether there was a reasonable basis to

¹⁰¹ Ibid.

¹⁰² Chapter two, paragraph 2.1

proceed with an investigation. The Prosecutor argued that the materials submitted by the ICID were not binding on him, and this is correct. The Statute provides that “[a] member of the office shall not seek or act on instructions from any external source.”¹⁰³ An argument can be made that since the UNSC referred the matter to the ICC, it will ultimately determine how proceedings will be carried out. This is far from the truth. The mere fact that the UNSC referred the Darfur conflict to the ICC does not remove the Prosecutor’s discretion in conducting the preliminary examinations.¹⁰⁴ This means that the UNSC cannot defer a preliminary examination, but can only defer an investigation or prosecution of an international crime.¹⁰⁵

7.3.2 The Prosecutor and independence in Libya

The activities of the Prosecutor in Libya were directly influenced by the UNSC referral.¹⁰⁶ This is not a problem as the Rome Statute provides that the UNSC can refer a matter to the Prosecutor acting under Chapter VII of the UN Charter.¹⁰⁷ The Rome Statute provides that the Prosecutor shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.¹⁰⁸ However, there is nothing in the conduct of the former Prosecutor to show that he was not independent in the preliminary examination conducted in Libya and the subsequent decision to open an investigation. However, an issue that should be raised is whether the subsequent indictments issued by the Prosecutor reflect the level of crimes committed in Libya.

For instance, the International Commission of Inquiry on Libya clearly identified three parties to the conflict and made specific recommendations regarding the activities of the Gaddafi forces, members of the armed opposition and NATO officials. The report confirmed that the Gaddafi forces had committed various violations of international humanitarian law

¹⁰³ Article 42(1) of the Rome Statute.

¹⁰⁴ Rules 104 and 105 RPE.

¹⁰⁵ Chapter four, paragraph 4.5.3.

¹⁰⁶ As already noted in the study, the former ICC Prosecutor had initially issued a statement to the effect that he could only act through a UNSC referral or if the Libyan government accepted the jurisdiction of the Court.

¹⁰⁷ Chapter four, paragraph 4.5.3.

¹⁰⁸ Article 42 of the Rome Statute.

which amounted to war crimes.¹⁰⁹ In addition, the report stated that the armed opposition during the Libyan conflict committed war crimes and crimes against humanity during the conflict.¹¹⁰ The report pointed out too that there had been no investigation into the violations committed by the armed opposition.¹¹¹ Regarding the activities of NATO forces in Libya the report of the commission was ambivalent and recommend further investigation in relation to the activities of NATO.¹¹²

However, there is no further information from the Prosecutor on the activities of the armed opposition and those of NATO. It may be rightly argued that since the preliminary examination in the Libyan conflict was conducted in less than a week, these activities happened after the Prosecutor had made a determination to commence investigation. However, the Rome Statute provides that the Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.¹¹³ In fact, the decision to proceed with an investigation means that the Prosecutor had the discretion to investigate all sides to the conflict.

7.3.3 The Prosecutor and impartiality in Sudan

As already noted in Chapter five, impartiality involves a fair-minded and objective treatment of persons and issues, free from any bias or influence.¹¹⁴ Under the theory of neutrality, it is discussed as non-bias in decision making.¹¹⁵ This is because the exercise of prosecutorial discretion during preliminary examinations must adhere to internationally recognised human rights, and be without any adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, birth or other

¹⁰⁹ Paragraph 119 of the Report of the International Commission of Inquiry on Libya.

¹¹⁰ Ibid, paragraph 120.

¹¹¹ Ibid.

¹¹² The Commission stated that 'NATO conducted a highly precise campaign with a demonstrable determination to avoid civilian casualties. For the most part they succeeded. On some limited occasions the Commission confirmed civilian casualties and found targets that showed no evidence of military utility. The Commission was unable to draw conclusions in such instances on the basis of the information provided by NATO and recommends further investigations' See Paragraph 122 of the Report of the International Commission of Inquiry on Libya.

¹¹³ See Article 53(4) of the Rome Statute.

¹¹⁴ Chapter five, paragraph 5.4.2.

¹¹⁵ Chapter two, paragraph 2.1.1.

status.¹¹⁶ The fact that the Darfur situation was referred by the UNSC may have made the determination easier than is the case in a *proprio motu* referral. This is because the Prosecutor has also charged both parties to the conflict for international crimes committed during the conflict.

7.3.4 The Prosecutor and impartiality in Libya

Although the situation referred by the UNSC to the Prosecutor is the Libyan Situation, only individuals allied to Gaddafi have been indicted by the ICC. However, there is a clear case that has been made against the National Transitional Council, showing that they committed crimes within the jurisdiction of the Court. For instance the International Commission of Inquiry on Libya expressed its deep concern that no investigation or prosecutions were instigated into the crimes committed by the National Transitional Council.¹¹⁷ This statement is supported by Kevin Heller who argues that the National Transitional Council committed crimes within the jurisdiction of the ICC and should have been investigated.¹¹⁸

7.3.5 The Prosecutor and objectivity in Sudan

The former Prosecutor seems to have been objective in the Darfur conflict to the extent that he gave both the Sudanese government and rebels opportunities to send materials relating to the conflict to his office.¹¹⁹ Furthermore, beyond the preliminary examination stage, the Prosecutor investigated both sides to the conflict. For example, the Prosecutor presented five cases involving seven defendants.¹²⁰ In the case of the *Prosecutor v Ahmad Muhammad Harun* ('Ahmad Harun') and *Ali Muhammad Ali Abd-Al-Rahman* ('Ali Kushayb'), the

¹¹⁶ Ibid.

¹¹⁷ Paragraph 37 of the Report of the International Commission of Inquiry on Libya A/HRC/19/68, 8 March 2012.

¹¹⁸ Kevin Heller 'The International Commission of Inquiry on Libya: A Critical Analysis.' In: Meierhenrich, Jens, (ed.), *International Commissions: the Role of Commissions of Inquiry in the Investigation of International Crimes*. (2016) Oxford: Oxford University Press (Forthcoming), 1-51, available online at <http://ssrn.com/abstract=2123782>, accessed 19 September 2016.

¹¹⁹ See Paragraph 33 of the Policy Paper on Preliminary Examinations.

¹²⁰ *The Prosecutor v Ahmad Muhammad Harun* ('Ahmad Harun') and *Ali Muhammad Ali Abd-Al-Rahman* ('Ali Kushayb') ICC-02/05-01/07; *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09; *The Prosecutor v Bahar Idriss Abu Garda*, ICC-02/05-02/09; *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09; *The Prosecutor v Abdel Raheem Muhammad Hussein*, ICC-02/05-01/12.

defendants were charged with war crimes and crimes against humanity.¹²¹ The Prosecutor made an application for warrants of arrest against them in February 2007 and Pre-Trial Chamber I issued the warrants in April 2007.¹²²

In the *Prosecutor v Omar Hassan Ahmad Al Bashir*, the defendant was charged with crimes against humanity, war crimes and genocide.¹²³ Warrants of arrest were issued against him in March 2009¹²⁴ and July 2010.¹²⁵ In the *Prosecutor v Abdel Raheem Muhammad Hussein*, the accused was charged with crimes against humanity and war crimes.¹²⁶ All the accused persons in the three cases are currently at large and the Sudanese government has refused to arrest and surrender them to the ICC despite repeated demands.¹²⁷ The charges all relate to the activities of the Sudanese forces and Janjaweed militia in Darfur.

The Prosecutor alleged that the rebel groups fighting the government of Sudan have committed international crimes. In the *Prosecutor v Bahar Idriss Abu Garda*, the defendant was charged with war crimes under article 25(3)(a) of the Statute. He appeared before the Court after a summons to appear was issued against him.¹²⁸ Pre-Trial Chamber I refused to confirm charges against him¹²⁹ and rejected the Prosecutor's application for leave to appeal

¹²¹ICC *Situations – Darfur, Sudan*, June 2005.

¹²² See Warrant of Arrest for Ahmad Harun in *the Prosecutor v Ahmad Harun ('Ahmad Harun') and Ali Muhammad Al Abd-Al-Rahman ('Ali Kushayb')*, 27 April 2007, ICC-02/05-01/07; Warrant of Arrest for Ali Kushayb in *the Prosecutor v Ahmad Harun ('Ahmad Harun') and Ali Muhammad Al Abd-Al-Rahman ('Ali Kushayb')*, 27 April 2007, ICC-02/05-01/07.

¹²³ICC *Situations – Darfur*, June 2005.

¹²⁴ Warrant of Arrest for Omar Hassan Ahmad Al Bashir in *the Prosecutor v Omar Hassan Ahmad Al Bashir*, 4 March 2009, ICC-02/05-01/09.

¹²⁵ Second Warrant of Arrest for *Omar Hassan Ahmad Al Bashir* in 12 July 2010, No ICC-02/05-01/09

¹²⁶ See Warrant of Arrest for Abdel Raheem Muhammad Hussein in the *Prosecutor v Abdel Raheem Muhammad Hussein*, 1 March 2012, ICC-02/05-01/12.

¹²⁷ ICC *Seventeenth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSC 1593 (2005) 5 June 2013 (Seventeenth Report of the Prosecutor to the UNSC)*; Paragraph 17 of the UNSC Resolution 2091 (2013) 14 February 2013, S/RES/2091 (2013) which *call[s]* on the Government of Sudan to fulfil all its commitments, including lifting the state of emergency in Darfur, allowing free expression and undertaking effective efforts to ensure accountability for serious violations of international human rights and humanitarian law, by whomsoever perpetrated.'

¹²⁸ See Summons to Appear for Bahar Idriss Abu Garda in *Prosecutor v Bahar Idriss Abu Garda* 7 May 2009, ICC-02/05-02/09.

¹²⁹ Decision on the Confirmation of Charges in *Prosecutor v Bahar Idriss Abu Garda*, 8 February, 2010, ICC-02/05-02/09.

the decision.¹³⁰ In the *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, the accused persons were charged with war crimes.¹³¹ Pre-Trial Chamber I confirmed the charges against them in March 2011.¹³²

The Defence team of Saleh Mohammed Jerbo Jamus recently notified the Court of his death during an attack in North Darfur.¹³³ However, the Prosecutor decided to keep his name on the charge sheet until there is official confirmation of his death.¹³⁴ The decision of the Prosecutor to open investigations in Sudan after preliminary examinations cannot be faulted because of the gravity of crimes that were committed. In addition, the fact that the UNSC referred the matter may have worked to the advantage of the Prosecutor. However, discussions below will assess how the Prosecutor used the policy objectives of the office to make a decision.

7.3.6 The Prosecutor and objectivity in Libya

As already discussed in Chapter five, objectivity relates to the ability of the Prosecutor to investigate both incriminating and exonerating circumstances equally in order to establish the truth in a situation before the ICC.¹³⁵ From the discussions above, it is not clear that the Prosecutor has been objective in the preliminary examination conducted in Libya as the preliminary examination carried out in Libya only considered the crimes committed by the Gaddafi government but not those of the National Transitional Council. The report of the commission of inquiry on Libya clearly shows this lack of objectivity.¹³⁶

¹³⁰ Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’‘ 23 April 2010, ICC-02/05-02/09.

¹³¹ ICC ‘Situations – Darfur, Sudan, June 2005.

¹³² See Corrigendum of the ‘Decision on the Confirmation of Charges’ in the *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, 7 March 2011, ICC-02/05-03/09.

¹³³ See Public Redacted Version of ‘Defence Notification of the Death of Mr. Saleh Mohammed Jerbo Jamus on 21 April 2013, 23 April 2013, ICC-02/05-03/09; British Broadcasting Corporation ‘Darfur War Crimes Suspect Rebel Jerbo – Killed in Sudan’, 24 April 2013.

¹³⁴ Paragraph 13 of the Seventeenth Report of the Prosecutor to the UNSC.

¹³⁵ Chapter five, paragraph 5.4.3; Article 54(1) of the Rome Statute; Regulation 34(1) OTP Regulations.

¹³⁶ Paragraph 60 – 64 of the Report of the International Commission of Inquiry on Libya.

7.4 Policy objectives during preliminary examinations

The policy objectives are part of the policies adopted by the Prosecutor in the policy paper on preliminary examinations.¹³⁷ These policies are also similar to the theory of neutrality adopted in the study and are discussed extensively in Chapter two.¹³⁸

7.4.1 The Prosecutor and transparency in Sudan

The former Prosecutor was not adequately transparent during the preliminary examination carried out in the Darfur conflict, as he failed to issue any situation specific reports except the presentation made to the UNSC. Although it could be argued that there is no legal requirement on the Prosecutor to inform the public about ICC proceedings during preliminary examinations, the onus is on the Prosecutor to be transparent to the fullest extent possible.¹³⁹ As already noted, the current Prosecutor, Fatou Bensouda has made transparency a core responsibility of her office, which means that there is a clear change in policy between Moreno Ocampo and Fatou Bensouda.¹⁴⁰

7.4.2 The Prosecutor and transparency in Libya

It is argued that there was a restricted level of openness during the preliminary examination. It seems the Prosecutor relied more on the referral of the UNSC and other external sources to conduct the preliminary examination in Libya. For example, regarding the gravity of the situation in Libya, the Prosecutor argued that _in referring the situation in Libya to the ICC, the UN Security Council has highlighted the gravity of the situation. It clearly meets the threshold of gravity required by the ICC Statute, taking into account all relevant criteria.¹⁴¹ However, the Rome Statute does not expect the Prosecutor to rely on the referral by the

¹³⁷ Chapter five, paragraph 5.5.

¹³⁸ Chapter two, paragraph 2.1 - 2.1.3

¹³⁹ Chapter five, paragraph 5.5.1.

¹⁴⁰ Ibid.

¹⁴¹ Paragraph 16 of the First Report of the Prosecutor of the International Criminal Court to the UNSC Pursuant To UNSCR 1970 (2011); See also Paragraph 50 of the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi.

UNSC as the basis for a decision to proceed with an investigation. Rather, the Prosecutor is expected to analyse the situation taking into consideration the provisions of article 53 of the Rome Statute. Furthermore, the Prosecutor took less than one week to reach a decision to commence with an investigation, while it has taken longer periods in other situations discussed in this study.¹⁴² Although the length of time of conducting a preliminary examination is not an important criterion, it can be argued that the ICC Prosecutor should take a reasonable time to conduct the examination..¹⁴³

7.4.3 The Prosecutor and ending impunity through positive complementarity in Sudan

The Prosecutor did not articulate the potentials of positive complementarity in the decision to proceed with an investigation in the Sudanese conflict. A case can be made for the application of positive complementarity in Sudan. The UNSC Resolution 1593 that referred the Darfur conflict to the ICC arguably supported the application of positive complementarity. For instance, the Resolution urges all States and concerned regional and international organisations to cooperate fully with the ICC.¹⁴⁴ This recognises that co-operation between the ICC and the AU is vital for effective investigation and prosecution of international crimes in Africa. It also suggests that there should be a shared burden between the ICC and the AU to ensure co-operation between them.

In analysing Resolution 1593 and the promotion of positive complementarity at the regional level, the words of the Resolution are pertinent. It *invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity.¹⁴⁵ The possibility of conducting proceedings in the region can be given three different interpretations. The first interpretation is that the AU should facilitate the work of the ICC in the investigation and prosecution of

¹⁴² See Annexure I for the approximate periods of conducting preliminary examinations in other countries in Libya and other countries.

¹⁴³ See Grotius Centre for International Legal Studies 'Preliminary Examination and Legacy/Sustainable Exit: Reviewing Policies and Practices' 26 October 2015, available at http://postconflictjustice.com/wp-content/uploads/2015/10/Report-Preliminary-Examination-and-Legacy_Sustainable-Exit_Reviewing-Policies-and-Practices.pdf, accessed 1 March 2016.

¹⁴⁴ Paragraph 2 of UNSC Resolution 1593 of 2005.

¹⁴⁵ Paragraph 3 of the UNSC Resolution 1593 of 2005.

international crimes in Africa. This can be achieved using the relationship agreement that is yet to be concluded, or through a memorandum of understanding that can be reviewed regularly.¹⁴⁶

The second argument is that the AU can assist or empower Sudan to carry out investigations and prosecutions of international crimes in Sudan in collaboration with the ICC. This can either be possible through the hybrid court recommended by the AUHLPD or the proposed Chambers of the African Court of Justice on Human and Peoples' Rights (ACJHPR).¹⁴⁷ The third interpretation is that the ICC and the AU can work out modalities of carrying out *in situ* trials on the continent. The plan for the AU to set-up a criminal chamber to investigate and prosecute international crimes committed in Africa supports the UNSC resolution that referred the Darfur conflict to the ICC. However, this conclusion does not deny that there are several issues yet to be resolved regarding the proposed hybrid court and criminal chambers of the ACJHPR. None of these were possible options for the Prosecutor at the time the assessment on preliminary examination was made and actually speaks to the discretion exercised by the Prosecutor. However, since the ICC is a Court of last resort, the Prosecutor

¹⁴⁶ Article 87(6) of the Rome Statute.

¹⁴⁷ The AU has started the process of extending the jurisdiction of the ACJHPR to adjudicate over international crimes committed in Africa. The proposal which is now at an advanced stage, has elicited several reactions from different segments of the society in Africa and abroad. While there are supporters of the decision, some scholars argue that the process has not benefitted from wider consultations on the viability of the project. See generally: AU *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 15 May 2012; Max du Plessis, Antoinette Louw and Ottilla Maunganidze *African Efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions*, ISS Paper 241, November 2012; Avocats Frontieres *Africa and the International Criminal Court: Mending Fences*, July 2012; Ademola Abass *The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects* (2013) 60 *Netherlands International Law Review* 27-50; Martin Matasi and Jürgen Bröhmer *The Proposed International Criminal Chamber Section of the African Court of Justice and Human Rights: A Legal Analysis*, 20 March 2013; Max Du Plessis *A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes*, 27 August 2012; Frans Viljoen *AU Assembly should consider Human Rights Implications before Adopting the Amending Merged African Court Protocol*, Africa Law, 23 May 2012; Max du Plessis *Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes*, June 2012, Institute for Security Studies Paper No 235; Chidi Odinkalu *Concerning the Criminal Jurisdiction of the African Court – A Response to Stephen Lamony*, 19 December 2012; Stephen Lamony *African Court not Ready for International Crimes*, 10 December 2012; Drew Mitnick *African Union Considers Proposals to Add International Criminal Jurisdiction to the Pan-African Court*, *Human Rights Brief*, 3 April 2013; Frans Viljoen *AU Assembly should consider Human Rights Implications before Adopting the Amending Merged African Court Protocol*, Africa Law, 23 May 2012..

has a responsibility to ensure that local remedies, where they exist, should be encouraged and explored.

7.4.4 The Prosecutor and ending impunity through positive complementarity in Libya

As has already been discussed in this study, complementarity is the hallmark of the Rome Statute. It encourages national judicial systems to carry out investigations and prosecutions of international crimes that occurred within their jurisdiction.¹⁴⁸ On the other hand, positive complementarity refers to the policy of co-operation between the ICC and States party to the treaty, aimed at promoting national proceedings.¹⁴⁹ However, the period within which the Prosecutor carried out preliminary examination did not give room for the application of positive complementarity. The issue then is whether the Prosecutor should have allowed for more time in Libya to see whether it was possible to conduct genuine investigations and prosecutions as required by the Statute. Since the Rome Statute is silent on the time it will take to complete a preliminary examination, it is at the discretion of the Prosecutor, and depends on the available evidence and urgency of the situation to decide when to complete a preliminary examination.

7.4.5 The Prosecutor and prevention of international crimes in Darfur

The extent to which the preliminary examination carried out in the Darfur conflict prevented international crimes is subject to debate. It may be argued that the involvement of the ICC exacerbated the conflict and even put civilians at a greater risk when the Sudanese government expelled humanitarian workers because of the ICC indictment.¹⁵⁰ The procedure itself was not made public. The only information that was made available to the public regarding the preliminary examination carried out in Darfur was the report presented to the UNSC by the Prosecutor. Therefore, it is safe to conclude that the Prosecutor did not perform any early warning function with the preliminary examination carried out in the Darfur

¹⁴⁸Chapter five, paragraph 4.6.1.

¹⁴⁹ Ibid.

¹⁵⁰ Liv Tønnessen 'From Impunity to Prosecution? Sexual Violence in Sudan beyond Darfur' (2012) *Norwegian Peacebuilding Resource Centre* 1- 10.

conflict. The preliminary examination in Darfur was not used to put perpetrators on notice or to promote national proceedings in Sudan.¹⁵¹

7.4.6 The Prosecutor and prevention of international crimes in Libya

The Prosecutor's ability to prevent crimes in Libya during the preliminary examination was limited by time and circumstances. First, Libya was not a State Party to the Rome Statute and therefore, the ICC has no jurisdiction over crimes committed in Libya except with the UNSC resolution. Second, the four days' window used to complete the preliminary examination did not give room for any effect. In addition, the Prosecutor did not make public the findings of the examination and the reasoning behind it. It is only the first report to the UNSC mandated by resolution 1970 that the Prosecutor used to discuss the preliminary examination. In summary, the process did not contribute to the prevention of international crimes in Libya.

7.6 Conclusion

This chapter has looked at the manner in which prosecutorial discretion exercised by the ICC during preliminary examination is informed by the law and other legal principles and policy objectives adopted by the ICC Prosecutor, in recognition of the theory of prosecutorial neutrality.

The chapter has argued that the UNSC has the power to refer States not party to the ICC as provided by the Rome Statute. In addition, the ICC legal framework provides for the conduct of preliminary examination irrespective of how the jurisdiction of the ICC was activated. The involvement of the UNSC under Chapter VII of the UN Charter was significant on its own and therefore indicated that the two situations were threats to international peace and stability.

The chapter has shown that there was evidence that legal factors like jurisdiction, admissibility (complimentarity and gravity) and interests of justice were met during the preliminary examinations conducted by the ICC Prosecutor. However, it is argued that the Prosecutor did not adhere to some of the policies and principles adopted by the office in the exercise of discretion during preliminary examination. These include the policies on interests

¹⁵¹ See Paragraph 106 of the Policy Paper on Preliminary Examinations.

of justice, positive complementarity and using the preliminary examination as a preventive mechanism against the commission of crimes within the jurisdiction of the court.

Despite the controversial nature of the UNSC referrals of the Darfur and Libyan conflicts, it could be argued that the referrals have strengthened the activities of the ICC. This is because the involvement of the UNSC gave the conflicts and the activities of the ICC a global attention. The chapter agrees with the decision of the Prosecutor that the crimes committed in the Darfur and Libyan conflicts meet the gravity threshold established in the Statute. One cannot but agree with the Prosecutor that there was a reasonable basis to proceed with investigations.

As has been discussed in this chapter, the interpretation of the interests of justice by the Prosecutor has necessitated abandoning the peace negotiations that were organised to end the Darfur conflict. None of them has proved to be successful so far and most of the recent ones took place after the decision to proceed with an investigation. However, in Libya the limited time of conducting the preliminary examination did not give room to activate national proceedings through positive complementarity.

The Prosecutor did not provide enough information on how the preliminary examinations were conducted and the information that is readily available is contained in the reports submitted to the UNSC which are unfortunately limited in content and analysis of issues involved. Regarding the jurisdiction of the Court over the crimes committed in Darfur and Libya, it is evident that though Sudan and Libya are not States party to the Statute, the referrals by the UNSC satisfy the jurisdiction threshold as UN members are under an obligation to carry out the decisions of the UNSC. Besides, the Rome Statute makes provision for the referral.

The next chapter discusses the Kenyan and *Côte d'Ivoire* Situations and the decisions of the prosecutor to proceed with an investigation. Both Situations were initiated by the Prosecutor using the *proprio motu* powers in article 15 of the Rome Statute.

Chapter Eight

Prosecutorial Discretion and *Proprio Motu* Referrals in Kenya and Côte d'Ivoire

8.0 Introduction

This chapter focuses on the last two case studies, the situations in Kenya and Côte d'Ivoire - both of which are *proprio motu* referrals. The nature of the inquiry is that discussed in the last two chapters. It is to determine whether the ICC Prosecutor exercised his discretion correctly or in a manner that can be defended in both these situations. Of all the three procedures through which situations are referred to the ICC, *proprio motu* referral is the most controversial. There have been several developments in the Kenya and Côte d'Ivoire situations that bring into focus the prosecutorial discretion exercised during preliminary examinations. After a brief discussion of the post-election violence in both countries and the preliminary examinations conducted by the Prosecutor, this chapter discusses whether the prosecutor applied the ICC legal framework, principles and policies correctly in the decision to open investigations in Kenya and Côte d'Ivoire.

8.1 The 2007-8 post-election violence in Kenya and the ICC referral

Kenya experienced unfortunate post-election violence from late 2007 to early 2008. Although the 2007 elections were primarily responsible for the post-election violence, it has been argued that it reflected deeper historical and material inequalities that have trailed Kenya since its independence.¹ Several unsuccessful efforts were made to end the conflict, both within and outside the continent.² Finally, the African Union Panel of Eminent African

¹ Muthoni Wanyeki 'The International Criminal Court's Cases in Kenya: Origin and Impact' (2012) *Institute for Security Studies Paper* No 237, 1; Gabrielle Lynch and Zgonec-Rozej 'The ICC Intervention in Kenya' (2013) Chatham House, AFP/ILP 2013/01; Report from the Office of the High Commissioner for Human Rights Fact-Finding Mission to Kenya, 6-28 February 2008; HRW 'Ballots to Bullets: Organised Political Violence and Kenya's Crisis of Governance' March 2008 Vol 20, No 1 (A), Africa Report No 137.

² Elisabeth Lindenmayer and Josie Kaye 'A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya', August 2009, International Peace Institute, 1-2.

Personalities (AUPEAP) led by the former Secretary-General of the United Nations, Mr. Kofi Annan, spearheaded the mediation process that ultimately ended the violence.³

At the end of the negotiations, the parties signed an agreement which led to the establishment of a coalition government through the adoption of the National Accord and Reconciliation Act, 2008.⁴ Mwai Kibaki of the Party of National Unity (PNU) retained his position as President of Kenya and Raila Odinga of the Orange Democratic Movement (ODM) became Prime Minister.⁵ The Kenya National Dialogue and Reconciliation (KNDR) agreement also recommended the setting up of the Commission of Inquiry into Post-Elections Violence (CIPEV) answerable to the AU and acceptable to both parties of the conflict.⁶ The CIPEV was chaired by Justice Philip Waki of the Kenyan judiciary and was assisted by international human rights and security experts from Australia and the DRC.⁷

The CIPEV report stated that ‘the post-election violence was spontaneous in some geographic areas and a result of planning and organisation in other areas, often with the involvement of politicians and business leaders’.⁸ The CIPEV recommended the setting up of a Special Tribunal for Kenya ‘to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya’.⁹ The CIPEV also recommended that the Special Tribunal should apply Kenyan law and the International Crimes Act and be staffed with local and international personnel.¹⁰ The CIPEV further recommended that the Special Tribunal be anchored on the Constitution of Kenya to ensure that it is ‘insulated against objections of constitutionality’.¹¹

In the proposed Bill for the establishment of the Special Tribunal, the Special Tribunal was expected to have four organs: the Chamber, the Prosecutor, the Registry and the Defence

³ Ibid.

⁴ The National Accord and Reconciliation Act, 2008.

⁵ Stephen Brown and Chandra Sriram ‘The Big Fish won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya’ (2012) 111 *African Affairs* 244 - 245.

⁶ Kenya National Dialogue and Reconciliation ‘Commission of Inquiry on Post-Election Violence’, 4 March 2008.

⁷ Muthoni Wanyeki *op cit* at 6.

⁸ The Report of the Commission of Inquiry into the Post-Election Violence (CIPEV Report) VIII.

⁹ Ibid at 472.

¹⁰ Ibid, at 471.

¹¹ Ibid, at 473.

Office.¹² The CIPEV report also provided procedures for appointing the judges of the Chamber, the Prosecutor and the registrar of the Special Tribunal for Kenya.¹³

The report recommended that the jurisdiction of the Special Tribunal should be the adjudication of cases brought against individuals who committed international crimes during the 2007-2008 post-election violence.¹⁴ The CIPEV argued against publicly releasing the names of the perpetrators.¹⁵ In addition, the CIPEV report provided that if Kenya failed to set up the Special Tribunal, the list of individuals alleged to be responsible for the crimes committed during the post-election violence should be forwarded to the Prosecutor of the ICC for subsequent investigation and prosecution of the crimes committed in Kenya.¹⁶

The proposed Special Tribunal faced several hurdles.¹⁷ Different attempts to create the Special Tribunal in 2009 failed because Kenyan parliamentarians could not garner the quorum needed to amend the Constitution and adopt the draft bill setting up the Tribunal.¹⁸ It was also obvious that some of the law-makers were not interested in accountability as they were afraid that they could be indicted by the Special Tribunal.¹⁹ After several delays and the failure to set up accountability mechanisms as agreed with the AUPEAP, Kofi Annan handed over the sealed list to the ICC Prosecutor for further action.²⁰ This set the stage for the intervention of the ICC Prosecutor in the situation.

8.1.1 The 2010 post-election violence and Côte d'Ivoire's referral

The Government of Côte d'Ivoire accepted the jurisdiction of the ICC through a declaration pursuant to article 12(3) of the Rome Statute. The initial declaration which was accepted during the government of former President Laurent Gbagbo related to crimes committed in

¹² Ibid, at 474.

¹³ Ibid.

¹⁴ Ibid, at 475.

¹⁵ Ibid, at 18.

¹⁶ Ibid, at 473.

¹⁷ Ben Rawlence and Nick Daniels '100% Waki', 28 November 2008.

¹⁸ Open Society Foundations: Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya (2011) New York: Open Society Foundations, 97; HRW 'Kenya: Swiftly Enact Special Tribunal - International Criminal Court Should Be a Last Resort for Justice' 25 March 2009.

¹⁹ Sam Omwenga 'Will Kenya be governed from The Hague?' *The Star*, 17 November 2012,.

²⁰ Xan Rice 'Annan hands ICC list of perpetrators of post-election violence in Kenya', *The Guardian*. 9 July 2009,

the country from 16 September 2002.²¹ However, after the events that led to the removal of Laurent Gbagbo from office, President Alassane Ouattara re-confirmed the declaration made by Gbagbo on 18 December 2010. According to the Human Rights Council:

'The refusal of former President Gbagbo to give up power after being defeated in the presidential elections of 28 November 2010 plunged *Côte d'Ivoire* into an unprecedented political crisis marked by grave and massive violations of human rights and international humanitarian law. There were many reports of extra-judicial and summary executions, rape, acts of torture and other cruel, inhuman and degrading treatment, enforced disappearances, arbitrary arrests and detentions, attacks against religious buildings, and act of intimidation, harassment and extortion.'²²

The UNSC also adopted a resolution in which it deplored the conflict in *Côte d'Ivoire* and called on Laurent Gbagbo to step aside and hand over power to Alassane Ouattara.²³ The AU set-up a High Level Panel that recommended a Government of National Unity under the leadership of Alassane Ouattara. However, the proposal was rejected by President Gbagbo's government. Subsequently, clashes erupted between forces loyal to Gbagbo and Ouattara, leading to human rights abuses and international crimes committed by both sides of the conflict. Forces loyal to Ouattara, with the help of French soldiers and UN officials, later arrested Laurent Gbagbo and placed him in protective custody.

After Alassane Ouattara became the legitimate President of *Côte d'Ivoire*, he wrote to the Prosecutor of the ICC in May 2011 requesting the involvement of the Court in investigating and prosecuting those responsible for the crimes committed after the general elections.²⁴ The Prosecutor started a preliminary investigation to determine whether there was a reasonable basis to open an investigation and concluded that the statutory criteria established by the Rome Statute to open an investigation were met in the *Côte d'Ivoire* situation.

²¹ ICC _OTP Report of Preliminary Examination 2011_ 13 December 2011, 1 – 25.

²² Human Rights Council _Report of the International Commission of Inquiry on Côte d'Ivoire_ A/HRC/17/48, 1 July 2011 paragraph 1.

²³ UNSC Resolution 1975 (2011) SC/10215 adopted 30 March 2011.

²⁴ Situation in the Republic of Cote d'Ivoire - Request for Authorisation of an Investigation pursuant to article 15 of the Rome Statute, ICC-02/11, 23 June 2011.

The Prosecutor requested for authorisation from the Pre-Trial Chamber III in June 2011 to open an investigation into the situation in *Côte d'Ivoire*.²⁵ In the request for authorisation, the Prosecutor argued that the threshold for the activation of the jurisdiction of the ICC had been met, based on the level of violence.²⁶

The request for authorisation covered crimes committed within *Côte d'Ivoire* from 28 November 2010. Pre-Trial Chamber III granted the authorisation to the Prosecutor in October 2011.²⁷ The Chamber stated that the ICC had jurisdiction to entertain the case as Côte d'Ivoire had lodged a declaration accepting the jurisdiction of the Court. The Court also stated that crimes committed during the non-international armed conflict were within the jurisdiction of the Court.

8.2 The preliminary examinations in Kenya and *Côte d'Ivoire*

This section reviews the manner in which the Prosecutor exercised jurisdiction in the two preliminary examinations using the criteria that were set out in Chapters 6 and 7. As with the previous four case studies, this analysis will help to determine whether the Prosecutor exercised his/her discretion properly and hence whether there was a reasonable basis upon which the decisions to open the investigations was made. As already discussed in Chapter four, the main criteria relate to jurisdiction, admissibility (complementarity and gravity) and the interests of justice.²⁸

8.2.1 Jurisdiction in Kenya

As already noted in previous chapters, preliminary examinations are carried out by the Prosecutor of the ICC to determine whether there is a reasonable basis to proceed with an

²⁵ Ibid.

²⁶ See Ibid, where the ICC Prosecutor argued that the '[v]iolence has reached unprecedented levels in the aftermath of the presidential election held on 28 November 2010. There is a reasonable basis to believe that at least 3000 persons were killed, 72 persons disappeared, 520 persons were subject to arbitrary arrest and detentions and there are over 100 reported cases of rape while the number of unreported incidents is believed to be considerably higher.'

²⁷ Situation in the Republic of Cote d'Ivoire - Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire ICC-02/11, 3 October 2011.

²⁸ Chapter four, paragraph 4.4 - 4.7.

investigation.²⁹ The period of preliminary examination in the Kenya situation was approximately 21 months.³⁰ During this period the Prosecutor examined the legal factors provided in article 53 of the Rome Statute and used the general principles and policy objectives developed in the office as evaluation tools.³¹

A key decision of the Prosecutor to proceed with an investigation in the Kenya is the request for authorisation to open investigation submitted to Pre-Trial Chamber II in November 2009.³² The Prosecutor informed Pre-Trial Chamber II (PTC II) that his preliminary examination was based on reliable public documents that discussed in detail Kenya's post-election violence.³³ The Prosecutor alleged that both parties to the post-election violence had committed international crimes including murder, rape and other forms of sexual violence, deportation or forcible transfer of population and other inhumane acts.³⁴ In addition, he addressed both admissibility and interests of justice issues relating to the post-election violence.

Kenya is a State Party to the Rome Statute, having signed the treaty in August 1999 and deposited its instrument of ratification in March 2005.³⁵ Kenya is also one of the few countries that have domesticated the Rome Statute.³⁶ The transformation of the Rome Statute into Kenyan law was part of the recommendations of the Waki Commission and therefore took place only after the post-electoral violence referred to earlier.³⁷

Since the violence involving international crimes took place between 2007 and 2008, the ICC clearly has jurisdiction over the incidence and that citizens of Kenya who were involved in

²⁹ See Chapter one, paragraph 1.2; Chapter four, paragraph 4.4.

³⁰ Paragraph 5, Request for authorisation of an investigation pursuant to Article 15, *Situation in the Republic of Kenya*, ICC-01/09, 26 November 2009. This is from 5 February 2008 when the Prosecutor officially announced his office was monitoring the Kenyan Situation to 26 November 2009 when the Prosecutor requested for authorization to open an investigation. See ICC _OTP statement in relation to events in Kenya The Hague, 5 February 2008 (Hereafter _Request for authorisation of an investigation pursuant to Article 15').

³¹ See chapters three and four.

³² Request for authorisation of an investigation pursuant to Article 15.

³³ Ibid.

³⁴ Request for authorisation of an investigation pursuant to Article 15.

³⁵ ICC _Kenya', 16 March 2005,.

³⁶ See *Kenya International Crimes Act, 2008*.

³⁷ Antonina Okuta _National Legislation for Prosecution of International Crimes in Kenya' (2009) 7 *Journal of International Criminal Justice*, 1063-1076.

the violence are subject to the jurisdiction of the ICC.³⁸ It is therefore not surprising that the Prosecutor concluded that crimes committed during Kenya's post-election violence fell within the jurisdiction of the ICC, *ratione materiae*, *ratione temporis* and *ratione personae*, as laid down in Article 12 of the Rome Statute.³⁹

Regarding jurisdiction *ratione materiae*, the determination by PTC II that crimes against humanity were committed in Kenya is significant. The Kenya situation is the first one for which the Court approved a request by the Prosecutor to initiate an investigation based on Article 15 of the Statute.⁴⁰ However, the decision of the Court raises questions regarding the characterisation of the crimes committed during the post-election violence. Such characterisation goes to the root of the discretion exercised by the Prosecutor to initiate the investigations in Kenya.

The majority judgment that authorised the opening of the investigation held that crimes falling within the jurisdiction of the ICC had been committed in Kenya. In particular, they held that 'organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population'.⁴¹ In reaching this decision, the judges relied on decisions of the ICC,⁴² the ad-hoc tribunals⁴³ and commentaries of scholars.⁴⁴

³⁸ Chapter four, paragraph 4.4.

³⁹ Paragraph 47 of the request for authorisation of an investigation pursuant to Article 15.

⁴⁰ Kirsten Ainley 'The International Criminal Court on Trial' (2011) 24 *Cambridge Review of International Affairs* 309 at 312.

⁴¹ See paragraph 92 of the decision on the request for authorisation. The majority judgment further argued that if 'the drafters of the Statute intended to exclude non-State actors from the term "organization", they would not have included this term in article 7(2)(a) of the Statute.'

⁴² Paragraph 81 of Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, available online at <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>, accessed 10 July 2013.

⁴³ Paragraph 98 of the *Prosecutor vs Dragoljub Kunarac and others* IT-96-23 & IT-96-23/1-A, 12 June 2002; para 653 of *Prosecutor v Tadic*, Case No IT-94-1-T, 'Judgment', 7 May 1997. See also Gerhard Werle and Boris Burghardt 'Do Crimes against Humanity Require the Participation of a State or a 'State-like' Organisation?' (2012) 10 *Journal of International Criminal Justice*, 1151 at 1165 – 66.

⁴⁴ Machteld Boot, Rodney Dixon and Christopher Hall 'Article 7' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2 ed (2008) 236.

Had the Prosecutor characterised the crimes as ordinary crimes punishable within the national judicial system, the Prosecutor's role would have been limited to how Kenyan courts would investigate and prosecute the crimes. However, the fact that PTC II and Appeals Chamber of the ICC held that crimes committed in Kenya met the definition of international crimes means that the judges were persuaded by the Prosecutor's submissions.

Curiously, Judge Kaul wrote a dissenting judgment regarding the elements of crimes against humanity, doubting whether these elements were actually fulfilled and whether the majority decision had paid sufficient attention to this issue before authorising the initiation of investigation. His dissent was based on a difference of opinion between him and the majority regarding the interpretation of article 7(2)(a) of the Statute.⁴⁵ Judge Kaul was of the view that there was no nexus between the individual act of a perpetrator (specific crime) and the attack (contextual element) mentioned in the Rome Statute.⁴⁶ In addition, he said that 'State or organisational policy' is a legal requirement of a crime against humanity and there was no clear evidence of this in the Kenyan situation.⁴⁷

He further held that downgrading the requirements for crimes against humanity to ordinary serious crimes that should be prosecuted by Kenya would expand the jurisdiction of the ICC to the extent that it would become over-burdened and over-stretched in its activities.⁴⁸

⁴⁵ Article 7(2)(a) of the Rome Statute provides that '[a]ttack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.' See Thomas Hansen 'The Policy Requirement in Crimes against Humanity: Lessons from and for the case of Kenya' (2011) 43 *The George Washington International Law Review* 1 – 41.

⁴⁶ Paragraph 22 of the dissenting judgment of Judge Hans Peter Kaul in Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr. The crux of Judge Kaul's dissent is that —Article 7(2) (a) of the Statute, which sets out the legal definition of 'attack directed against any civilian population' as constitutive contextual element of crimes against humanity, and my examination of the Prosecutor's Request and supporting material, including the victims' representations, have led me to conclude that the acts which occurred on the territory of the Republic of Kenya do not qualify as crimes against humanity falling under the jurisdictional ambit of the Court. I have concluded in particular that there is no reasonable basis to believe that crimes, such as murder, rape and other serious crimes, were committed in an 'attack against any civilian population' 'pursuant to or in furtherance of a State or organizational policy to commit such attack', as required by article 7(2)(a) of the Statute."

⁴⁷ Ibid paragraph, 32.

⁴⁸ Paragraph 10 of Dissenting Opinion of Judge Hans-Peter Kaul in Decision on the Authorisation of an Investigation.

Regarding the relationship between international crimes and ordinary crimes, Judge Kaul argued that '[t]he qualitative requirement of 'State or organisational policy' in article 7(2)(a) of the Statute distinguishes crimes against humanity from other common crimes which are to be prosecuted at the national level only.'⁴⁹

Judge Kaul further stated the issue is not whether serious crimes were committed during the post-election violence that occurred in Kenya but whether the ICC is the right forum for the investigation and prosecution of the crimes.⁵⁰ This thesis adopts the minority judgment of Judge Kaul which means that the violence did not meet the legal requirements of 'State and organisational policy' provided in the Statute. This in effect means that the characterisation of the crimes committed in Kenya omitting the 'State and organisational policy' and discretion exercised by the Prosecutor elevated the crimes punishable under Kenyan laws to international crimes under the Statute.

After the PTC II had authorised the prosecutor to commence investigations in relation to the crimes committed in Kenya, the Prosecutor requested summons against six Kenyans in December 2010 as provided in the Statute.⁵¹ He alleged that there were reasonable grounds to believe that the defendants had committed crimes within the jurisdiction of the ICC, necessitating the issuance of summonses to answer to the charges.⁵²

In March 2011, PTC II issued summonsed the six defendants to appear.⁵³ However, Judge Kaul issued a second dissenting opinion from the decision of the majority, reiterating his earlier stance that the ICC lacked jurisdiction to hear the cases because crimes committed

⁴⁹ Paragraph 54 of Dissenting Opinion of Judge Hans-Peter Kaul in Decision on the Authorisation of an Investigation.

⁵⁰ Paragraph 6 of Dissenting Opinion of Judge Hans-Peter Kaul in Decision on the Authorisation of an Investigation.

⁵¹ Article 58(7) of the Rome Statute.

⁵² See Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang ICC-01/09, 15 December 2010; Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ICC-01/09, 15 December 2010..

⁵³ Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ICC-01/09-02/11, 8 March 2011; Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang ICC-01/09-01/11, 8 March 2011..

during the post-election violence did not amount to crimes against humanity.⁵⁴ At the end of the confirmation hearing, PTC II confirmed charges against four of the six defendants summonsed to appear before the ICC while Judge Kaul dissented from the decision of the majority.⁵⁵

Although the Prosecutor concluded during preliminary examination that there was reasonable basis to proceed with an investigation, the majority and minority arguments in the decision to authorise the investigation reveal the on-going debate on whether the crimes that occurred in Kenya were indeed crimes against humanity. The reliance of the PTC II on the decisions of the ad-hoc tribunals to find that the crimes do not have to result from State or organisational policy in order for them to be crimes against humanity is significant for the jurisprudence of the ICC. This is because the Rome Statute makes it clear that decisions of the ad-hoc tribunals are not binding on the ICC.⁵⁶ Furthermore, the elements of crimes of the ICC clearly supports the conclusion that ‘State or organisational policy’ is indeed a requirement in defining crimes against humanity.⁵⁷

For the purposes of this study, the discretion exercised by the Prosecutor is within the powers granted in the Rome Statute. The decision of the judges was either to confirm or disagree with the dispositions of the Prosecutor.

⁵⁴ Paragraph 2 of the Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's ‘Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang’ ICC-01/09-01/11, 15 March 2011; paragraph 2 of Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's ‘Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali’ ICC-01/09-02/11, 15 March 2011.

⁵⁵ Confirmation hearings take place before trials. See Art 61 of the Rome Statute. In the Situation in Kenya, the ICC confirmed charges against William Samoei Ruto; Joshua Arap Sang; Francis Kirimi Muthaura and Uhuru Muigai Kenyatta. The charges against Henry Kiprono Kosgey and Mohammed Hussein Ali were rejected and dismissed. See Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (*The Prosecutor v William Samoeiruto, Henry Kiprono Kosgey And Joshua Arap Sang*) ICC-01/09-01/11, 23 January 2012; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (*The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali*) ICC-01/09-02/11, 23 January 2012.

⁵⁶ Article 21 of the Rome Statute; paragraph 29 of Dissenting Opinion of Judge Hans-Peter Kaul in Decision on the Authorization of an Investigation.

⁵⁷ Article 7(3) of the Elements of Crimes of the ICC; Charles Jalloh ‘Situation in the Republic of Kenya: Decision on the Authorisation of an Investigation’ (2011) 105 *American Journal of International Law* 540 – 547.

8.2.2 Jurisdiction in *Côte d'Ivoire*

In Côte d'Ivoire, the alleged crimes were committed within the jurisdiction of the Court as earlier communicated by the government of Laurent Gbagbo and re-confirmed by President Alassane Ouattara. They included crimes against humanity and war crimes.⁵⁸ The Pre-Trial Chamber accepted the argument of the Prosecutor that those crimes fell within the jurisdiction of the Court and allowed the opening of an investigation.

8.2.3 Complementarity in Kenya

In the Kenya situation, the Prosecutor stated in the request for authorisation to open an investigation that there were no national proceedings during the preliminary examinations, thus making the situation automatically admissible before the ICC.⁵⁹ He argued that the inability of Kenyan leaders to establish accountability mechanisms like the Special Tribunal recommended by the CIPEV meant that no domestic prosecution was contemplated for those who committed crimes during the post-election violence.⁶⁰ He noted that limited prosecutions conducted in several parts of Kenya after the violence were for lesser crimes not related to the atrocities committed during the post-election violence.⁶¹

The determination by ICC judges that crimes within the jurisdiction of the Court had occurred during the post-election violence was challenged by the Kenyan government on grounds related to complementarity.⁶² Kenya's challenge was based on article 19 of the Rome Statute.⁶³

⁵⁸ These include murder constituting a crime against humanity under article 7(1)(a); rape and other forms of sexual violence constituting a crime against humanity under article 7(1)(g); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under article 7(1)(e); enforced disappearance of persons under article 7(1)(i); and murder under article 8(2)(c)(i); attacking civilians under article 8(2)(e)(i); attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission under article 8(2)(e)(iii), attacking protected objects under article 8(2)(e)(iv) and rape under article 8(2)(e)(vi). See Paragraph 39 of the Request for Authorisation in the Situation in *Cote D'Ivoire*.

⁵⁹ Paragraph 52 of the Request for Authorisation.

⁶⁰ Paragraph 53 of the Request for Authorisation.

⁶¹ Paragraph 54 of the Request for Authorisation.

⁶² Application on Behalf of the Government of The Republic of Kenya Pursuant to Article 19 of The ICC Statute ICC-01/09-01/11 and ICC-01/09-02/11, 31 March 2011, available online at <http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf>, accessed 11 July 2013. (Kenya's Challenge of Admissibility).

⁶³ Article 19(2) provides that [c]hallenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: (a) An accused or a person for whom a warrant of

Kenya argued that it had embarked on several fundamental and far-reaching constitutional and judicial reforms, including the adoption of a new Constitution in August 2010⁶⁴, and therefore it was unreasonable for the Prosecutor to investigate and prosecute Kenyan citizens.⁶⁵ Kenya further argued that it had adopted the International Crimes Act of 2008 as part of the reforms that were initiated after the post-election violence.⁶⁶ The adoption of the International Crimes Act, Kenya argued, represented an effort to give effect to the principle of complementarity. Kenya maintained that its national judicial system was capable of prosecuting those responsible for the post-election violence.⁶⁷

Because of the willingness and actual efforts taken by the domestic authorities to investigate the crimes, Kenya argued that the cases should be held not admissible by the Court pursuant to the complementarity principle. In his response to the application by Kenya, the Prosecutor argued that the burden of proof lay with Kenya to show that it was conducting investigations into the cases before the ICC.⁶⁸ The Prosecutor also argued that promising to conduct an investigation does not suffice to prevent the ICC from admitting a case.⁶⁹ Although there were investigations regarding the post-election violence, the ICC Prosecutor submitted that crimes investigated and the individuals under investigation were not the same parties that were before the ICC.⁷⁰

In its decision, Pre-Trial Chamber II dismissed Kenya's application by stating that there was no evidence that Kenya was conducting investigations in respect of the individuals wanted by the ICC.⁷¹ The Court held that the admissibility test in article 17 of the Statute has two prongs, namely, complementarity in article 17 (1)(a)–(c) of the Statute and gravity in article

arrest or a summons to appear has been issued under article 58; (b) A State which has jurisdiction over a case, on the ground that It is investigating or prosecuting the case or has investigated or prosecuted; or (c) A State from which acceptance of jurisdiction is required under article 12.

⁶⁴ Paragraph 2 of the Kenya's Challenge of Admissibility.

⁶⁵ Paragraph 9 of Kenya's Application.

⁶⁶ Paragraph 23 of Kenya's Admissibility Challenge.

⁶⁷ *Ibid.*

⁶⁸ Paragraph 16 of the Decision on Application.

⁶⁹ Paragraph 17 of the Decision on Application.

⁷⁰ *Ibid.*

⁷¹ Paragraph 66 of Decision on Application.

17(1)(d) of the Statute.⁷² In relation to complementarity, there has to be a determination whether national proceedings have begun or not. It is only when this question is answered in the affirmative that the issue of ‘unwillingness or inability’ will arise.⁷³ The Court applied the views of the Appeals Chamber on complementarity.⁷⁴ The Court further held that for Kenya’s application to succeed, its national proceedings had to address both the person and the conduct which was the subject of the case before the ICC.⁷⁵

Kenya appealed this decision to the Appeals Chamber in June 2011,⁷⁶ pursuant to Article 82(1)(a) of the Statute⁷⁷ and Rule 154(1)⁷⁸ of the ICC.⁷⁹ In support of the appeal, Kenya contended that Pre-Trial Chamber II erred in law by not considering its efforts to investigate those accused of masterminding the post-electoral violence.⁸⁰ Kenya argued that it had primacy over the ICC regarding the investigation and prosecution of the post-election violence.⁸¹ In addition, it argued that Pre-Trial Chamber II had ignored the strong

⁷² Paragraph 43 of the Decision on Application; See also Para 52 of the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an investigation into the Situation in the Republic of Kenya’, ICC-01/09-19-Corr.

⁷³ Paragraph 44 of Kenya’s Admissibility Challenge.

⁷⁴ Paragraph 78 of 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 OA 8, 25 September 2009.

⁷⁵ Paragraph 50 and 51 of Decision on Application. See also para 24 of the Decision on the Prosecutors Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr, 27 April 2007.

⁷⁶ See Appeal of the Government of Kenya against the ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11, 6 June 2011 (Appeal of Government of Kenya).

⁷⁷ Article 82 (1)(a) provides, ‘[e]ither party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) A decision with respect to jurisdiction or admissibility.’

⁷⁸ Rule 154(1) provides, ‘[a]n appeal may be filed under article 81, paragraph 3 (c)(ii), or article 82, paragraph 1 (a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision.’

⁷⁹ Paragraph 2 of Appeal of Government of Kenya.

⁸⁰ Paragraph 5 of Document in Support of the ‘Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, ICC-01/09-02/11, 20 June 2011 (Document in Support of Appeal).

⁸¹ Kenya stated in the document of appeal that ‘[o]n the basis of the information provided by the Government of Kenya, there can be no doubt that an investigation into the six Suspects *has been and is in fact going on* and that it is patently wrong to find that there is “inactivity”’. Paragraph 6 of Document in Support of Appeal [Emphases in the original].

presumption that the principle of complementarity creates in favour of the national jurisdiction.⁸²

In relation to the same person/same conduct principle relied upon by the Pre-Trial Chamber, Kenya argued that the principle of complementarity does not necessarily require that individuals being investigated by a State and by a Prosecutor must be identical to render the case inadmissible before the ICC.⁸³ Kenya called on the Appeals Chamber to reverse the decision of the Pre-Trial Chamber II or send the case back for re-hearing.⁸⁴

In dismissing Kenya's appeal, the Appeals Chamber held that the Pre-Trial Chamber II had applied the correct legal test and that Kenya was inactive regarding the investigation of the individuals currently before the ICC.⁸⁵ The Appeals Chamber further held that a case is only inadmissible before the Court if the same suspects are being investigated by Kenya for substantially the same conduct'.⁸⁶ Regarding Kenya's argument that the Pre-Trial Chamber was biased against the government of Kenya, the Appeals Chamber held that the Pre-Trial Chamber was right in rejecting Kenya's objection as it was evident that Kenya was not prosecuting the three suspects before the ICC for international crimes.⁸⁷

The judgment of the Appeals Chamber forecloses any speculation that there could be a difference in the interpretation and application of inaction in situations involving self-referrals and *proprio motu* referrals. The decision is subject to criticism in some respects. The ICC serves a complementary role to national jurisdictions and was not established to supplant the activities of the national governments. Although it can be questioned whether there was evidence that Kenya had started preliminary investigations regarding the post-election violence, its primacy cannot be waived as long as it has the capacity to show compliance with the ingredients of complementarity in Article 17 of the Rome Statute. In addition, the decision of the Appeals Chamber in the Kenyan situation has a broader implication of the

⁸² Paragraph 8 of the Document in Support of Appeal.

⁸³ Paragraph 12 of the Document in Support of Appeal.

⁸⁴ Paragraph 93 and 94 of the Document in Support of Appeal.

⁸⁵ Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ICC-01/09-02/11 O A, 30 August 2011 (Appeal Decision).

⁸⁶ Paragraph 40 of Appeal Decision.

⁸⁷ Paragraph 82 of the Appeal Decision.

ICC. This is because the decision appears to rest primarily on a broader, more interventionist and perhaps unrealistic vision of the ICC.⁸⁸

However, the case of Kenya is peculiar as the Court's decision was based on the fact that the Kenyan government was not investigating those currently before the ICC for crimes committed during the post-election violence.

8.2.4 The Prosecutor and complementarity in *Côte d'Ivoire*

As already noted in Chapter four, complementarity during the preliminary examination phase involves the evaluation of the existence of relevant national proceedings in relation to the potential cases being considered for investigation.⁸⁹ The Prosecutor therefore argued that the Côte d'Ivoire situation was admissible before the ICC because no national investigations or proceedings are pending in Côte d'Ivoire against those bearing the greatest responsibility for the most serious crimes falling within the jurisdiction of the Court allegedly committed in Côte d'Ivoire since 28 November 2010.⁹⁰ The fact that there was no pending investigation before the courts in Côte d'Ivoire meant that the ICC was justified to commence proceedings.

8.2.5 The Prosecutor and gravity in Kenya

The Rome Statute requires that crimes within the jurisdiction of the Court must be of sufficient gravity to justify further action by the Court.⁹¹ In deciding whether a crime is of sufficient gravity for purposes of the ICC, the Prosecutor considers the scale, nature, manner of commission of the crimes and their impact, bearing in mind the potential cases that would likely arise from an investigation of the situation.⁹² In the Kenya situation, the Prosecutor argued that the gravity requirement was met.⁹³ In the request for authorisation to open an

⁸⁸ Charles Jalloh Kenya v the ICC Prosecutor (2012) 53 *Harvard International Law Journal Online* 269 at 277.

⁸⁹ Chapter four, paragraph 4.6.1.

⁹⁰ Paragraph 52 of the Request for Authorisation.

⁹¹ Article 17 (1)(d) of the Rome Statute.

⁹² Chapter four, paragraph 4.6.2; Paragraph 7 of the Report on Preliminary Activities 2013.

⁹³ The Prosecutor stated that the scale of the post-election violence resulted in a reported 1,133 to 1,220 killings of civilians, more than nine hundred documented acts of rape and other forms of sexual violence, with many more unreported, the internal displacement of 350,000 persons, and 3,561 reported acts causing serious injury. See Paragraph 56 of the Request for Authorisation.

investigation, the Prosecutor argued that ‘widespread or systematic attack has been interpreted as excluding isolated or random acts from the concept of crimes against humanity’.⁹⁴ The Prosecutor stated that although the conflict was at first seen as a spontaneous reaction of citizens to the perceived rigging of the election, subsequent events confirmed that the attacks were planned, pre-meditated and co-ordinated attacks.⁹⁵ As noted earlier, the Prosecutor argued these crimes amounted to crimes against humanity.⁹⁶

Based on article 15(4) of the Statute, the Prosecutor requested Pre-Trial Chamber II to authorise the commencement of an investigation.⁹⁷ Furthermore, the Prosecutor argued that prospective cases were admissible before the ICC because there was an absence of national proceedings against those bearing greatest responsibility for the crimes and due to the gravity of the acts committed during the post-election violence.⁹⁸

The Prosecutor noted that crimes were committed in six out of the eight regions and these areas were the most populated including the cities of Nairobi, the Rift Valley, and the Nyanza and Western provinces.⁹⁹ The Prosecutor also described in detail how the crimes committed in the Kenyan post-election violence met the gravity criteria.¹⁰⁰ From the Prosecutor's report, it is unclear whether gravity was considered from a quantitative or qualitative angle.

⁹⁴ Paragraph 79 of the Request for Authorisation; See Para 33 of Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo ICC-01/05-01/08, 10 June 2008, Paragraph 62 of Decision on the Prosecution Application under Art 58(7) of the Statute, *The Prosecutor v Ahmad Muhammed Harun (‘Ahmad Harun’) and Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)* 11-02/05-01/07 27 April 2007.

⁹⁵ Paragraph 84 of the Request for authorisation of an investigation pursuant to Article 15.

⁹⁶ These acts include: (a) murder constituting a crime against humanity under Article 7(1)(a) of the Statute; (b) rape and other forms of sexual violence constituting a crime against humanity under Article 7(1)(g) of the Statute; (c) forcible transfer of population constituting a crime against humanity under Article 7(1)(d) of the Statute; and (d) other inhumane acts causing serious injury constituting a crime against humanity under Article 7(1)(k) of the Statute. See paragraph 93 of the Request for Authorisation.

⁹⁷ Article 15 (4) of the Rome Statute provides, ‘[i]f the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.’

⁹⁸ Paragraph 55 of the Request for authorisation of an investigation pursuant to Article 15.

⁹⁹ *Ibid.*

¹⁰⁰ Paragraphs 58 - 59 of the Request for authorisation of an investigation pursuant to Article 15.

8.2.6 The Prosecutor and gravity in Côte d'Ivoire

According to the Prosecutor and consistent with the provisions of the Rome Statute, the Prosecution's assessment of gravity includes both quantitative and qualitative considerations based on the prevailing facts and circumstances.¹⁰¹ In addition, as stated in Regulation 29(2) of the Regulations of the Office of the Prosecutor, the non-exhaustive factors that guide the Office's assessment include the scale, nature, manner of commission of the crimes, and their impact.¹⁰²

Based on the preliminary analysis conducted by the Prosecutor, it was determined that the gravity threshold established in the Rome Statute was made in the Côte d'Ivoire Situation. This is because the Prosecutor identified high-ranking government officials who were involved in ordering, inciting, planning, facilitating, and otherwise contributing to the organization of the violence.¹⁰³ Furthermore, the Prosecutor argued that "the information available indicates that serious crimes by their very nature such as murders, rapes, and enforced disappearances have been committed on a large-scale, as part of a plan or in furtherance of a policy, or in the context or association with an armed conflict."¹⁰⁴

The conclusion therefore, is that the crimes committed in Côte d'Ivoire met the gravity criteria as provided by the Rome Statute and earlier discussed in this study.¹⁰⁵ The request by the Prosecutor to open an investigation was within the provisions of the treaty.

8.2.7 The Prosecutor and the interests of justice in Kenya

The interests of justice is a legal factor affecting the decision to proceed with an investigation during preliminary examinations.¹⁰⁶ While jurisdiction and admissibility are positive requirements, the interest of justice is a potential countervailing consideration that results in

¹⁰¹ Chapter four, paragraph 4.6.2.

¹⁰² See *Prosecutor v. Abu Garda, Decision on the Confirmation of Charges*, ICC-02/05-02/09-243-Red, 8 February 2010, paragraph 31.

¹⁰³ See Paragraph 57 of the Request for Authorisation.

¹⁰⁴ See Paragraph 58 of the Request for Authorisation.

¹⁰⁵ Chapter four, paragraph 4.6.2

¹⁰⁶ Chapter four, paragraph 4.7

the decision not to proceed after the conduct of a preliminary examination.¹⁰⁷ The Rome Statute does not mandate the Prosecutor to give reasons why an investigation is in the interest of justice.¹⁰⁸ Based on these analyses, the Prosecutor concluded that there was no reason to believe that opening an investigation in the Kenyan situation would not be in the interests of justice.¹⁰⁹

The Kenyan situation has progressed beyond the preliminary examination stage. However, the issue of interests of justice is still relevant in the proceedings of the ICC. This is because the UNSC can defer proceedings before the ICC.¹¹⁰ Kenya officially requested a referral of the ICC indictment under article 16 of the Rome Statute in March 2011.¹¹¹ During discussions at the UNSC on the issue, some members expressed concern that the request did not enjoy the support of all members of the government of national unity set-up after the election violence.¹¹² The UNSC met again in April 2011 and it was agreed that the best option available to Kenya was to seek a deferral under article 19 of the Rome Statute.¹¹³ Following the conclusions of local elections in 2013, Kenya made another appeal to the UNSC through its permanent mission to the UN and argued for recognition of the positive changes in Kenya that should warrant a deferral to consolidate Kenya's progress to democracy and stability and fight against impunity.¹¹⁴

¹⁰⁷ Paragraph 60 of the Request for authorisation of an investigation pursuant to Article 15.

¹⁰⁸ Ibid.

¹⁰⁹ Paragraph 61 of the Request for authorisation of an investigation pursuant to Article 15.

¹¹⁰ Article 16 of the Rome Statute; see chapter three and discussions on the UNSC.

¹¹¹ Ben Agina Kibaki, Muthaura and Security Chiefs meet Envoys over ICC Deferral Bid 16 February 2011, Standard Digital News; See Letter dated 23 March 2011 from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council titled Request of Kenya for deferral under article 16 of the Rome Statute of the International Criminal Court 29 March 2011, S/2011/201.

¹¹² Ibid.

¹¹³ Security Council Report Chronology of Events, 31 May 2013.

¹¹⁴ In the presentation to the UNSC, the permanent representative of Kenya to the UN stated that, Kenya is committed to fighting impunity. In this respect the Government has put in place legislative and administrative reforms to reinforce the fight against impunity. Some of the measures taken include: adoption of a new popular Constitution and enactment of over 200 pieces of legislation to implement it, operationalisation of independent constitutional bodies, robust judicial reforms, police reforms, strengthening the principle of separation of powers, upheld the public right to access information, ensuring public participation in national affairs and further entrenched the freedom of the media. See statement by H.E Mr Macharia Kamau, Ambassador/Permanent Representative, Permanent Mission of Kenya to the UN during the Interactive Dialogue with members of the UN Security Council, 23 May 2013.

Kenya's permanent representative to the UN argued that the UNSC should use its inherent power in maintaining international peace and security and relevant provisions of the Statute to terminate the ICC cases.¹¹⁵ The UNSC did not accede to the request because Kenya was unable to prove that the referral was a threat to international peace and security. It seems that Kenya's request for a deferral or termination under article 16 of the Rome Statute did not succeed. This is because article 16 pre-supposes the existence of a threat to international peace and security.¹¹⁶ The UNSC did not make a determination that the post-election violence in Kenya was a threat to international peace and security.¹¹⁷

The current investigation and prosecution of the crimes do not pose a threat to international peace and security and therefore does not fall within the stipulations of article 16. A deferral under article 16 of the Statute is limited to 12 months and cannot be automatically renewed.¹¹⁸ Termination of the ICC case as argued for by Kenya is not an option as the UNSC cannot terminate a case before the ICC. It can only defer an investigation or prosecution for a limited period of time. Another option available to Kenya was for the Prosecutor to use her discretion under article 53 of the Rome Statute to terminate the case in the interest of justice.¹¹⁹

It seems that complementarity offered a better opportunity for Kenya to demonstrate that it is not inactive but willing and able to prosecute those responsible for the crimes.¹²⁰ While there may be issues with holding trials in Kenya while the ICC cases are still on-going, there is

¹¹⁵ Ambassador Macharia Kamau argued that '[t]he current peaceful situation in Kenya has not come with ease and to maintain peace and stability in Kenya and the region is the common responsibility of the international community including the UN Security Council. Kenya would like to see these cases terminated as soon as possible, how and by whom is debatable, but to end they should.' Ibid.

¹¹⁶ Claus Kress 'On the Outer Limits of Crimes against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision (2010) 23 *Leiden Journal of International Law* 855 - 873.

¹¹⁷ At the height of the conflict, the UNSC only released a Presidential Statement condemning the violence and calling the parties to end the violence through negotiations. See UNSC 'Statement by the President of the Security Council' 6 February 2008, S/PRST/2008/4..

¹¹⁸ Amir Rahgoshay 'The Deferral of Investigation or Prosecution in the ICC by request of the Security Council of UN organisation' (2011) 8 *Life Science Journal* 796 – 804.

¹¹⁹ See paragraph 2.6 of chapter two.

¹²⁰ Max du Plessis and Christopher Gevers 'Kenya's ICC Deferral Request and the Proposed Amendment to article 16 of the Rome Statute', 17 February 2011. See also paragraph 2.5 of chapter two discussions regarding admissibility issues.

nothing that stops Kenya from prosecuting the middle-level perpetrators using its national judicial system in the interim. This will be evidence that Kenya has the political will to hold its citizens accountable and supports her earlier argument about adopting a ‘bottom-up’ approach to the investigation and prosecution of those responsible for the post-election violence.¹²¹ It also corresponds with the latest strategy paper of the Prosecutor of building cases from middle perpetrators to the top hierarchy.¹²²

From the foregoing, it is submitted that at the time the Prosecutor decided that there was reasonable basis to open investigation in Kenya, there was no basis for Kenya to claim that it was investigating or prosecuting the same people that are currently before the ICC for crimes committed during the post-election violence. However, although subsequent initiatives by the Kenyan Government can be seen in a positive light, they still did not meet the threshold of complementarity as set by the Appeals Chamber. If the Prosecutor had applied positive complementarity, it would have helped the Kenyan government to overcome the inability to hold trials. The Prosecutor had the discretion to suspend investigations and prosecutions and allow Kenya to conduct the trials, but this option was not used.

8.2.8 The Prosecutor and the interests of justice in *Côte d’Ivoire*

It is needful here to recall that jurisdiction and admissibility are positive requirements that must be satisfied for the ICC to investigate a situation. However, the interests of justice under the Rome Statute is a potential countervailing consideration that may produce a reason not to proceed, as already discussed in Chapter four.¹²³ The Prosecutor is therefore not required to establish that an investigation is in the interests of justice, but rather, whether there could be specific circumstances which provide substantial reasons to believe it is not in the interests of justice to proceed at that time.¹²⁴ Based on developments in Côte d’Ivoire, it is submitted that not opening an investigation was not in the interests of justice as the victims of crimes had clearly stated that they needed justice. Furthermore, the government reiterated the need for the ICC to commence investigations because of lack of capacity of the Ivorian judiciary to carry out investigations. Therefore, based on the information available at the time the

¹²¹ Paragraph 34 of Application Pursuant Article 19 of the ICC Statute. See discussions on positive complementarity.

¹²² See Strategies of the Prosecutor 2012 to 2015

¹²³ Chapter four, paragraph 4.7; Article 53(1) of the Rome Statute; Paragraph 59 of the Request for Authorisation.

¹²⁴ Ibid.

decision to conduct a preliminary examination was made, the Prosecutor argued that opening an investigation would be in the interests of justice.¹²⁵

8.3 Prosecutorial discretion and general principles during preliminary examination

8.3.1 The Prosecutor and independence in Kenya

A lot has been said about the independence of the Prosecutor.¹²⁶ In the Kenyan situation, it does not seem as if his decision to proceed with an investigation was based on external influences. Rather, what is evident is that the Prosecutor had given Kenya the possibility of conducting trials in the region, but this was not possible during the period, as the Kenya Parliament failed to pass the law that would have set-up the Special Tribunal recommended by the CIPEV report. The Prosecutor had given the Kenyan Government enough opportunity to set-up an accountability mechanism to investigate and prosecute those responsible for planning and executing the post-electoral violence in Kenya.¹²⁷

Both the Prosecutor and a delegation from Kenya decided on a time-table for accountability. However, if that agreement failed, Kenya agreed to refer the matter to the ICC in accordance with article 14 of the Statute.¹²⁸ However, when the government and the parliamentarians could not agree on the establishment of the Special Tribunal, the Prosecutor made a request to Pre-Trial Chamber II to be allowed to initiate an investigation on the crimes committed in Kenya.¹²⁹ The Prosecutor also reviewed materials relating to the conducts of all the parties to the conflict which showed an improvement compared to the Ugandan and DRC situations where the Prosecutor had failed to initiate proceedings against individuals allied to government institutions. The determination of the Prosecutor to proceed with an investigation under *proprio motu* referral is subject to the approval of the Pre Trial Chamber.¹³⁰ But this does not limit the exercise of discretion, since the Pre-Trial Chamber can make a determination only when a request is submitted to it by the Prosecutor to initiate an

¹²⁵ Paragraph 60 of the Request for Authorisation.

¹²⁶ Chapter four, paragraph 5.4.1.

¹²⁷ Mba Nmaju ‘Violence in Kenya: Any Role for the ICC in the Quest for Accountability?’ (2009) 3 *African Legal Studies* 78 - 95.

¹²⁸ See ICC ‘Agreed Minutes of the Meeting between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government’ The Hague, 3 July 2009. .

¹²⁹ Paragraph 1 of request for authorisation of an investigation pursuant to Article 15.

¹³⁰ See chapter four, paragraph 4.2.

investigation or whenever the Prosecutor decides not to proceed because of the interests of justice.¹³¹

8.3.2 The Prosecutor and independence in *Côte d'Ivoire*

From the foregoing, it is argued that the Prosecutor was clearly independent in the preliminary examination of crimes allegedly committed in Côte d'Ivoire. In the request for authorisation under article 15 of the Rome Statute, the Prosecutor clearly set out how the preliminary examination was conducted and the factors that influenced the decision to open an investigation in that situation.¹³² In addition, the request for authorisation also stated the legal parameters within which the preliminary examination was conducted.¹³³ The request for authorization, to the extent of the information it contains, shows that the Prosecutor acted within the parameters of the Statute and was not guided by extraneous considerations in making the determination to proceed with an investigation.

8.3.3 The Prosecutor and impartiality in Kenya

The principle of impartiality flows from article 21(3) of the Rome Statute. It involves the Prosecutor applying consistent methods and criteria, irrespective of the States or parties involved or the person(s) or group(s) concerned.¹³⁴ Impartiality also means that there should not be any discrimination as recognised under international human rights law. When the preliminary examination in Kenya is viewed independently, the manner the procedure was carried out indicates the Prosecutor was not partial. This is because as already stated, geopolitical implications or geographical balance between situations are not relevant criteria for determining whether to open an investigation or not into a situation under the Statute.

The question of partiality is clearly related to the discretion of the Prosecutor. Since this study is not looking specifically at the political outcomes of the decision of the Prosecutor, the decision to open investigations in Kenya within the available information cannot be said to be tainted with partiality. The Prosecutors ability to charge both parties to the conflict is a

¹³¹ Ibid.

¹³² Paragraph 23 – 34 of the Request for Authorisation in Cote D'Ivoire.

¹³³ Paragraph 35 – 50 of the Request for Authorisation in Cote d'Ivoire.

¹³⁴ Paragraph 28 of the Policy Paper on Preliminary Examination.

clear evidence of impartiality and showed that the Prosecutor applied ‘consistent methods and criteria’ as required by the Rome Statute.

8.3.4 The Prosecutor and impartiality in Côte d’Ivoire

As already noted in the study, impartiality requires the application of consistent methods and criteria, irrespective of the States or other parties involved.¹³⁵ Furthermore, the exercise of prosecutorial discretion during preliminary examinations must adhere to internationally recognised human rights, and be without any adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, birth or other status.¹³⁶

It is submitted that the Prosecutor was fairly impartial during the preliminary examination conducted in Côte d’Ivoire. A sticking issue in the activities of the Prosecutor relates to the prosecution of only one party to the conflict although there was evidence that both parties to the conflict had committed crimes within the jurisdiction of the Court. It also acknowledged that this responsibility is at the discretion of the Prosecutor and subject to available evidence. A clear contrast can be made between the Kenyan situation and the Côte d’Ivoire situation in the sense that the Prosecutor charged both parties to the conflict for crimes within the jurisdiction of the Court.

8.3.5 The Prosecutor and objectivity in Kenya

This requires the Prosecutor to investigate both incriminating and exonerating circumstances in order to establish the truth.¹³⁷ Any information received by the Prosecutor during preliminary examination is subjected to evaluation to assess its authenticity and reliability. Objectivity refers not only to the conduct in the Kenyan situation but also in relation to other situations before the ICC.¹³⁸ The review of the materials submitted to the Prosecutor revealed that crimes had been committed during the post-election violence. The objectivity of the decision by the Prosecutor that the crimes committed during the post-election violence were

¹³⁵ chapter five, paragraph 5.4.2; Paragraph 28 Policy Paper on Preliminary Examinations.

¹³⁶ Ibid. See also Article 21(3) of the Rome Statute.

¹³⁷ See chapter five, paragraph 5.4.3; Article 54 of the Rome Statute; Paragraph 30 of the Policy Paper on Preliminary Examinations.

¹³⁸ Ibid.

crimes against humanity meeting the threshold of gravity under the Statute can be questioned, in relation to the arguments made by Judge Kaul who argues that the crimes committed during the post-election violence did not meet the legal criteria for such crimes.

This study agrees with Judge Kaul's argument that the crimes committed during the post-election violence did not meet the legal requirement of resulting from 'State and organisational policy'. In addition, it is argued that the Prosecutor did not avail himself the possibility of applying the principle of positive complementarity which offered the Prosecutor an opportunity to advance the ideals of the ICC. This is because the Rome Statute in its preamble recognises that it is the primary duty of States to hold their citizens accountable for international crimes. However, since the decision of the Prosecutor is subject to the approval of the Pre-Trial Chamber, it is obvious that the decision of the majority stands, irrespective of any misgivings regarding the decision to seek for an authorisation.

8.3.6 The Prosecutor and objectivity in *Côte d'Ivoire*

As discussed earlier, the principle of objectivity relates to the ability of the Prosecutor to investigate both incriminating and exonerating circumstances equally in order to establish the truth in a situation before the ICC.¹³⁹ Article 54(1) of the Rome Statute refers to the duties and powers of the prosecution during investigations, but the Prosecutor also maintains 'objectivity' as a self-regulating principle during preliminary examination.¹⁴⁰

The request for authorisation makes a clear connection between the activities of the militias and the support and assistance they received from government forces, showing that the crimes committed by pro-Gbagbo forces were organised, systematic and widespread.¹⁴¹ The request for authorisation clearly articulated the fact that the organised nature of the armed groups showed unmistakable evidence that a situation of non-international armed conflict existed.¹⁴² In addition, the request for authorisation also indicated instances where armed groups loyal to Ouattara may have committed crimes within the jurisdiction of the ICC.¹⁴³

¹³⁹Chapter five, paragraph 5.4.3; Article 54(1) of the Rome Statute; Regulation 34(1) OTP Regulations.

¹⁴⁰ Ibid; Paragraph 30 Policy Paper on Preliminary Examinations.

¹⁴¹ Paragraph 73 – 133 of the Request for Authorisation.

¹⁴² Paragraph 4 of the Request for Authorisation.

¹⁴³ Paragraph 71 of the Request for Authorisation to Open an Investigation Under Article 15 in Cote d'Ivoire.

However, the inability to charge those loyal to President Ouattara may be a sign of lack of objectivity on the side of the Prosecutor of the ICC.

8.4 Prosecutorial discretion and policy objectives during preliminary examination

The policy objectives also relates to the theory of prosecutorial neutrality as already discussed in chapter two of the study which includes non-biased decision making, non-partisanship and principled decision making.¹⁴⁴ These issues are discussed extensively below.

8.4.1 The Prosecutor and transparency in Kenya

The Prosecutor was transparent during the preliminary examination in Kenya in trying to get the government to establish accountability mechanisms.¹⁴⁵ However, regarding the procedure of conducting preliminary examination, there was no public information available on the procedure before the Prosecutor announced the decision to seek for an authorisation from the Pre-Trial Chamber. The Prosecutor did not issue any report on the reasons why the decision to proceed with an investigation was made, except the in documents submitted to the Pre-Trial Chamber. One can argue that the policy changes between Ocampo and Bensouda may have accounted for the difference in carrying out effective public enlightenment on the activities of the Prosecutor during preliminary examinations in Kenya.

8.4.2 The Prosecutor and transparency in Côte d'Ivoire

The circumstances surrounding the Côte d'Ivoire situation show that the Prosecutor tried to be transparent in the activities carried out in Côte d'Ivoire prior to the decision to open investigations. However, as has been consistently argued in this study, the inability of the former Prosecutor to adopt a transparent approach in the process of carrying out a preliminary examination leads to a lot of speculations regarding the activities of the Prosecutor and the influence of extraneous factors that do not meet the provisions of the Rome Statute.

It is clear that the intention of the Prosecutor may have been to act within the provisions in a transparent manner and pursue the policies of the office in a way that will close the impunity

¹⁴⁴ Chapter two, paragraph 2.1.

¹⁴⁵ See chapter five, paragraph 5.5.1.

gap. However, the effect of the decisions of the Prosecutor not to inform the public adequately, particularly about the conduct of preliminary examinations has undermined the transparency required in the Prosecutor's performance, and also increased doubt as to whether the Prosecutor really acted within the provisions of the Statute. The activities of the Prosecutor in *Côte d'Ivoire* are verifiable cases in this regard.

A clear engagement on the legal factors regulating preliminary examination is only found in the request for authorisation. Therefore, it is argued that the Prosecutor may have acted within the provisions of the Rome Statute but the actions were not transparent to the extent that the public was not kept informed in the conduct of preliminary examination in *Côte d'Ivoire*.

8.4.3 The Prosecutor and complementarity in Kenya

The issue of complementarity has already been addressed in the chapter. One of the policy objectives of the Prosecutor is to end impunity through positive complementarity. However, this policy was not well articulated and practised by the Prosecutor during and after preliminary examinations. After the initiation of investigations, the issue of positive complementarity should not be abandoned. The effectives of not applying positive complementarity during preliminary examinations and during the investigation and prosecution stage can be seen in the relationship between the ICC and Kenya.

Kenya challenged the admissibility of the situation and also took certain steps to show that it was willing and able to investigate those accused of international crimes during the post-election violence. So far, Kenya's bid to have the cases deferred or transferred to its national courts has failed to garner any positive response. However, Kenya still has the opportunity to assume jurisdiction of the cases, if it can show that the defendants before the ICC are charged with the same conducts before Kenyan courts as in the ICC Appeals Chamber.¹⁴⁶

¹⁴⁶ Paragraph 40 of the judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute.'

Kenya can also challenge the admissibility of the case after the commencement of trial. This is only possible through the leave of the Court and may be based only on article 17(1)(c).¹⁴⁷ This is only possible when there is a clear case of investigation and prosecution of accused persons under Kenyan law. The ICC Prosecutor has acknowledged that a deferral is possible if ICC judges agree that Kenya has made substantial progress in the investigation and prosecution of those accused of international crimes in Kenya.¹⁴⁸ At the time of writing, this is yet to happen.

It has been argued that the judges of the PTC II and not the Prosecutor should be blamed for the characterisation of the crimes committed in Kenya as crimes against humanity and not ordinary crimes.¹⁴⁹ However, this argument fails to appreciate the fact that an application by the Prosecutor to open an investigation is a pre-supposition that crimes within the jurisdiction of the ICC have been committed.¹⁵⁰ Besides, it was the Prosecutor that characterised the crimes committed during the post-election violence in Kenya as crimes against humanity.¹⁵¹

The subsequent requests for issuance of summons were made by the Prosecutor. It was within the discretion of the prosecutor to decide whether to allow Kenya to exercise jurisdiction over its citizens concerning the post-election violence. This is because the Statute allows the Prosecutor to exercise such option while maintaining the possibility of intervening when Kenya fails to investigate or prosecute the crimes as alleged. If the Prosecutor had elected the procedure of positive complementarity, it would have aided Kenya in its efforts to investigate those responsible for the crimes during the period of preliminary examination. In addition, Kenya had requested the assistance of the Court and the Prosecutor regarding the post-election violence in Kenya.¹⁵²

¹⁴⁷ Article 17 (1)(c) provides '[h]aving regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: [...] (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3'.

¹⁴⁸ Capital News 'ICC Ready to Engage Kenya Legally on Deferral Bid', 30 May 2013.

¹⁴⁹ Aiste Dumbryte 'The Exercise of Prosecutorial Discretion at The International Criminal Court: Does the Need for Functional Independence Outweigh Calls for Increased Oversight and Accountability for Decisions Made and Policies Pursued by the Office of the Prosecutor?' 1 – 8.

¹⁵⁰ See Article 15(1) of the Rome Statute.

¹⁵¹ Paragraph 93 of the Request for authorisation of an investigation pursuant to Article 15.

¹⁵² Paragraph 1 of Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194, ICC-01/09, 21 April 2011.

The request for assistance under article 93(10) of the Rome Statute became an issue in relation to the admissibility challenge by Kenya. If the request made by the government of Kenya had been accepted by the Prosecutor, it would have been an opportunity for the Prosecutor and the Government of Kenya to discuss practical issues relating to the investigation and prosecution of the ICC cases locally. It was within the discretion of the Prosecutor to support Kenya's request for assistance.

Kenya could have used its domestic laws to prosecute offenders for the post-election violence as confirmed by a decision of the ICC.¹⁵³ In this case, the Court held that the Statute does not make a distinction between ordinary and international crimes.¹⁵⁴ In relation to the *Ne bis in idem* rule,¹⁵⁵ the Court also held that article 20(3) of the Statute does not require the same legal characterisation of the crime in order to satisfy the *ne bis in idem* principle.¹⁵⁶ It can be concluded from the discussions above that prosecuting those responsible for the post-election violence using Kenya's domestic law is supported by ICC's jurisprudence on complementarity.

The activities of the Prosecutor in Kenya do not show a clear example of positive complementarity or assistance under article 93(10) of the Statute. The emphasis on only ICC prosecution does not acknowledge the primary responsibility on States Party to the treaty to exercise criminal jurisdiction over their citizens.

It is submitted that where a State Party has shown interest and willingness to engage the ICC, such a state should be given every opportunity and assistance. This is to ensure that states carry out their obligations under the Rome Statute in recognition that the jurisdiction of the

¹⁵³ In *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* Pre-Trial Chamber I held that the assessment of domestic proceedings should focus on the alleged conduct and not its legal characterisation. The question of whether domestic investigations are carried out with a view to prosecuting international crimes' is not determinative of an admissibility challenge. Paragraph 85 Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, 31 May 2013, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*.

¹⁵⁴ Ibid at 86.

¹⁵⁵ This is the rule against double jeopardy. See Linda Carter The Principle of Complementarity and the International Criminal Court: The Role of *Ne Bis in Idem*' (2010) 8 *Santa Clara Journal of International Law* 165 – 198.

¹⁵⁶ Ibid.

ICC is complementary to the domestic legal systems.¹⁵⁷ The current difficulties faced by the Prosecutor in dealing with the Kenyan situation may be linked to the inability of the Prosecutor to appreciate the potentials of positive complementarity.

8.4.4 The Prosecutor and complementarity in *Côte d'Ivoire*

One important aspect of the activities of the Prosecutor is ending impunity through positive complementarity.¹⁵⁸ While the study agrees with the Prosecutor regarding the assessment of complementarity under admissibility issues, the Prosecutor's restricted view of positive complementarity has hampered the effective deployment of the principle in the fight against impunity.¹⁵⁹ Although Article 17 of the Rome Statute clearly deals with issues of admissibility which involve complementarity and gravity, positive complementarity offers a cost effective way of improving the possibility of conducting local trials and ensuring States are able to hold their citizens accountable. However, the Kenyan situation can be contrasted with the Côte d'Ivoire situation in the sense that while Kenya contested the involvement of the ICC in the investigation of the crimes committed during the post-election violence, both leaders of governments, Laurent Gbagbo and Alassane Ouattara of Côte d'Ivoire accepted the jurisdiction of the Court and encouraged the ICC Prosecutor to investigate crimes committed after the elections.

Although there was evidence of minimal investigation by the government of Côte d'Ivoire, the issue that was of interest to the Prosecutor was not how to support these activities but to weigh whether they met the admissibility criteria.¹⁶⁰ In addition, the Prosecutor based his assessment of the Ivorian judiciary on a letter written by the President about the inability of the judiciary to conduct trials.¹⁶¹ However, it is argued that as a party to the conflict, the President of Côte d'Ivoire might not have been in the best position to give a clear and impartial assessment of the judiciary. In addition, the Prosecutor did not show evidence of efforts made to ascertain whether the statement of the President represented the true picture of the judiciary. Furthermore, it should be noted that when President Ouattara announced the launch of a criminal probe against Laurent Gbagbo, Simone Gbagbo and 100 other close

¹⁵⁷ Article 1 of the Rome Statute.

¹⁵⁸ Chapter five, paragraph 5.5.2..

¹⁵⁹ Ibid.

¹⁶⁰ Paragraph 47 – 53 of the Request for Authorisation in the Cote d'Ivoire Situation

¹⁶¹ Paragraph 49 of the Request for Authorisation.

associates in April 2011, the Justice Minister specified that the preliminary investigation excluded crimes that might fall under the jurisdiction of the ICC.¹⁶²

The Prosecutor did not inquire further whether the investigations were for the same crimes committed during the post-election violence. In the end, some of the people who were under investigation in Côte d'Ivoire were also indicted by the ICC for crimes within the jurisdiction of the Court, although the prosecutor in *Côte d'Ivoire* excluded the crimes. It is submitted that the Rome Statute does not insist that accused persons should be investigated and prosecuted only for crimes within the jurisdiction of the Court. Therefore as long as there is evidence that an individual has been investigated for the same crime or offence and punished or acquitted, the accused person, if charged in the second court, can plead double jeopardy under article 20 (3) of the Rome Statute.¹⁶³

8.4.5 The Prosecutor and prevention of crimes in Kenya

It is highly debatable whether the preliminary examination carried out in Kenya helped to prevent the commission of international crimes. There was much less violence following the 2013 election, compared with what happened in 2007. However, what really minimised the electoral violence was not the fear of the ICC but a re-alignment of political interests between the Kikuyus and the Kalenjins.¹⁶⁴ This led to the formation of the Jubilee Alliance which is an amalgam of The National Alliance (TNA) and United Republican Party (URP) that won the 2013 election, thereby tentatively reconciling bitter rivals and political enemies.¹⁶⁵ The ICC intervention helped Uhuru Kenyatta to win Kenya's presidency with the Jubilee Alliance because it was seen as representing a Western interest.¹⁶⁶

¹⁶² Ibid.

¹⁶³ Article 20 (3) provides that [n]o person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

¹⁶⁴ Gabrielle Lyncha 'Electing the Alliance of the Accused': The Success of the Jubilee Alliance in Kenya's Rift Valley' (2013) *Journal of Eastern African Studies* 1 – 22.

¹⁶⁵ Gabrielle Lynch 'Non-Judicial Battles: Kenyan Politics and the International Criminal Court' (2014) 8 *Africa Policy Brief* 1 – 10.

¹⁶⁶ BBC News Africa 'Did the ICC help Uhuru Kenyatta win Kenyan election?' 11 March 2013.

What happened in Kenya may also be compared with what happened in Uganda. The ICC is believed to have helped stop the conflict between the government and the LRA, however, it also made it impossible for the LRA to complete the peace deal as Joseph Kony could not get a guarantee that he would not be prosecuted in The Hague if he signed the peace deal with the government of Uganda. While the ICC may have good intentions, it seems some of the outcomes of its interventions are highly unpredictable. It also means that using the ICC to prevent people from committing international crimes is subject to several factors that may be beyond the control of the ICC Prosecutor.

8.4.6 The Prosecutor and prevention of crimes in *Côte d'Ivoire*

The Prosecutor has stated that prevention of crimes is one of the core functions of a preliminary investigation.¹⁶⁷ This is aimed at breaking the circle of impunity by deterring international criminals and their sponsors.¹⁶⁸ Although the Prosecutor has intervened by issuing press statements in several countries where crimes are ongoing, the deterrent effects of these activities are yet to be determined. For example, the acceptance of the jurisdiction of the ICC by the Laurent Gbagbo government did not deter subsequent conflicts that plagued the country after the presidential elections. Most of the parties to the conflict at least knew about the existence of the ICC and that it had jurisdiction over the crimes that were taking place at that time.

One thing that is clear is that both the former and current Prosecutors of the ICC have yet to find a way to have an impact on situations during preliminary examinations. This may be a function of several factors. First, the ICC is situated in The Hague and literally removed from the theatres of these conflicts, making the possibility of its deterrent effect very remote. Second, the issuance of press releases through the website of the ICC is a very limited means of communication. This is because most of the individuals who perpetrate the targeted crimes may not have the internet as their primary means of communication. Third, the Prosecutors' interpretation of positive complementarity means that their primary concern is to evaluate admissibility issues and not to encourage national investigations and prosecution of international crimes. Taken together, this policy did not work in Côte d'Ivoire and barely had any measurable impact.

¹⁶⁷ Chapter five, paragraph 5.5.3; Paragraph 104 Policy Paper on Preliminary Examinations.

¹⁶⁸ Paragraph 106 Policy Paper on Preliminary Examinations.

8.5 Conclusion

The situations in Kenya and Côte d'Ivoire marked the first time the Prosecutor decided there was a reasonable basis to proceed with investigations using the *proprio motu* powers in article 15 of the Rome Statute. This power is subject to oversight by the Pre-Trial Chamber of the ICC whose responsibility is to scrutinise and weigh the evidence submitted by the Prosecutor.

In Côte d'Ivoire, the initial acceptance of jurisdiction of the Court and its subsequent ratification by the government meant that the Prosecutor's power to conduct the preliminary examination into that country's situation could not be challenged. The main challenge in Côte d'Ivoire was that the Prosecutor did not charge key perpetrators from all parties to the conflict for crimes. This has called into question the neutrality of the Prosecutor.

The use of 'inactivity' or 'inaction' under article 17 of the Rome Statute to determine Kenya's challenge of jurisdiction is a lost opportunity to engage with the ICC on interpretations of unwillingness and inability in a *proprio motu* proceedings. The adoption of 'inaction' as a basis for the intervention of the ICC under article 15 of the Statute raises fundamental issues in the activities of the Prosecutor during preliminary examinations. Although the Prosecutor has argued that positive complementarity is a key policy objective, it was not used in Kenya and Côte d'Ivoire to spur national trials, and this lack is clearly demonstrated by subsequent events in both countries.

The chapter also discussed the evidence available to the Prosecutor at the time the preliminary examination was conducted and subsequent developments that necessitated the dropping of charges against some of the suspects. This is as a result of the lack of co-operation between the ICC and Kenya, and constitutes one of the challenges identified earlier in the study, that lack of co-operation between a State and the ICC may hamper the investigation of crimes. However, it was seen that there is cooperation between the Prosecutor and the government of Côte d'Ivoire although some of the requests made by the ICC to the Ivorian government are yet to be acceded to.

With regard to the bid by the Kenyan government to invite the UNSC to use article 16 of the Rome Statute to stop the activities of the Court, this chapter has noted that Kenya needed to demonstrate that the principles of positive complementarity applied to the case.

One major issue that the Prosecutor did not take into consideration during the preliminary examination conducted in the two countries is that the ICC policy paper provides for the use of positive complementarity. Positive complementarity presupposes that the ICC will defer to national judicial systems when they show interest in investigating and prosecuting crimes within the jurisdiction of the ICC. However, this issue was not prioritised in the Kenya and Côte d'Ivoire situations.

It is clear that the Prosecutor failed to charge all parties to the conflict for the crimes committed, especially in Côte d'Ivoire. Although the Prosecutor had used gravity to show why some parties to conflicts were not charged in Kenya, it is not clear how the Prosecutor reached the decision on who to charge or not to charge in Côte d'Ivoire and the reasons for the decision.

From discussions in the last two case studies and issues already discussed in this chapter, it is difficult to conclude that the ICC Prosecutor was consistent in the preliminary examinations conducted in Kenya and Côte d'Ivoire. The reasons are not far-fetched. The possibility of conducting *proprio motu* examination in a situation country is controversial, as this thesis has shown.

Chapter Nine

Conclusion and recommendations

9.0 Introduction

According to the office of the Prosecutor of the ICC, between July 2002 and October 2015, the Prosecutor received about 11,568 'communications' (petitions) to open preliminary examinations *proprio motu*, under article 15 of the Rome Statute, in different countries around the world.¹ Only eleven situations made it to the preliminary examination stage, while only two--Kenya and Côte d'Ivoire--reached the investigation and prosecution stages. This means that overwhelming majority of petitions received by the ICC for preliminary examination are manifestly outside the jurisdiction of the ICC. Furthermore, it also means that the ICC as an international criminal justice institution has been very busy since it was established in 2002. In addition, it means that preliminary examinations fulfills an essential task of gate keeping at the ICC, so that the ICC is not over-burdened with frivolous petitions or petitions that are not clearly within the jurisdiction of the Court.

As stated in Chapter one, the purpose of the thesis is to investigate the exercise of prosecutorial discretion during preliminary examinations. Some of the questions answered include: what is the extent and scope of prosecutorial discretion regarding the conduct of preliminary examinations? what is its legal basis? and how has the prosecutor exercised that discretion in practice? As the Prosecutor has a key role in the ICC, perceptions of partiality or accusations of lack of independence or objectivity in his or her work, have an adverse impact on the effectiveness of the ICC and international criminal law in general. For that reason, this study seeks to provide suggestions on how the exercise of prosecutorial discretion during preliminary examinations could be improved.

Several scholars have written on the exercise of prosecutorial discretion by the Prosecutor.² However, very few have focused specifically on the exercise of discretion during the

¹ ICC 'Preliminary Examinations' available online at https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx, accessed 11 February 2016.

² See Chapter one, paragraph 1.4.

preliminary examination stage.³ A unique feature of this study is the use of the theory of prosecutorial neutrality, the legal criteria in the Rome Statute and the policies and principles of the Prosecutor as analytical tools. More importantly, the study investigates the situations of six countries across Africa, where specific criticisms of bias have been leveled against the ICC Prosecutor.⁴ It argues that the ICC Prosecutor should exercise his or her discretion independently, impartially and objectively, as demanded by the theory of prosecutorial neutrality in the interests of the effective administration of international criminal justice. Such neutrality has to be maintained at both the formal and practical levels.

It will be recalled that the theory of prosecutorial neutrality was originally propounded for the American criminal justice system. However, in Chapter two of this thesis, the theory was re-designed to accommodate developments at the ICC. This was possible by identifying the similarities and differences in the domestic and international criminal justice systems. In addition, the research noted that the exercise of discretion by the ICC Prosecutor is limited by the Rome Statute through the oversight functions of the Pre-Trial Chamber of the ICC and the UNSC.

This study has demonstrated that the preliminary examination is an essential feature of the ICC and as such plays a strategic role in the administration of international criminal justice. The Rome Statute grants the Prosecutor unprecedented powers to initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the ICC, subject to the approval of the Pre-Trial Chambers of the ICC.⁵ Even when States party to the treaty and the UNSC refer matters to the ICC, the Prosecutor has the discretion to decide whether there is a reasonable basis to proceed with investigations. This suggests that the discretion granted to the Prosecutor to conduct preliminary examinations is not limited by the powers of the UNSC to suspend investigations or prosecutions in article 16 of the Rome Statute.⁶

Preliminary examinations at the ICC serve different purposes. First, they are used to establish whether or not there is a reasonable basis to proceed with full investigation.⁷

³ Ibid.

⁴ See chapters six to eight for the case studies.

⁵ Article 15 of the Rome Statute; HRW ‘Courting History The Landmark International Criminal Court’s First Years’ July 2008, 30 – 66.

⁶ Chapter four, paragraph 4.5.2.

⁷ Chapter four, paragraph 4.6.

Second, they are also used by the Prosecutor to advance the principle of positive complementarity.⁸ Third, they serve as an early warning mechanism enabling the Prosecutor to put parties to a conflict on notice that the ICC is following developments in a conflict situation.⁹

The adoption of the policy paper on preliminary examinations is a welcome development and its contents have been thoroughly analysed in this study.¹⁰ Not only does it offer an opportunity for supporters and critics of the ICC, to scrutinise the activities of the Prosecutor based on the general principles and policy objectives adopted to guide the exercise of discretion during preliminary examinations, but it also helps the Prosecutor to make consistent decisions using the re-established criteria.

9.1 The evolution of prosecutorial discretion

This thesis has shown that the notion of prosecutorial discretion has evolved over time, from the time it was first used in the domestic legal system and incorporated into the international criminal justice system, to its current form in the Rome Statute and the ICC Prosecutor's practice. The legal systems of most countries model their prosecutorial institutions on the adversarial system found in the UK or the inquisitorial system of the civil law systems. However, some legal systems have adopted mixed criminal justice systems, incorporating elements of both inquisitorial and adversarial models of prosecution.¹¹

The mixed model was transferred into international criminal justice systems to the extent that the early prosecutors of these international tribunals carried out investigations and prosecutions as well. However, those first prosecutorial offices lacked independence. As the study has shown, the prosecutors of the ad-hoc criminal tribunals that sat in Nuremberg and Tokyo operated under the directions of the allied powers that appointed them into office.¹² Again, the prosecutors of other international and hybrid tribunals such as the ICTY, ICTR, SCSL, ECCC and the STL exercised varied degrees of independence in the prosecution of

⁸ Chapter five, paragraph 5.5.2; Paragraph 100 of the Policy Paper on Preliminary Examinations.

⁹ Chapter five, paragraph 5.5.3; Paragraph 104 of the Policy Paper on Preliminary Examinations.

¹⁰ Chapter five, paragraphs 5.3 - 5.5.

¹¹ See chapter three, paragraph 3.1.

¹² Ibid, paragraph 3.1.2.

perpetrators of international crimes.¹³ It is only the Prosecutor of the ICC that has clear institutional independence to conduct preliminary examinations as part of the discretion exercised by the office. Hence, the ICC's Prosecutor is a hybrid of both common and civil law systems, which is a unique observation of this research.¹⁴

9.2 The significance of the theory of prosecutorial neutrality

It is essential that the Prosecutor is non-biased, non-partisan and principled. The Prosecutor must also be independent, objective, and non-political. These principles constitute the elements of the theory of prosecutorial neutrality. Implementing these principles in practice could make the decisions of the Prosecutor to be more transparent and accountable, and hence bolster public confidence in the administration of international criminal justice.

As noted in Chapter two, prosecutorial neutrality is crucial to the administration of criminal justice at both national and international levels.¹⁵ It emphasises the absence of bias, non-partisanship and the principled application of established rules and procedures, and also provides the possibility for the exercise of prosecutorial discretion that can ensure the just and fair administration of international criminal justice irrespective of the interests of the parties to a conflict.¹⁶

9.3 Formal independence of the ICC Prosecutor

From an institutional point of view, the ICC Prosecutor is guaranteed more independence than any of his predecessors. As already noted in Chapter four, the Prosecutor is elected by an absolute majority of States party to the Rome Statute.¹⁷ In addition, the ICC Prosecutor

¹³ Ibid, paragraph 3.2.1 - 3.2.3.

¹⁴ This is discussed exhaustively in Chapter four. See also Juan Acevedo *Victims' Status at the International Criminal Court: Victims as Witnesses, Victim Participants/Civil Parties and Reparations Claimants* (2014) Abo: Abo Akademi University Press, 96; Kai Ambos 'International criminal procedure: "adversarial", "inquisitorial" or mixed?' (2003) 3 *International Criminal Law Review* 1 – 37; Claus Kress 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 *Journal of International Criminal Justice* 603 - 617.

¹⁵ See chapter two, paragraph 2.6.

¹⁶ Ibid.

¹⁷ See Chapter Four, paragraph 4.3.

enjoys an uninterrupted nine-year term and can only be removed from office by the Assembly of State party of the Rome Statute due to ‘serious misconduct’ or a ‘serious breach’.¹⁸ However, although the formal guarantee of independence is necessary, it is not sufficient to prevent perceptions of partiality. The Prosecutor must act independently in practice. As this thesis has shown, this could be achieved by the office of the Prosecutor adopting practices which promote transparency and accountability.¹⁹ In essence, the Prosecutor should be a three-dimensional neutral prosecutor.

Initially, the Prosecutor did not fully embrace the notion of prosecutorial neutrality, as discussed in Chapter two of the study. As a result, some of the preliminary examinations were conducted under the cloak of secrecy and decisions made were not justified publicly. This was partly because the former Prosecutor had not yet developed detailed guidelines, policies and principles governing the exercise of prosecutorial discretion in general and during preliminary examinations. There have been significant improvements with the adoption of the policy paper on preliminary examinations by the current Prosecutor. However, some problems still remain as will be highlighted in this chapter.

9.4 Principles, policies and guidelines on the exercise of prosecutorial discretion during preliminary examinations

The thesis discussed the procedural principles that should govern the exercise of discretion during preliminary examinations.²⁰ They were drawn from the theory of prosecutorial neutrality, from the Rome Statute, the jurisprudence of the ICC and from the Prosecutor’s own interpretative documents. These principles include independence, impartiality, objectivity and transparency. The study argues that there is a convergence between the policy paper on preliminary examinations adopted by the current Prosecutor, Fatou Bensouda and the theory of neutrality, which is the framework used to evaluate the activities of the Prosecutor in the case studies discussed in this thesis.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Chapter five, paragraph 5.4 - 5.5.

9.5 Legal basis for prosecutorial discretion for preliminary examinations and guidance

As this study has shown, article 53 establishes the legal framework for preliminary examinations. That article clearly shows that jurisdiction, admissibility (complementarity and gravity), and interests of justice are the substantive factors that must be taken into account when making decisions pertaining to preliminary examinations.²¹ In addition to these factors, the Prosecutor also has to consider the question of jurisdiction in its all elements – subject matter, time and territory.²²

In Chapter four, it was shown that article 17 of the Statute regulates complementarity and gravity and that, though they relate to issues of admissibility before the ICC, these are vital elements of preliminary examinations.²³ It was also argued that the absence of proceedings by a State that has jurisdiction over a case is enough to make a situation admissible. If a State is inactive, the issues of unwillingness and inability do not arise.²⁴

Under gravity, it was argued that the Prosecutor's assessment of gravity includes quantitative and qualitative considerations.²⁵ Other factors affecting gravity include the scale, nature, manner of commission of the crimes, and their impact.²⁶ The thesis found that the Prosecutor's application of the principle of gravity to preliminary examinations has been inconsistent to the extent that it is not clear how the Prosecutor arrives at decisions on the issue of gravity. For example, in Uganda, the Prosecutor was not clear on how the gravity of the crimes allegedly committed by UPDF soldiers did not meet the assessment under the Rome Statute.

The last major factor that decisions on preliminary examinations have to consider is the interests of justice. It has been argued that the Prosecutor's differentiation between 'interests of peace' and 'interests of justice' restricts a practical application of the principle of interests of justice in the Rome Statute.²⁷ The Prosecutor's policy paper states that the office is only

²¹ Chapter four, paragraph 4.4 - 4.7.

²² Ibid.

²³ Ibid, paragraph 4.6.

²⁴ Ibid.

²⁵ Chapter four, paragraph 4.6.2.

²⁶ Ibid.

²⁷ Chapter four, paragraph 4.7.

concerned with the interest of justice and not with the interest of peace. However, the Rome Statute does not make this distinction. The effect is that a situation where the Prosecutor should consider the broader effect of a peace negotiation or its potential impact on a situation is not a primary concern of the ICC Prosecutor. This is not a progressive interpretation of the Rome Statute and should be revised.

9.6 Accountability mechanisms regulating the exercise of prosecutorial discretion

Despite the independence and discretion granted to the ICC Prosecutor, the Rome Statute also establishes checks and balances to ensure the Prosecutor does not act out of context. These checks and balances serve as accountability mechanisms.²⁸ As discussed in Chapter four, there are three main accountability mechanisms that serve as a check on the powers of the Prosecutor. The first is the judicial review carried out by the Pre-Trial Chamber before the Prosecutor is granted leave to proceed with an investigation under article 15 of the Rome Statute. In addition, if the Prosecutor decides that it is not in the interest of the justice to carry out an investigation, the Prosecutor is under an obligation to inform the Pre-Trial Chamber of this outcome.²⁹

Second, the Assembly of States Party to the Rome is responsible for the election and discipline of the ICC Prosecutor.³⁰ This means that if the Prosecutor commits a serious or material breach of his or her duties under the Rome Statute, the Assembly of States Parties can remove him or her from office with an absolute majority. Furthermore, the body approves the budget of the Prosecutor, which means they have a controlling influence on the activities of the office of the Prosecutor, through the allocation of funds to the office.³¹

Third, the UNSC acting under Chapter VII of the UN Charter can suspend an on-going investigation using article 16 of the Rome Statute. As earlier argued in Chapter four, the Rome Statute gives the UNSC the power to defer proceedings currently before the Court, if the proceedings constitute a threat to international peace and security.³²

²⁸ Chapter four, paragraph 4.9.

²⁹ Chapter four, paragraph 4.9.1.

³⁰ Chapter four, paragraph 4.9.2.

³¹ Ibid.

³² Chapter four, paragraph 4.9.3.

9.7 The exercise of discretion by the Prosecutor in preliminary examinations in six African countries

Six country situations, all African, were used to consider how the Prosecutor has applied the principles discussed above. In essence, the inquiry in the case studies sought to find out if the Prosecutors understood and correctly applied the substantive and procedural powers provided for in the Rome Statute in the exercise of prosecutorial discretion during preliminary examinations. The choice of case studies from Africa was informed by the fact that the strongest criticisms of the ICC has come from the African continent. It was thus important to establish whether there is a substantive claim that the Prosecutor is biased against African leaders.

The analysis of the case studies produced mixed results.³³ For example, in the preliminary examinations conducted in Uganda and Central African Republic, while Moreno Ocampo, the first Prosecutor, did not clearly articulate the procedure through which the preliminary examinations were carried out in Uganda and Situation I of the Central African Republic, Fatou Bensouda adopted the policy paper on preliminary examination and used it to justify her actions and decisions in Central African Republic Situation II.³⁴

In addition, in terms of the substantive decisions made during the preliminary examinations conducted in Uganda and Central African Republic, the study found that the Prosecutor was correct in concluding that both situations fell within the jurisdiction of the ICC. Furthermore, the Prosecutors were correct in concluding that the admissibility criteria, namely complementarity and gravity, were met in the Central African Republic Situations I and II. However, in respect of the Uganda situation, former Prosecutor Moreno Ocampo failed to substantiate the decision that the crimes committed by government forces did not meet the threshold of gravity needed to trigger ICC jurisdiction and charges.³⁵

The former Prosecutor did not follow the policy paper on preliminary examinations in investigations conducted in Uganda and Central Africa Situation I although the policy paper mirrors provisions of the Rome Statute.³⁶ Furthermore, the study argues that the former ICC

³³ See generally, Chapters six to eight of the study.

³⁴ Chapter six, paragraph 6.7

³⁵ Ibid.

³⁶ Ibid.

Prosecutor applied a restrictive interpretation to the provisions of the Rome Statute regarding the principle of positive complementarity during preliminary examinations especially in Uganda.³⁷ This means that Uganda was not given the benefit of doubt to prove that it was willing and able to hold accountable those accused of committing international crimes in the northern Uganda conflict.

In relation to the preliminary examinations conducted in Sudan and Libya, the study noted that UNSC has the power to refer States not party to the ICC as provided by the Rome Statute.³⁸ Furthermore, the ICC legal framework provides for the conduct of preliminary examinations irrespective of how the jurisdiction of the ICC was activated, UNSC referrals inclusive.³⁹ With respect to both Sudan and Libya situations, the study concludes that legal factors such as jurisdiction, admissibility and interests of justice were met during the preliminary examinations conducted by the ICC Prosecutor. However, the former Prosecutor did not adhere to some of the policies and principles adopted by the office in the exercise of discretion during preliminary examination.⁴⁰ These include policies on positive complementarity and the use of preliminary examination to spur national trials.

The study agrees with the decision of the Prosecutor that the crimes committed in the Darfur and the Libyan conflict met the gravity threshold established in the Statute. Therefore, there was a reasonable basis to proceed with the investigations. The interpretation of the interests of justice by the Prosecutor necessitated abandoning the peace negotiations that were organised to end the Darfur conflict. As noted in the study, none of these peace processes has proved to be successful so far and most of the recent ones took place after the decision to proceed with an investigation. In addition, the study argues that the limited time of conducting preliminary examination in Libya did not give room to the government of Libya to activate national proceedings through positive complementarity.⁴¹

However, in Sudan and Libya, the former Prosecutor did not provide enough information regarding how the preliminary examinations were conducted and the information that is available are reports submitted to the UNSC, which are limited in content and analysis.

³⁷ Ibid.

³⁸ Chapter 7, paragraph 7.6.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

Regarding the jurisdiction of the Court over the crimes committed in Darfur and Libya, the study argues that although Sudan and Libya are not States party to the Statute, the referrals by the UNSC satisfies the jurisdiction threshold.⁴²

The situations in Kenya and *Côte d'Ivoire* represent the first cases where the Prosecutor decided there was a reasonable basis to proceed with investigations using the *proprio motu* powers in article 15 of the Rome Statute. This power is subject to oversight by the Pre-Trial Chamber of the ICC whose responsibility is to scrutinise and weigh the evidence submitted by the Prosecutor before approving a request by the Prosecutor to conduct an investigation into alleged crimes.⁴³

With respect to *Côte d'Ivoire*, the initial acceptance of the jurisdiction of the Court and subsequent ratification of the same by the government meant that the Prosecutor's power to conduct the preliminary examination into that country's situation could not be challenged. However, the Prosecutor did not charge the perpetrators of violence from all parties to the conflict for crimes. This called into question the neutrality of the Prosecutor.⁴⁴

With respect to Kenya, the use of 'inaction' or inactivity to determine Kenya's challenge of jurisdiction represented a lost opportunity to engage with the ICC on interpretations of unwillingness and inability in *proprio motu* proceedings. The adoption of 'inaction' or inactivity as a basis of the intervention of the ICC under article 15 of the Statute raises fundamental questions for the Prosecutor during preliminary examinations. Although the ICC Prosecutors have argued that positive complementarity is a key policy objective, it was not utilised in Kenya and Côte d'Ivoire to spur national trials.⁴⁵ Positive complementarity presupposes that the ICC will defer to national judicial systems when they show interest to investigate and prosecute crimes within the jurisdiction of the ICC.

Overall, the ICC Prosecutors mostly followed the provisions of the Rome Statute in the preliminary examinations conducted in Uganda, Central African Republic, Sudan and Libya. However, the study has found several grey areas in the implementation of the principles governing prosecutorial discretion. Of the six countries discussed in the study, the Prosecutor

⁴² Ibid.

⁴³ Chapter 8, paragraph 8.2

⁴⁴ Ibid.

⁴⁵ Ibid.

received most criticisms in respect of the preliminary examinations conducted in Kenya and Côte d'Ivoire. This is due in part to the fact that *proprio motu* examinations in Situation countries are controversial, and perhaps also to the questionable decisions of the Prosecutor and supported by the ICC Chamber that the crimes committed in Kenya reached the threshold of gravity required for crimes against humanity, and the failure to charge all parties to the violence in *Côte d'Ivoire*.⁴⁶

9.8 Recommendations

As the conclusion above shows, the ICC Prosecutor enjoys significant institutional independence. There have also been notable improvements in the manner in which the office has carried out its functions especially in preliminary investigations, from the first Prosecutor who was not as transparent to the current Prosecutor who has been more transparent. The development of guidelines and policy papers has also helped to clarify the Prosecutor's own understanding of the powers and factors that must be taken into account when exercising prosecutorial discretion during preliminary examinations. Although most of these principles are valid and have a legal basis, their application in practice has raised some concerns, and this thesis has shown that some of those concerns have some merit. It is in view of the foregoing discussions that the following recommendations are offered. This is to support the efforts of the current Prosecutor to ensure that the activities of the Court are understood by different stakeholders, including those directly affected by conflicts currently under preliminary examination, investigation or prosecution stages.

9.8.1 Clarification of the roles of the Pre-trial Chamber and Prosecutor in decisions concerning preliminary examinations

It is generally acknowledged that the Rome Statute is not a perfect document and contains ambiguous provisions that are difficult to reconcile.⁴⁷ One issue that is not clear is whether preliminary examination is subject only to the discretion of the Prosecutor or whether the Pre-Trial Chamber can intervene in certain circumstances. In Central African Republic Situation I, the decision of the Pre-Trial Chamber III, and the response of the former

⁴⁶ See Chapter four, paragraph 4.2.

⁴⁷ See Chapter one, paragraph 1.2.

Prosecutor are not clear on this.⁴⁸ It is therefore argued that this is an issue that needs to be clarified either in the Prosecutor's guidelines and policy papers or by the ICC. This will help to define the role of the Prosecutor during preliminary examinations and define the role of the Pre-Trial Chambers beyond authorisation for *proprio motu* investigations. Included in this clarification should be the timelines within which the Prosecutor has to make a decision.

The principle of a reasonable time adopted by the Pre-Trial Chamber III in the Central African Republic Situation I should be adopted as a benchmark, and the Court empowered to enforce a timeline on the Prosecutor regarding preliminary examinations.⁴⁹ This will be subject to the peculiarities of the situation and the Pre-Trial Chamber may give the Prosecutor the option of reporting the status of preliminary examinations while the process is ongoing.

The Pre-Trial Chamber should perform oversight functions on the exercise of prosecutorial discretion during preliminary examinations. This is because it will enhance the quality of proceedings at the ICC. If the Prosecutor routinely informs the Pre-Trial Chamber of its activities prior to a request for authorisation, it will create a dialogue process that will enable the Pre-Trial Chamber to understand the activities of the ICC Prosecutor better, thus enhancing the overall administration of justice at the ICC. After all, the Prosecutor has to obtain an authorisation from the Court before launching a *proprio motu* investigation.

9.8.2 Review of the gravity policy

The Prosecutor's application of the principle of gravity has been questionable. Although the Appeal Chambers has almost made gravity a non-issue during admissibility proceedings, the issue of gravity is still of importance to the Prosecutor during preliminary examinations. The former Prosecutor was not clear on the application of gravity and whether it involved a qualitative or quantitative analysis during some of the preliminary examinations carried out during his tenure. Although the policy paper on preliminary examination has clarified this

⁴⁸ See *Situation in the Central African Republic* Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05, 30 November 2006; See also Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05, 15 December 2006.

⁴⁹ See Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic above.

position, stating that gravity involves both quantitative and qualitative analysis of victims of international crimes, it is not yet clear how the gravity analysis is carried out. It is recommended that a gravity policy specifically detailing how the Prosecutor analyses the gravity criteria in the Rome Statute be adopted. Since it is clear from this study that there is a change in policy between Moreno Ocampo and Fatou Bensouda's administrations, it is recommended that the current gravity policy should be revisited.

9.8.3 Enhancing positive complementarity during preliminary examinations

The current Prosecutor states in the policy paper on preliminary examinations that the process is used to encourage positive complementarity whereby States are encouraged to investigate and prosecute international crimes. While there have been efforts to galvanise local support for the investigation and prosecution of international crimes by domestic judicial systems during preliminary examinations, the Prosecutor has not asserted the same pressure on all countries under preliminary examination, thereby fueling allegations of bias against the Prosecutor.⁵⁰ As already stated, the ICC is a court of last resort. This means that it is not meant to supplant or take-over genuine investigations and prosecutions of international crimes by national governments. Therefore, its strength should lie in the ability to ensure that State Parties comply with the provisions of the Rome Statute regarding the principle of complementarity.⁵¹

The thesis therefore recommends that the Prosecutor should endeavor to use preliminary examinations to spur national governments to investigate and prosecute crimes within the jurisdiction of the ICC committed by citizens. Such efforts will enhance positive complementarity and support national investigation and prosecution of international crimes. This will likely decrease the need to rely on the ICC for the investigation and prosecution of international crimes.

⁵⁰ See the case studies in Chapters six to eight for details.

⁵¹ Max du Plessis, Antoinette Louw and Ottilla Maunganidze _ African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' Institute for Security Studies Paper No 241, November 2012, 1 – 24; Thomas Hansen _ A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity' (2012) 13 Melbourne Journal of international Law, 217 – 234.

9.8.4 Public disclosure of preliminary examinations and prevention of crimes

The Prosecutor argues that it uses preliminary examinations as an early warning mechanism. This is, however, a recent development and was not part of the practice of the ICC during the early years of its operations. The practice itself is currently not uniform and the study has found that its effect is at best minimal.⁵² The press statements of the Prosecutor are mostly posted on the website of the ICC and distributed through social media, print and electronic media outlets. However, very few of the target audience get the information when it is needed most.

It is recommended that this policy be overhauled thereby necessitating the adoption of a better strategy that will ensure the statements and official communications of the Prosecutor reach the target audience. This suggests that translating the statements into the local languages where conflicts are ongoing is vital. In addition, other means of enhancing the effectiveness of public service announcements should be explored instead of restricting it to the traditional methods of press releases and uploading information on the website of the ICC.⁵³ These include uploading video and audio messages that can be played by radio and television stations across the States involved.⁵⁴

9.8.5 Division of labour between the UNSC and the Prosecutor

The current policy paper on the interests of justice adopted by the former Prosecutor of the ICC differentiates between the interests of peace and the interests of justice.⁵⁵ The implication is that only the UNSC acting under chapter VII of the UN can use article 16 of the Rome Statute to defer proceedings currently before the Court. The political nature of the UNSC has made it impossible for the Council to operate in a transparent and fair manner.

⁵² See the case studies in Chapters six to eight.

⁵³ Press releases on preliminary examinations are posted on the first page of the ICC website. However, once the information is overtaken by other events, it gets lost in the ICC website. It is only when the media picks up the information that it gets serious attention from the international community.

⁵⁴ The Prosecutor of the International Criminal Court recently issued a public statement ahead of Nigeria's elections. The ICC website contains downloadable audio and video files that can be played by radio and television stations across Nigeria. See ICC "Statement by the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of elections in Nigeria: —Feiterate my call to refrain from violence—" 16 March 2015.

⁵⁵ Policy Paper on the Interests of Justice, September 2007.

This development has resulted in the charge that the ICC is biased when the UNSC also has a role to play as provided under article 16 of the Rome Statute.

This study recommends that the decision to suspend or defer investigations or prosecutions in the ‘_interests of justice’ under article 53 of the Rome Statute should be a shared responsibility between the ICC and the UNSC. This will involve the UNSC handling issues that emanate from its referrals using article 16 of the Rome Statute while the Prosecutor concentrates on cases arising from States Party referrals or the Prosecutor’s *proprio motu* powers. This will conform to the argument by the Prosecutor that the ‘_interests of peace’ are political in nature and therefore beyond the mandate of his office.

Situations referred by the UNSC to the ICC are usually threats to international peace and security. Therefore, it should be the UNSC who considers deferrals in these Situations. Such a division of labour between the UNSC and the ICC Prosecutor in considering the deferral of cases will ensure that the checks and balances provided by the Rome Statute are used to its optimum and help avoid the UNSC exerting undue influence over the activities of the ICC.⁵⁶

9.8.6 Reports of termination of preliminary examinations

The Prosecutor needs to review the reports announcing the termination of preliminary examinations. Although the Statute provides that those that inform the ICC Prosecutor of crimes allegedly committed in their countries should be notified of the outcome of preliminary examinations, it does not preclude the Prosecutor from making the information available to the public.⁵⁷ Although it is conceded in the study that the effort of the Prosecutor in releasing reports has improved since Fatou Bensouda became the Prosecutor, reports that thoroughly discuss the substantive and procedural issues regulating the conduct of preliminary examinations is recommended.

⁵⁶ Benson Olugbuo *op cit*, 351 – 379.

⁵⁷ Paragraph 97 of the Policy Paper on Preliminary Examinations.

Annexure I: Preliminary Examinations at the International Criminal Court from July 2002 to August 2016

Situation	Method of initiating PE	Current status of PE	Decision on PE	Reason for decision	Approximate time taken to make a decision
Afghanistan (Asia)	<i>Proprio motu</i> (Art 15)	Admissibility Phase	On-going	N/A	N/A
Côte d'Ivoire (Africa)	Art (12) 3 and <i>Proprio motu</i> (Art 15)	Completed	Proceed	Legal criteria met (Art 53 (1) (a-c))	Seven years and nine months (1 Oct. 2003 – 23 June 2011)
Columbia (South America)	<i>Proprio motu</i> (Art 15)	Admissibility Phase	On-going	N/A	N/A

Central African Republic (Africa)	First PE: Self -Referral (Article 14) Second PE: Self-Referral (Article 14)	First PE :Completed Second PE: Completed	First PE: Proceed Second PE: Proceed	First PE: Legal criteria met (Art 53 (1) (a-c) Second PE: Legal criteria met (Art 53 (1) (a-c)	First PE: Two years and four months (7 Jan. 2005 – 22 May 2007) Second PE: N/A
Comoros (Palestine/Israel conflict) (Africa)	Partial Self-Referral (Article 14)	Completed	Declined	Did not meet legal criteria Article 53 – Admissibility – gravity	One year and five months (14 May 2013 – 6 November 2014)
DRC (Africa)	Self-Referral (Article 14)	Completed	Proceed	Legal criteria met (Art 53 (1) (a-c)	One year and two months (19 April 2004 - 23 June 2004)

Georgia (Asia)	<i>Proprio motu</i> (Article 15)	Complete	Proceed	Legal criteria met (Art 53 (1) (a-c))	Seven years and 2 months (August 2008 - 13 October 2015)
Guinea (Africa)	<i>Proprio motu</i> (Article 15)	Admissibility Phase	On-going	N/A	N/A
Honduras (North America)	<i>Proprio motu</i> (Article 15)	Completed	Declined	Did not meet admissibility criteria under Art 53	Four years and eleven months (18 November 2010 - 27 October 2015)

Iraq (Asia)	First PE: <i>Proprio motu</i> (Article 15) Second PE: <i>Proprio Motu</i> (Article 15)	First PE: Completed Second PE: Reopened on 13 May 2014 (Jurisdiction Phase)	First PE (Declined) Second PE(Ongoing)	First PE: admissibility criteria not met regarding gravity Second PE: N/A	First PE Two years and nine months (19 March 2003 – 9 Feb. 2006) Second PE: N/A
Kenya (Africa)	<i>Proprio motu</i> (Article 15)	Completed	Proceed	Legal criteria met (Art 53 (1) (a-c))	One year and eleven months (27 December 2007 – 26 November 2009)
Libya (Africa)	UNSC (Article 13 (b))	Completed	Proceed	Legal criteria met (Art 53 (1) (a-c))	6 days (26 Feb. 2011 – 3 March 2011)

Mali (Africa)	Self- Referral (Article 14)	Completed	Proceed	Legal criteria met (Art 53 (1) (a-c)	6 Months (13 July 2012 – 16 January 2013)
Nigeria (Africa)	<i>Proprio motu</i> (Article 15)	Admissibility Phase	On-going	N/A	N/A
Palestine (Asia)	Declaration under Article 12(3)	First PE: Completed Second PE: Ongoing (Jurisdiction Phase)	Declined NA	Did not meet legal criteria (Jurisdiction) NA	Three years and two months (22 Jan. 2009 - 3 April 2012) NA

South Korea (Asia)	<i>Proprio motu</i> (Art 15)	Completed	Declined	Did not meet legal criteria under Art 53 (Admissibility)	Three years and five months (6 December 2010 - 23 June 2014)
Sudan (Africa)	UNSC (Article 13 (b))	Completed	Proceed	Legal criteria met (Art 53 (1) (a-c))	3 Months (31 March – 6 June 2005)
Uganda (Africa)	Self-Referral (Article 14)	Completed	Proceed	Legal criteria met (Art 53 (1) (a-c))	Seven months (16 December 2013 – 29 July 2004)
Ukraine	Declaration under Article 12(3)	Jurisdiction Phase	Ongoing	N/A	N/A

Venezuela (South America)	<i>Proprio motu</i> (Article 15)	Completed	Declined	lack of subject-matter jurisdiction	Three years and six months (1 July 2002 – 9 Feb. 2006)
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