criminal tribunals. Therefore, the Court's jurisdiction is subsidiary to municipal courts because it is only triggered if there is inaction, unwillingness or inability genuinely to investigate or prosecute by the domestic courts.[7] In addition, the Statute provides for the mechanisms commonly referred to as the 'trigger mechanisms'[8] through which matters can be brought before the Court for trial.[9] Two of the said trigger mechanisms are the objects of analysis in this research paper in so far as the principle of complementarity is concerned.

### 1.1. Complementarity in UNSC Referred Situations

The duplicative assertion of complementarity in the Preamble and the substantive part of the Statute are a manifestation of the fundamentality attached to the principle by States Parties.[10] However, some writers have contended that the position between the United Nations Security Council (UNSC) referring a situation to the ICC[11] and the extent to which complementarity will apply is unclear.[12] In this regard, there is an argument that a UNSC referral of a situation to the ICC effectively nullifies complementarity and vests the ICC with primacy in terms of jurisdiction.[13] Proponents of this view contend that UN Member States have conferred on the UNSC the primary responsibility to maintain international peace and security in the UN Charter (Charter).[14] Therefore, the Charter obligation to accept and carry out the decisions of the UNSC negatives the complementarity requirement.[15]

[7] See McGoldrick, Rowe and Donnelly (2004: 83).
[8] See Schiff (2008: 78).
[9] See Art. 13 ICC Statute.
[10] See Kleffner (2008: 99).
[11] See Art. 13 (*b*) ICC Statute.
[12] See Benzing (2003: 625).
[13] See Newton (2001: 49).
[14] See Art. 24 (1) Charter.
[15] See Lauwaars (1983/84: 1605-06).

To begin with, it must be noted that Article 17 of the Statute containing the principle of complementarity remains silent on this point.[16] However, it can be argued that the Statute envisages the application of complementarity even in situations referred to the ICC by the UNSC.[17] This is deducible, inter alia, from the power of the Court to determine, on its own motion, the admissibility of a case and the requirement on the part of the Prosecutor to consider the admissibility of a case before deciding to initiate an investigation.[18]

Notwithstanding this theoretical normative framework, the author contends that it is unfathomable that the Prosecutor or even the Court would hold a UNSC referral inadmissible[19] thereby leaving the UNSC with the option, inter alia, to establish the costly ad hoc tribunals – a trend the UNSC is endeavouring to avoid.[20] Thus, pragmatism renders it highly unlikely bearing in mind the UNSC's influential position. By adopting a Chapter VII resolution under the Charter to refer a situation to the ICC, the UNSC makes a determination that the situation being referred to the Court is a threat to, or a breach of peace.[21] Inevitably, this creates a nexus between the juridical mandate of the Court on the one hand and the peace and security responsibility of the UNSC on the other hand. According to the author, this greatly undermines the independence of the Court as envisioned by the Statute and practically renders 'complementarity' an apparition.



That notwithstanding, a further challenge arises from a presupposition that a UNSC resolution referring a situation to the ICC declared it admissible.[22] The legal and practical consequences flowing from such a scenario merit investigation. This is particularly in the face of arguments

[16] See Pichon (1998: 189).
[17] See Lattanzi and Schabas (1999: 84).
[18] See Arts. 19 (1) and 53 (1) (*b*) ICC Statute.
[19] See Sarooshi (2004: 101).
[20] See Arsanjani (1999: 28).
[21] See Art. 39 Charter.
[22] See Benzing (2003: 626).

that UN Member States would be bound because in their treaty obligations under the Charter, they have undertaken to accept and carry out the decisions of the UNSC.[23] Additionally, the question whether the ICC would be bound by such a decision of the UNSC raises concern.[24] The fact that the Statute intends the ICC to be an independent and impartial international organisation[25] does not of itself necessarily answer the question.[26]

A further argument has been made that, since the UNSC has the power to establish ad hoc tribunals with primary jurisdiction, it must a maiore ad minus have the power to vest an existing complementary court with primacy.[27] Undeniably, the crimes under the ICC's jurisdiction threaten the peace, security and well-being of the world. Therefore, the prevention and punishment of the crimes by the ICC entail, inter alia, contributing to the maintenance and restoration of international peace and security. To this end, the ICC President noted:

> 'The Rome Statute's express purpose overlaps with the goals of the UN. [...] To achieve our collective aims, our institutions must work together […] Cooperation is important because the Court and the UN are part of an interdependent system of international law and justice.'[28]



[23] See Arts. 25 and 103 Charter.
[24] See Benzing (2003: 626).
[25] See Art. 40 ICC Statute.
[26] See Oosthuizen (1999: 313).
[27] See Stigen (2008: 241).
[28] Stigen (2008: 236).

Similarly, other writers have observed that:

> 'It was foreseeable that when the Rome Statute of 1998 establishing the International Criminal Court (ICC) was adopted the relationship between the UN Security Council and the Court was going to be an uncomfortable one.'[29]

Thus the subject matter jurisdiction of the ICC 'straying' into the primary responsibility of the UNSC or vice versa is a particularly worrisome matter in so far as the complementarity regime envisioned by the ICC Statute is concerned.

1.2. Complementarity in Self-Referred Situations

Further, the practice by some States Parties (the Democratic Republic of Congo (DRC), Uganda, the Central African Republic and Mali) to refer to the ICC situations occurring on their own territories has given rise to tension within the proper construction of complementarity generally and the procedural setting of the concept in particular.[30] The proper construction entails a general assumption that complementarity will avail Member States a pre-emptive measure against the Court's action either by instituting proceedings in their domestic criminal courts, asking for a deferral[31] or challenging admissibility.[32] Whereas the Statute recalls that it is the duty of Member States to exercise their criminal jurisdictions over perpetrators of international crimes,[33] self-referrals 'seem to abdicate this duty' by claiming inability which, though compatible with the intent of justice, maybe incompatible with complementarity.[34] The question whether a self-referred situation to the ICC amounts to an abdication of the Rome Statute duty of member states



[29] Doria, Gasser and Bassiouni (2009: 455).
[30] See Kleffner in Stahn and Sluiter (2009: 41-54).
[31] See Art. 18 (2) ICC Statute.
[32] See Art. 19 ICC Statute.
[33] See Preambular paragraph 6 ICC Statute.
[34] See Kleffner in Stahn and Sluiter (2009: 41-2).

to prosecute grave crimes of an international dimension requires determination. The perceptible incompatibility between self-referrals and complementarity gives rise to the need for analysis whether, and to what extent complementarity generally, and the procedural construction particularly apply in such cases.

Consequently, some have contended that if domestic criminal tribunals are able and willing to prosecute as envisioned by the Statute, relinquishment of jurisdiction conflicts the complementarity principle, the fundamental purpose of which confers on national criminal jurisdictions the primary duty to investigate and prosecute grave international crimes.[35] On the other hand, others have argued that self-referrals can legitimately be made where the referring States have neither commenced investigations nor prosecutions, as there could be valid purposes for the referring states to abdicate their jurisdiction (hence, conceptualising such referrals as 'waivers of complementarity').[36]



Contrariwise, it appears questionable whether the mere fact that a State makes a self-referral would automatically entail such a waiver,[37] more so that waivers or renunciations of claims or rights of States must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right.[38]

These contentions border on the complementary regime of the ICC. Hence, the author has been motivated to test and analyse the underlying legal framework of the concept, its rationale and the extent to which it applies in the cases in casu.

[35] See Preambular paragraphs 4, 6, 10 and Art. 1 ICC Statute
[36] See Akhavan (2010: 103).
[37] See Kleffner in Stahn and Sluiter (2009: 43).
[38] See *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections) [1992] ICJ Rep 247-50.

2. Research Question

What does complementarity, as envisioned in the Statute, practically and theoretically entail?

3. Objectives of Study.

The Rome Statute provides:

> 'An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.'[39]

As noted above, the ICC exercises derivative jurisdiction because Member States deemed it fit to repose the primary responsibility to prosecute international crimes in domestic criminal jurisdictions of States Parties.[40] For this reason, the Court's jurisdiction is said to be complementary or to complement that of domestic criminal courts of Member States, hence the term 'complementarity'.

However, the principle of complementarity has generated a myriad of legal, academic and professional discourses among various stakeholders in the international criminal justice dispensation system. On the one hand, the challenges have gained momentum in the light of the recent UNSC referral of the situations in Sudan and Libya to the ICC. This stems from the fact that the relationship between the UNSC referring a situation to the Court and the application of the complementarity regime is unclear.[41] Notwithstanding the provisions of Articles 18 and 19 of

[39] Art.1 ICC Statute.
[40] See Art.1 ICC Statute.
[41] See Benzing (2003: 625-26).

the Statute, some scholars have argued that complementarity as such does not apply to UNSC referrals[42] while others have contended otherwise.[43]

On the other hand, the self-referred situations to the ICC by Uganda, the DRC, the Central African Republic and Mali have raised controversy within the proper construction of complementarity. Based on the complementarity principle, one such conundrum has been Uganda's threat to withdraw the self-referral which was later reiterated several times by government officials. Although the question of withdrawal of a State Party referral has never been officially brought up before the Court, the statements made by the Ugandan Government herald the possibility of facing such a question in the future.[44]

In an endeavour to address the above and further related questions, the author will:

I. Evaluate the Court's jurisdictional reach.

II. Analyse UNSC referrals to the Court against the admissibility requirement envisioned by the Statute. Due regard will be paid to the treaty obligations emanating from the Charter and the ICC Statute. The legal effects of a possible UNSC resolution deciding on admissibility will also be analysed.

III. Assess the legal basis of duty to prosecute, the framework for complementarity in self-referrals and the practical effect of treating self-referrals as waivers of complementarity.

IV. Examine the possibility and legal basis of withdrawal of a State Party referral bearing in mind that the Statute, the Rules and the Regulations make no express provisions.

[42] See Newton (2001: 49).
[43] See Holmes (2002: 683).
[44] See El Zeidy (2008: 56).

4. Significance of Study

The author intends to contribute to the discourse on the subject. In turn, this will enable readers to have a theoretical understanding of complementarity and to appreciate the practical conundrums around the subject. The author will also contribute to the enrichment of academic knowledge.

5. Scope of Research

This research revolves around ICC and/or UN Member States. Therefore, such States will be mentioned as and when a need has arisen in the course of the paper.

6. Hypothesis

The author is inclined to the view that ideally, the principle of complementarity will apply regardless of the trigger mechanism through which a situation is referred to the ICC. However, practical challenges arise when the UNSC has adopted a resolution under Chapter VII of the Charter that a particular situation is a threat to international peace and security and decides to refer the matter to the ICC. Further, that self-referred situations to the ICC do not, and should not amount to waivers of complementarity. It is also the author's view that once a situation is self-referred to the ICC, it becomes impossible for the self-referring state to withdraw the matter from the Court.

7. Research Methodology

The study will be conducted through desktop research. This will entail reading and analysing primary sources such as international conventions, resolutions, treaties and other relevant international legal instruments. Secondary resources will include books, journal articles, and electronic resources.

# CHAPTER TWO

In this Chapter, the author gives a brief introduction to the ICC before discussing the following concepts: Jurisdictional competency of the ICC, consent requirement of treaty law, complementarity and admissibility.

## 1. Development of the ICC

### 1.1. The Nuremberg and Tokyo Trials

In their determination to punish the Nazis for war crimes, the Allied Powers (UK, USA, France and the Soviet Union) considered the idea of international prosecutions during and after World War II.[45] In 1945, they convened at the London Conference where they established and adopted the Charter of the International Military Tribunal (IMT) to prosecute and punish the major war criminals of the European Axis.[46] Since the IMT Charter was adopted after the crimes had been committed, the IMT has been criticised, inter alia, as having applied the law ex post facto.[47]



Later, the Allies passed Control Council Law No. 10 (CCL No. 10) which, unlike the IMT Charter, dispensed with the requirement that crimes against humanity be 'in execution of or in connection with any crime within the jurisdiction of the tribunal.'[48] This facilitated the prosecution of crimes committed against Germans prior to 1939, euthanasia of the disabled as well as persecution of the Jews.[49] In 1946, the United Nations General Assembly (UNGA) unanimously affirmed the principles of international law recognized by the Nuremberg Tribunal and its judgment.[50] The Allies also established an International Military Tribunal for the Far East

[45] McGoldrick, Rowe and Donnelly (2004: 41).
[46] See Schabas (2004: 5).
[47] See Tomuschat (2006: 832-35).
[48] Doria, Gasser and Bassiouni (2009: 52).
[49] See Tomuschat (2006: 832-35).
[50] See Doria, Gasser and Bassiouni (2009: 52).

where Japanese war criminals were tried.[51] However, Tokyo left no legacy comparable to Nuremberg.[52]

### 1.2. The Ad Hoc Tribunals

The crimes in Yugoslavia and Rwanda quickly changed the political landscape for the creation of an international criminal court. In February 1993, the wide range of war crimes and crimes against humanity in Bosnia led the UNSC to resolve to establish an International Criminal Tribunal for the former Yugoslavia.[53] Later in November 1994, the UNSC resolved to create another ad hoc tribunal for Rwanda on request by the latter.[54]

Unfortunately, ad hoc tribunals do not provide an ideal solution to armed conflicts of truly appalling cruelty because they are only established after crimes have been committed. Further, their jurisdiction is limited both in time and in space and they cannot guarantee a uniform application of the law.[55] Contrariwise, a permanent international criminal court exists before crimes are committed and can better guarantee a uniform interpretation and enforcement of the law.



## 2. Drafting of the ICC Statute

The UN had simultaneously been working on codifying the crimes and the establishment of an international criminal court. This process percolated through the Genocide Convention, 1948 which directly advocated the creation of an international criminal court with jurisdiction over

[51] See McGoldrick, Rowe and Donnelly (2004: 20).
[52] See McGoldrick, Rowe and Donnelly (2004: 21).
[53] See UNSC Resolution 808 (1993).
[54] See Schabas (2004: 11).
[55] See Lattanzi and Schabas (1999: 10).

persons suspected of committing genocide.[56] In July 1998, the UNGA passed a Final Act to establish the Preparatory Committee (PrepCom).[57] The PrepCom was convened by the UNGA at its 1995 session to further develop the statute with the notion that a plenipotentiary conference would follow.[58] The Diplomatic Conference of Plenipotentiaries on the Establishment of an international criminal court convened in June 1998, in Rome.[59] More than 160 states were represented through their delegates and hundreds of NGOs took part in the negotiations either directly or through the Coalition for the International Criminal Court (CICC).[60] NGO participation was particularly important because it provided summaries of early negotiation and rationale for certain compromises without which the delicate compromises attained in the early stages of negotiation would be susceptible to collapsing.[61]

After much debate and negotiation, the Diplomatic Conference adopted the statute of the International Criminal Court on 17 July 1998.[62] The requisite 60 ratifications threshold for the statute to enter force was reached on 11 April 2002.[63] That notwithstanding, the statute would only become operational on the 1st day of the month after the 60th day of deposit of the 60th instrument of ratification.[64] Hence, the statute entered force on 1 July 2002. Thus, whereas the genealogy of the ICC can be traced to the Nuremberg and Tokyo Trials, the concepts and codification of international criminal law had existed and have been developing since ancient times.[65]



[56] See Sands (2003: 112).
[57] See Schiff (2008: 104).
[58] See Schiff (2008: 70).
[59]See Schabas (2004: 15).
[60] See Schiff (2008: 70).
[61] See Struett (2008: 109).
[62] See Schabas (2004: 18).
[63] See Schabas (2004: 20).
[64] See Art. 126 ICC Statute.
[65] See Gow (2002: 11).

3. Jurisdictional Competency of the ICC

The Statute is couched in a mandatory manner that the Court 'shall satisfy itself that it has jurisdiction in any case brought before it.'[66] Jurisdiction refers to the framework and circumstances within which the ICC can properly discharge its functions. Schabas aptly states:

> 'Jurisdiction refers to the legal parameters of the Court's operations, in terms of subject matter (jurisdiction *ratione materiae*), time (jurisdiction *ratione temporis*) and space (jurisdiction *ratione loci*) as well as over individuals (jurisdiction *ratione personae*).'[67]

ICC jurisdiction is circumscribed by Article 13 of the Statute which implicitly rejects the notion of universal jurisdiction.[68] Accordingly, the ICC can only hear cases self-referred by a state party, those referred by the UNSC or where the Prosecutor initiates an investigation proprio motu. [69] When the UNSC refers a situation to the Prosecutor, it matters less whether or not the crime was committed on the territory of a member state just like the nationality of the perpetrator becomes irrelevant because consent is derived from the Charter.[70] In ruling on the territorial and personal parameters in the Sudan situation that was referred to the Prosecutor by the UNSC, the Court stated that the territorial and personal jurisdictional limitations of the Court are inapplicable in cases referred to the Prosecutor by the UNSC acting under its Chapter VII powers of the Charter.[71] For this reason, some have argued that UNSC referrals have the operational



[66] Art. 19 (1) ICC Statute.
[67] Schabas (2004: 68).
[68] See Newton (2001: 49).
[69] See Art. 13 ICC Statute.
[70] See Werle (2009: 85). See also Art. 25 Charter.
[71] See Laughland.

effect of conferring on the Court a 'back-door universal jurisdiction',[72] a concept that was rejected during the negotiations.

On the other hand, proprio motu investigations[73] and referrals to the Prosecutor by States Parties[74] are dependent on the territorial and personal jurisdiction of the Court.[75] That is to say, the ICC will have jurisdiction only if the crime was committed on the territory of a member state or a non-member state that consents ad hoc to ICC jurisdiction or a national of either state.[76] Thus, except in cases referred to the Prosecutor by the UNSC, jurisdiction of the ICC is consensual in nature because it is based on the consent of states parties that have signed and ratified the Statute or a non-state party that consents ad hoc to the jurisdiction of the Court.[77] The concept of 'territory' includes jurisdiction over crimes committed on board a vessel or aircraft registered in a member state.[78] Whereas the IMT had jurisdiction to declare certain Nazi Organisations criminal, the ICC only has jurisdiction over natural persons[79] who have attained the age of 18 at the time of commission of the offence.[80] Further, trials in absentia are not permitted under the Statute.[81]



The subject matter jurisdiction of the Court, that is the crimes prosecutable before the ICC, is circumscribed to the most serious crimes of concern to the international community as a whole; genocide, crimes against humanity, war crimes and aggression.[82] For the crime of aggression, the

[72] See Driscoll (2004: 14).
[73] See Art. 13 (*c*) ICC Statute.
[74] See Art. 13 (*a)* ICC Statute.
[75] See Art. 12 (2) ICC Statute.
[76] See Art. 12 (3) ICC Statute.
[77] See Art. 12 ICC Statute.
[78] See Art. 12 (2) (*a*) ICC Statute.
[79] See Art. 25 (1) ICC Statute.
[80] See Art. 26 ICC Statute.
[81] See Art. 63 (1) ICC Statute.
[82] See Art. 5 ICC Statute.

Kampala Review Conference resolved to defer the Court's exercise of jurisdiction to a decision to be taken by Member States after 1 January 2017.[83]

In terms of jurisdiction ratione temporis (time), the ICC only exercises jurisdiction in relation to crimes committed after the Statute entered force,[84] in this case 1 July 2002.[85] In the case of a state that becomes party to the Statute after it has already entered force, the Court will only have jurisdiction to crimes committed from the moment the Statute enters force with respect to that particular state, unless the State declares otherwise.[86] This requirement has a nexus to, and is re-enforced by Article 24 of the Statute which proscribes retroactive punishment of criminality. Therefore, the Statute leaves it to the municipal criminal courts to try and punish persons responsible for serious crimes committed prior to its entry into force.

However, what remains doubtful is the Court's jurisdiction over 'continuous crimes', particularly cases of 'enforced disappearances' which are crimes against humanity under Article 7 of the Statute. A person could have been disappeared prior to the entry into force of the Statute and yet the crime would continue after the entry into force of the Statute as long as the disappearance continues.[87]



3.1. ICC Jurisdiction v Treaty Consent Requirement

As already seen, prosecutions in the ICC are consensual in nature. When the UNSC refers a situation to the ICC, States' consent to ICC jurisdiction is derived from ratification of the Charter and/or the Statute.[88] Accordingly, a fundamental and basic principle of international treaty law is

[83] See Heinsch (2010: 715-16).
[84] See Art. 11 ICC Statute.
[85] See Art. 126 ICC Statute.
[86] See Art. 11 (2) ICC Statute.
[87] See Schabas (2004: 72).
[88] See Lattanzi and Schabas (1999: 60). See also Art. 25 Charter.

that only states parties should be bound by a treaty.[89] In a true Vattelian fashion, this entails that a treaty should not create rights and obligations for a third state without its consent.[90]

However, the Statute dispenses with the need for ratification by national governments by conferring on the Court jurisdiction over nationals of non-party states in so far as the Court can preside over them if the crime was committed on the territory of a state party and that state party decides to refer the situation to the Court or the Prosecutor initiates proprio motu investigations.[91] Similarly, the territory of a non-party state where the crime was committed could consent ad hoc to the jurisdiction of the Court and decide to refer the situation to the ICC or the Prosecutor may institute investigations in such a case.[92] In both instances, states that have neither signed and ratified the ICC treaty nor accepted ad hoc the jurisdiction of the Court are exposed to its jurisdiction if their nationals are the alleged perpetrators.

Using the United States of America as an example, the Statute exposes a US soldier acting on a foreign territory to the jurisdiction of the ICC if she or he commits a crime within the jurisdiction of the Court on that territory. Theoretically, that would be the case notwithstanding that the US is not a party to the ICC treaty and that the foreign territory is also non-party but only accepts ad hoc the jurisdiction of the Court.[93] That would be the case even where the foreign territory is party to the Statute and decides to refer the situation to the ICC or the Prosecutor institutes investigations proprio motu. Practically, the US is likely to utilise its influence as one of the five permanent members of the UNSC to block such an investigation by, inter alia, deferring the

[89] See Arts. 34-8 VCLT.
[90] See Art. 34 VCLT.
[91] See Art. 12 (2) (*a*) ICC Statute.
[92] See Art. 12 (2) ICC Statute.
[93] See Scheffer (1999: 20).

investigations.[94] However, other non-party states may not avoid ICC jurisdiction over their nationals as they may be expected to cooperate with the Court in any request for arrest and surrender.[95]

Complementarity appears to offer a panacea to this jurisdictional conundrum because the national judicial system may claim primacy to investigate and prosecute international crimes. However, the problem is still unresolved because the ICC could still hold that there was no genuine investigation or prosecution and the matter would still be admissible to the ICC. For the purpose of consensual jurisdiction in line with international treaty law, the US had proposed that the Court's jurisdiction under Article 12 should require the express approval of both the territorial state where the crime is alleged to have been committed as well as the state of nationality of the alleged perpetrator in an event that either was non-party to the ICC treaty.[96] The author admits that such a provision would not only prevent a perilous drift toward universalising jurisdiction to non-party states but also uphold the international treaty law concept of consensual obligations on treaty party states. Regrettably, the American view did not make it into the final text of the Rome Statute.



The over-broad jurisdictional reach of the ICC is also discernible from the effect of amending Articles 5, 6, 7 and 8 of the Statute. Accordingly, if the ICC statute were amended to add new crimes to the subject matter jurisdiction of the Court or to revise the definitions of the existing crimes in the Statute, a state party can immunise its nationals from the jurisdiction of the Court by not accepting the amendment.[97] However, nationals of non-party states who commit offences on other territories would be subject to the potential jurisdiction of the court if that other state

[94] See Art. 16 ICC Statute.
[95] See Art. 89 (1) ICC Statute.
[96] See 'US Opposition to ICC.'
[97] See Art. 121 (5) ICC Statute.

accepted jurisdiction of the Court on the amended offences – an indefensible overreach of jurisdiction.[98] Article 12's potential jurisdictional violation of the principle of sovereign consent embedded in the Vienna Convention is a challenge. Scheffer argues that states not party to the Statute are exposed in ways that states parties are not and she illustrates this anomaly as follows:

> 'With only the consent of a Saddam Hussein, even if Iraq does not join the treaty, the treaty text purports to provide the court with jurisdiction over American or other troops involved in international humanitarian action in Northern Iraq.'[99]

The poor draftsmanship of Article 12 of the Statute was partially cured by the Rules of Procedure and Evidence (RPE) which provide that any non-party state that triggers an investigation thereby exposes its own conduct to the full scrutiny of the ICC.[100] According to the author, this provision seeks only to deter politically-motivated charges but does not address the fundamental aspect of international treaty law that states cannot be bound without their consent.



However, it can be said that one argument for prosecuting nationals of non-party states is that states have always prosecuted foreign nationals for offences committed within their territories (territorial jurisdiction) or simply because the citizens are victims (passive personality) or that the conduct merely affects the interests of that state (protective jurisdiction).[101] In such cases, the consent of the foreign national's state is irrelevant. However, one can still argue that there is a distinction between the exercise of jurisdiction over a foreign national by a national criminal tribunal and handing over a defendant to the jurisdiction of an international organisation whose own state has refused to participate in. In the latter case, states are not obligated to participate in

[98] See Scheffer (1999: 20).
[99] Ralph (2007: 130).
[100] See Rule 44 (2).
[101] See Wedgwood (1999: 99).

an international organisation because they are founded on consent, the lynchpin of the Rome treaty.[102] Even the Charter from which the UNSC derives its power and authority was consented to by states.[103]

To counter the above contention, it has been argued that the Statute in Article 12 does not impose obligations on third states as such, but upon its nationals.[104] Hans-Peter Kaul, leader of the German delegation at Rome has equally argued that the Statute does not impose obligations on third states as such but on nationals.[105] Therefore, it is an individual criminal who is the independent object of international law and not an extension of his or her state. Seen from this perspective, it becomes clear that the Statute does not violate Article 34 of the Vienna Convention. The author's view is that the ICC merely provides fora because territorial jurisdiction on which Article 12 is based has long been recognised as a principle of law between states. Therefore, states could have delegated the exercise of this territorial jurisdiction to a supranational organisation like the ICC.[106]



However, some have argued further that there is no precedent for states to delegate their territorial jurisdiction this way and that it amounts to a 'material alteration' of the traditional understanding of territorial jurisdiction.[107] Therefore, it should be inapplicable to states that do not consent to the Statute because states can opt to consent to universal and territorial jurisdiction to be exercised between states but object to it being exercised by an international organisation like the ICC. In the latter scenario, the burden imposed on states whose nationals may be subject

[102] See Wedgwood (1999: 100).
[103] See Wedgwood (1999: 100).
[104] See Ralph (2005: 40).
[105] See Kaul (2002: 608-9).
[106] See Kaul (2002: 608-9).
[107] See Ralph (2007: 133).

to prosecution before an international organisation is materially increased.[108] Hence, the Statute is seen as obliterating nation's sovereign right to choose what agreements they wish to enter into with other nations.[109] The 'nemo dat argument' does not apply in this case and a precedent for creating and conferring enormous powers on an institution can be gathered from the establishment of the Nuremberg Tribunal and the UN. Moreover, international crimes affect the interests of the international community as a whole. Therefore, the question does not rest on individual states' interest but the desire to end impunity. Scharf succinctly writes:

> 'Suggestion that a state has a right of exclusive jurisdiction over its nationals concerning acts committed abroad reflects a colonialist concept that was prevalent in earlier centuries but has little relevance to modern practice.'[110]

Interestingly, the US has so far managed to set a precedent through the UNSC Resolution 1593 (2005) referring the Darfur situation to the ICC that in the absent of consent from the non-party state involved or a referral by the UNSC, no investigation or prosecution should be commenced in the ICC.[111] In this resolution, the UNSC decided that nationals of contributing states which are non-party to the Rome Statute shall be subject to the exclusive jurisdiction of the contributing state for acts emanating from their operations in Sudan.[112] Similarly, in Resolution 1970 (2011) referring the situation in Libyan Arab Jamahiriya to the ICC, the UNSC included, at the insistence of the United States as a pre-condition to allowing the resolution to pass, a proviso that

[108] See Morris (2001: 51).
[109] See Feinstein and Lindberg (2009: 40).
[110] Scharf (2001: 75).
[111] See Doria, Gasser and Bassiouni (2009: 480).
[112] See UNSC Resolution 1593 (2005).

excludes from the jurisdiction of the Court its citizens as members of an international peacekeeping operation.[113] Therefore, it remains to be seen how the Court will respond.

4. Complementarity and Admissibility

Admissibility mainly arises as a result of the fundamental principle of 'complementarity'[114] which is introduced as a general notion by the Preamble and Article 1 of the Statute which declare ICC jurisdiction to be complementary to national criminal courts.[115]

The two provisions thus incorporate into the Statute complementarity as a general goal and a constitutional framework upon which basis the Court should function.[116] Under the complementary regime, the Court's jurisdiction is subsidiary to municipal courts because it is only triggered if there is inaction, unwillingness or inability genuinely to investigate or prosecute by the domestic courts.[117] Therefore, complementarity simply refers to the rules governing the relationship between the ICC and domestic courts.[118] This jurisdiction is the opposite of the jurisdictional primacy which the Ad Hoc tribunals enjoy whereby they can assume jurisdiction as of right without having to demonstrate any unwillingness or inability on the part of the municipal courts.[119] In this fashion, the ICC fills in the gaps of national criminal jurisdictions, and the two systems work together to ensure that impunity is fought on both fronts; national and international.



[113] See Resolution 1970 (2011). See also 'UNSC Referral of Libya Gives ICC the Opportunity to prove its Worth.'
[114] See McGoldrick, Rowe and Donnelly (2004: 66).
[115] See Kleffner (2008: 99).
[116] See Kleffner (2008: 99).
[117] See McGoldrick, Rowe and Donnelly (2004: 83).
[118] See Gioia (2006: 109).
[119] See Brown (1998: 383).

It can thus be said that complementarity of jurisdiction is the main feature of the ICC.[120] That the establishment of the ICC does not relieve member states of their responsibility and obligation to try and punish those responsible for serious crimes is premised on the fact that municipal tribunals constitute forum conveniens where ordinarily both the evidence and suspect will be located.[121] Thus practical considerations of efficiency and effectiveness are given primacy since municipal jurisdictions will have the best access to evidence and witnesses. Secondly, the drafters resorted to complementary jurisdiction in order to make the project sustainable since cases from across the world would overwhelm the Court and impact negatively on its limited financial resources.[122] Third was the intent to motivate domestic jurisdictions to exercise their criminal jurisdictions over international crimes.[123] Lastly, the complementarity regime offered a compromise between the need for state sovereignty to prosecute its own nationals without external influence on the one hand, and the need for international accountability on the other.[124]



Complementarity is translated into more specific legal norms in Articles 17 and 20 (3) of the Statute which lay down substantial grounds upon which a case would be admissible to the Court. Therefore, admissibility criteria implements complementarity.[125] Complementarity is further preserved by provisions in the Statute relating to preliminary rulings on admissibility[126] and challenging the admissibility of a case.[127] The Court is designated arbiter to assess the admissibility of a case.[128] Thus admissibility of a case may arise for determination in

[120] See Stahn and Sluiter (2009: 33).
[121] See Lattanzi and Schabas (1999: 39).
[122] See Melandry (2009: 536).
[123] See Benzing (2003: 596).
[124] See Melandry (2009: 536).
[125] Newton (2001: 52).
[126] See Art. 18 ICC Statute.
[127] See Art. 19 ICC Statute.
[128] See Art. 17 ICC Statute. See also Kleffner (2008: 102).

circumstances where the case is being investigated or prosecuted,[129] the case has been investigated and the state has decided not to prosecute the person concerned[130] or, the person concerned has already been tried.[131] In such instances, a case will be inadmissible, unless the state is in reality unwilling or unable 'genuinely' to carry out the investigation or prosecution.[132]

The Prosecutor and the ICC make a determination whether a state is 'genuinely unwilling' or 'genuinely unable' to investigate or prosecute.[133] Similarly, where a person has already been tried, a case is admissible if the proceedings in that court were for the purpose of shielding that person from his criminal responsibility.[134] Further, a situation is inadmissible if it lacks sufficient gravity or when a prosecution would not be in the interest of justice.[135]

It is common knowledge that not all member states have adapted their domestic penal laws to the ICC Statute. In turn, this presents a challenge to the rule against double jeopardy or the ne bis in idem principle which proscribes the punishment of a person by the Court for conduct which falls within its subject-matter jurisdiction if that person has already been tried by another court.[136] Assuming that an individual has been properly tried by a domestic court for an ordinary crime, such as murder, as opposed to genocide or crimes against humanity, strictly speaking, this would not be a case of inability or unwillingness to prosecute. Unless it can be demonstrated that the proceedings were simply meant to shield the accused from his or her criminal responsibility, such a case should be inadmissible before the ICC. Yet such trials tend to trivialise the crime and

[129] See Art. 17 (1) (*a*) ICC Statute.
[130] See Art. 17 (1) (*b*) ICC Statute.
[131] See Art. 17 (1) (*c*) ICC Statute. See also Kleffner (2008: 102).
[132] See Art. 17 (1) (*a*) ICC Statute.
[133] See Newton (2001: 54).
[134] See Art. 20 (3) (*a*) ICC Statute.
[135] See Art. 53 (2) (*c*) ICC Statute.
[136] See Art. 20 (3) ICC Statute.

contribute to revisionism or negationism.[137] Hence, it has been argued that Article 20 (3) should have been couched in a like manner with Article 20 (2) to read, 'no person who has been tried by another court for a crime referred to in Article 5' as opposed to, 'no person who has already been tried by another court for conduct [...][138] However, it can be said that the objective of the ne bis in idem principle is to prohibit double jeopardy to all cases in which the perpetrator has been genuinely acquitted or convicted by any domestic court.[139] Similarly, the Statute does not allow national courts to try an individual for any of the crimes within its jurisdiction if that person has already been tried by the Court.[140] Therefore, an argument can be made that a person acquitted of genocide for failure by the Prosecutor to prove specific intent can still be tried and prosecuted in national courts for ordinary homicide without breaching the Statute.

4.1. 'Unwillingness genuinely to investigate or prosecute'

The admissibility criteria provides the most direct basis for allocating responsibility for a prosecution between the Court on the one hand, and any other State that may claim jurisdiction on the other.[141] Admissibility criteria therefore establishes a protection mechanism against States' sovereign right to try and punish violators of international criminal norms and becomes akin to the system under human rights bodies requiring a petitioner to exhaust domestic avenues before instituting an action for human rights violations in international organisations.[142]

[137] See Schabas (2004: 88).
[138] See Schabas (2004: 88)
[139] See Werle (2009: 248).
[140] See Art. 20 (2) ICC Statute.
[141] See El Zeidy (2008: 159).
[142] See El Zeidy (2008: 159).

A check on the action undertaken by a state in relation to a particular situation becomes inevitable because not every action carried out by the state will satisfy the requirement. Accordingly, in Lubanga, PTC – I stated:

> 'The Chamber also notes that when a State with jurisdiction over a case is investigating, prosecuting or trying it, or has done so, it is not sufficient to declare such a case inadmissible. The Chamber observes on the contrary that a declaration of inadmissibility is subject to a finding that the relevant State is unwilling or unable to genuinely conduct its national proceedings in relation to that case within the meaning of article 17(1)(a) to (c), (2) and (3) of the Statute.'[143]

Thus, to block ICC intervention, the national criminal jurisdiction must carry out bona fide action demonstrating its 'willingness or ability genuinely' to carry out investigations or prosecutions.[144] The Court has to establish that the investigation or prosecution being carried out by the state in question is 'genuine' before a deferral can properly be made to or claimed by a domestic jurisdiction. In turn, this depends on the circumstances of each particular case.[145] Evaluating the genuineness of proceedings practically entails scrutinising the domestic judicial proceedings in relation to a particular case as a whole from its inception to the time of assessment.[146]

The Statute provides that unwillingness exists if; the national proceedings are undertaken to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the

[143] *Decision on the Prosecutor's Application for a Warrant of Arrest* (*Prosecutor v Lubanga*) ICC-01/04-01/06-8) dated 17/03/2006.
[144] See El Zeidy (2008: 163).
[145] See El Zeidy (2008: 166).
[146] See El Zeidy (2008: 166).

court,[147] there has been an unjustified delay in the proceedings[148] or that the proceedings are not conducted independently or impartially, with a view not to bring the person concerned to justice.[149] This safeguard is meant to counter attempts by national criminal tribunals to shield those responsible for international crimes.[150] In the first criterion, the Court has the task of examining the motives of the national authorities (executive, judicial or legislative). This demands an assessment of the quality of justice and covers procedural and substantive due process rights as recognised by international law.[151]

Hence, national proceedings undertaken in order to make it appear as if investigations or prosecutions are underway, including 'sham trials' to afford the defendant an opportunity to subsequently plead the ne bis in idem principle[152] are without effect.[153] Such proceedings will properly be construed as having been undertaken for the purpose of 'shielding the defendant from his or her criminal responsibility' or that they lacked independence or impartiality.



4.2. 'Inability genuinely to investigate or prosecute'

It has been argued that to a certain extent, 'unwillingness' relies on a subjective assessment whereas 'inability' involves objective elements.[154] As an illustration, a state would be desirous of instituting a genuine investigation, prosecution or trial but factually lack the capacity to do so.

[147] Art. 17 (2) (*a*) ICC Statute.
[148] Art. 17 (2) (*b*) ICC Statute.
[149] Art. 17 (2) (*c)* ICC Statute.
[150] See Melandry (2009: 357).
[151] Schabas (2004: 86).
[152] See Art. 20 ICC Statute.
[153] See Schabas (2004: 86).
[154] See El Zeidy (2008: 222) See also Melandry (2009: 507).

This may result from, among other things, a civil war or lack of an effective judicial system, like in Somalia, Rwanda and Colombia.[155] The ICC Statute provides:

> 'In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.'[156]

It is worth noting that cases of inability are not limited to situations where the state is unable to secure the custody of the suspect, or obtain the necessary evidence. The phrase, 'or otherwise unable to carry out its proceedings' serves as a catch-all clause so that all possible factors giving rise to inability are as well captured.[157] Mali is the case in point because the State lacks control over Northern Mali which is controlled by the rebels, yet murder and rape, inter alia, are endemic.



The inability to obtain the accused or the necessary evidence and testimony must arise from a total or substantial collapse or unavailability of the national judicial system.[158] To satisfy the requirement of a total or substantial collapse, it will be sufficient if the collapse has attained an intensity affecting a significant or considerable part of the domestic justice system.[159] According to this argument, a degree of intensity paralysing the investigation, prosecution, trial or execution of verdicts will suffice.

[155] See El Zeidy (2008: 222).
[156] Art. 17 (3) ICC Statute.
[157] See El Zeidy (2008: 224).
[158] See Schabas (2004: 86).
[159] See El Zeidy (2008: 226).

Based on the preceding, it can be argued that developed and well-functioning judicial systems which are unable to secure the custody of a defendant would properly avoid ICC prosecutions on grounds of complementarity since their national judicial systems have not suffered a total or substantial collapse to satisfy the inability requirement as laid down in Article 17 (3) of the Statute.[160] Louise Arbour, an experienced international criminal law expert and Prosecutor of the Ad Hoc Tribunals has argued that such a regime is likely to work for the developed countries but against developing nations.[161] Merit is to be found in such an argument bearing in mind that 'total or substantial collapse of a national judicial system', the pre-condition to finding 'inability', will easily be established in countries that are devastated by wars, Africa in particular. Contrariwise, the Prosecutor is likely to face insurmountable difficulties to prove 'total or substantial collapse' of national judicial systems for developed countries.

4.3. Challenging Admissibility



The complementary regime of the ICC is preserved further by affording States and individuals an opportunity to challenge admissibility.[162] The Statute has mechanisms to ensure that States which would exercise jurisdiction themselves over a particular situation are informed of the possible ICC proceedings. When the Prosecutor decides to institute proprio motu investigations or subsequent to a state party referral, she or he is obligated to inform all states parties and other states which would ordinarily exercise jurisdiction over the matter.[163]

[160] See Schabas (2004: 86).
[161] See Schabas (2004: 86).
[162] See Newton (2001: 48).
[163] See Art. 18 (1) ICC Statute.

Notably, this requirement does not include situations referred to the Prosecutor by the UNSC.[164] Some writers have attributed this to the fact that the process leading up to the generation of a Chapter VII resolution will give sufficient notice to the concerned state.[165] The accused or the person against whom a subpoena has been issued,[166] a State with jurisdiction over the matter[167] or a State from which acceptance of jurisdiction is required[168] may challenge the admissibility of a case on the grounds set out in Article 17 of the Statute. Similarly, the Court is empowered to satisfy itself on its own motion that a case is admissible.[169] Additionally, the Prosecutor may invite the Court to make a ruling on the admissibility of a case.[170]

4.4. The Court's Approach to Complementarity

Moreno Ocampo, the first Prosecutor of the ICC who recently left office remarked:

> 'As a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned [...] The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses.'[171]



[164] See Art. 18 ICC Statute.
[165] See Newton (2001: 56).
[166] See Art. 19 (2) (*a*) ICC Statute.
[167] See Art. 19 (2) (*b*) ICC Statute.
[168] See Art. 19 (2) (*c*) ICC Statute.
[169] See Art. 19 (1) ICC Statute.
[170] See Art. 19 (3) ICC Statute.
[171] 'Paper on some policy issues before the Office of the Prosecutor.'

Indeed this is in line with Newton's observation that 'the complementarity principle is the fulcrum that prioritises the authority of domestic forums to prosecute the crimes defined in Article 5 of the Rome Statute.'[172]

The Government of Uganda referred the situation in Northern Uganda to the ICC in December 2003. Among other things, Uganda stated that it 'has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible.'[173] The author contends that the Ugandan courts did not suffer any collapse in order to satisfy 'inability' (total or substantial collapse or unavailability of a national judicial system) as defined in the Statute.[174] Notably, the courts were fully functional and more than able to prosecute the alleged offenders.[175] Moreover, Ugandan courts are among the most enlightened in Africa.[176] Similarly, it cannot be said that the Ugandan Government was 'unwilling' to investigate and/or prosecute the defendants because none of the admissibility requirements for 'unwillingness'[177] were applicable to the Ugandan situation.[178] Rather, the Prosecutor and the Government of Uganda simply resorted, out of 'convenience', to hold the trials before the ICC. To argue that the case would be admissible on grounds of 'inability' since the Ugandan national judicial system could not secure the custody of the defendants is simply preposterous as the same applies with equal magnitude to the ICC.[179] Therefore, it can be argued that both the Prosecutor and the Court were renegades in relation to the complementary requirement.



[172] Newton (2001:26).
[173] See Schabas (2007: 150).
[174] See Schabas (2007:150). See also Art. 17 (3) ICC Statute.
[175] See Schabas (2007: 150).
[176] See Schabas (2007: 151).
[177] See Art. 17(2) ICC Statute.
[178] See Schabas (2007:151).
[179] See Schabas (2007:151).

In expressing his discontent over complementarity in the Ugandan self-referral, Schabas aptly writes:

> 'If the Prosecutor is sincere about his desire to stimulate national systems, he might be better to send the case back and give the State in question a lecture about its responsibilities in addressing impunity.'[180]

On the other hand, the situation in the DRC comes closer to a classic case of a state whose national criminal justice system is 'unable' to prosecute. As seen earlier, what renders a case admissible to the ICC on account of 'inability' to prosecute is succinctly laid down in the Statute.[181]

In issuing the arrest warrant, the Pre-Trial Chamber wrote:

> 'For the purpose of the admissibility analysis [...] the DRC national judicial system has undergone certain changes [...] this has resulted inter alia in the issuance of two arrest warrants against Thomas Lubanga Dyilo [...] Moreover, as a result of the DRC proceedings Thomas Lubanga Dyilo has been held in custody in Kinshasa [...] the Prosecution's general statement that the DRC national judicial system continues to be unable in terms of Article 17 (1) (a-c) and (3) of the Statute does not any longer correspond to the reality.'[182]

Simply put, PTC – I conceded that the national judicial system of the DRC did not suffer a 'total or substantial collapse or unavailability' as required by Article 17 (3) of the Statute. In the author's view, the fact that Lubanga was in detention in the DRC for genocide and crimes

[180] Schabas (2007: 151).
[181] Art. 17 (3) ICC Statute.
[182] *Decision on the Prosecutor's Application for a Warrant of Arrest* (*Prosecutor v Lubanga*) ICC-01/04-01/06-8) 10 February 2006, paras. 35-36.

against humanity is uncontrovertibly a flagrant manifestation that the national judicial system was willing to discharge its international obligations diligently to address impunity.

However, PTC – I indicated that the national proceedings should involve the same person and the same conduct of enlisting and conscripting children under the age of 15 in armed conflict which was before the Court.[183] PTC – I ruled that the DRC was not carrying out proceedings against the defendant in relation to the specific charges before the Court. Therefore, admissibility criteria had been satisfied.

Although Moreno Ocampo indicated in a press statement that compelling children to be killers puts in danger the future of mankind,[184] the crimes being addressed by the DRC were of greater gravity. The Statute makes no attempt to put crimes on a hierarchy based on gravity and the judges at the ICTY have indicated that there is no objective distinction of the crimes based on seriousness.[185] In practice, it is possible to plea bargain, withdraw charges of genocide but maintain charges of crimes against humanity.[186] Similarly, Article 124 of the Statute permits States to opt out of jurisdiction for war crimes but not crimes against humanity and genocide.[187] Additionally, the Statute is more tolerant of the defence of superior orders and defence of property only when war crimes are involved.[188] On the strength of the preceding, it could be argued that indeed there is a hierarchy and that war crimes follow genocide and crimes against humanity.

[183] See *Decision on the Prosecutor's Application for a Warrant of Arrest* (*Prosecutor v Lubanga*) ICC-01/04-01/06-8).
[184] See Statement by Luis Moreno-Ocampo.
[185] See *Judgment (Prosecutor v. Furundžija)* ICTY [2000] para. 247. See also *Judgment in Sentencing Appeals (Prosecutor v. Tadić)* [2000] ICTY.
[186] See Schabas 'Complementarity in Practice: Some Uncomplimentary Thoughts.'
[187] See Schabas 'Complementarity in Practice: Some Uncomplimentary Thoughts.'
[188] See Schabas 'Complementarity in Practice: Some Uncomplimentary Thoughts.'

The Statute is very clear in the preamble that effective prosecution must be ensured by taking measures at the national level and that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.[189] These provisions encourage positive complementarity and states to assume their obligations. Moreover, the objective of complementarity is to motivate domestic jurisdictions to exercise their criminal jurisdictions over international crimes. Even Moreno Ocampo had indicated that the policy of the Office of the Prosecutor would be to undertake investigations only where there is a clear case of failure to act by the State or States concerned. In the author's view, subjecting Thomas Lubanga Dyilo to prosecution in the Hague for recruitment of child soldiers as opposed to domestic trial on more serious charges of genocide and crimes against humanity was an absolute failure by both the Court and the Prosecutor to give effect to the salient provisions of the Statute's preamble. Thus, the author contends that neither the Ugandan nor the DRC situation has been handled by the ICC and the Prosecutor in a manner that is consistent with the Statute's complementarity regime which aspires to encourage national criminal jurisdictions to discharge their international obligations of prosecuting those responsible for international crimes.



[189] See preambular paras. 4 and 6 ICC Statute.

## CHAPTER THREE

In this Chapter, the author makes an assessment of the UNSC referral mechanism and the complementary requirement of the Statute.

1. General Introduction to UNSC Trigger Mechanism

As seen earlier, the jurisdiction of the ICC sprouts from consent of Party States.[190] However, an exception is to be found in situations referred to the Prosecutor by the UNSC in the exercise of Chapter VII powers under the Charter[191] pursuant to which it can determine the existence of a threat to the peace, breach of the peace or an act of aggression.[192] When the UNSC makes such a determination, it is empowered to take measures aimed at restoring or maintaining international peace and security[193] and UN Member States are obligated to accept and carry out the decisions.[194] The powers of the UNSC are coercive and mandatory in that UN Member States are under an obligation to cooperate not only with the UNSC but also inter se to implement its decisions.[195]



In this regard, the UNSC may make a Chapter VII resolution to refer the situation to the Prosecutor of the ICC.[196] In such a case, the Court does not need to satisfy itself of the jurisdictional prerequisites that the crime was committed on the territory of a party state or by a national of a party state or on the territory or by a national of a non-party state that consents ad hoc to ICC jurisdiction.[197] The jurisdictional reach of the ICC is thereby extended beyond the

[190] See Art. 4 (2) ICC Statute.
[191] See Arts. 12 (2) and 13 (*b*) ICC Statute.
[192] See Art. 39 Charter.
[193] See Art. 39 Charter.
[194] See Art. 25 Charter.
[195] See Arts. 2, 25, 48 and 49 Charter.
[196] See Art. 13 (*b*) ICC Statute.
[197] See McGoldrick, Rowe and Donnelly (2004: 98).

territory of member states of the ICC and the nationality of the perpetrator to the whole world.[198] Seen from such a perspective and in such instances, some have argued that the Court would be exercising 'universal jurisdiction' in so far as the territoriality and personality principles become irrelevant in determining the Court's jurisdictional reach.[199]

It must be noted at the outset that the UNSC refers to the Prosecutor a 'situation' as opposed to a 'case.'[200] This was motivated by reasons not to give the Prosecutor over-broad powers because a case is much more narrowly defined in terms of the specific offence(s) and the alleged perpetrator(s). Otherwise, the Prosecutor could easily proceed to investigate the crime(s) and/or person(s) named in the 'case'. The safeguard is also reflected in Article 15 of the Statute whereby the Prosecutor cannot institute proprio motu investigations without obtaining PTC authorisation. In turn, this prevents the politicisation of the referral procedure through the targeting of pre-selected individuals or of the parties to a particular side of a conflict while at the same time limiting the UNSC's competence in this area.[201] This does not in any way suggest a limitation on the UNSC's ability to decide under the Charter that a particular 'case' should be referred to the Court. Rather, that such a decision would not be binding on the Court.[202] Therefore, the ICC Statute merely recognises and acknowledges the primacy accorded to the UNSC by the Charter to maintain and restore international peace and security.[203] As of October 2012, two situations occurring on the territories of non-party states had been referred to the



[198] See Bergsmo (1998: 352).
[199] See Tiribelli (2008: 15).
[200] See Art. 13 (*b*) ICC Statute.
[201] See McGoldrick, Rowe and Donnelly (2004: 97). See also Rastan 'The Power of the Prosecutor in Initiating Investigations.'
[202] See McGoldrick, Rowe and Donnelly (2004: 97).
[203] See McCormack and Robertson (1999: 640).

Prosecutor by the UNSC.[204] Darfur (Sudan) was the first situation to be referred to the Prosecutor in 2005[205] followed by the referral of the situation in Libya in 2011.[206]

Having given a background to the mechanism behind UNSC referrals, it becomes imperative to consider how complementarity, which is given effect through the admissibility criteria, comes into play. On the one hand, the United Nations was principally created to maintain and restore international peace and security, the domain of the UNSC.[207] On the other hand, crimes under the jurisdiction of the Court are a threat to international peace and security.[208] In this fashion, the express purpose of the Statute overlaps the goals of the UN.

When the UN was created, Member States conferred on the UNSC the primary responsibility to maintain international peace and security and they agreed that the UNSC shall act on their behalf.[209] Member States are therefore duty bound to accept and carry out the decisions of the UNSC. Consequently, an argument has been made that a UNSC referral of a situation to the Prosecutor nullifies and overrides a state's inherent national judicial authority to try and punish international crimes.[210] Going by this argument, a UNSC referral dispenses with the complementarity requirement by vesting jurisdictional primacy on the Court similar to that enjoyed by the Ad Hoc tribunals.

[204] See Mistry and Verduzco.
[205] See Condrelli and Ciampi (2005: 591).
[206] See 'ICC Situations.'
[207] See Art. 1 Charter.
[208] See Preambular paragraph 3 ICC Statute.
[209] See Art. 24 (1) Charter.
[210] See Newton (2001: 49).

2. Complementarity in UNSC Referred Situations

For self-referred and proprio motu investigations, the Statute provides in explicit terms that the admissibility criteria shall apply.[211] However, when the UNSC makes a referral, the issue is unclear.[212] Article 17 of the Statute (Issues of admissibility) does not distinguish between the triggering mechanisms but neither does the context suggest that the criteria should not apply.[213]

Although there are no direct provisions in the Statute upon which to determine this question, an inference can still be drawn that admissibility criteria apply to UNSC referrals. To begin with, Article 17 (1) makes reference to preambular paragraph 10 and Article 1 of the Statute, which both generally declare that the Court shall be complementary to national jurisdictions. It can therefore be said that the Statute envisages the application of complementarity in all matters referred to the Prosecutor. Further, the Statute gives the Court discretion to determine on its own motion the admissibility of a case in line with Article 17.[214] Furthermore, in initiating an investigation, the Prosecutor is obligated to consider whether the case would be admissible under Article 17 of the Statute.[215] Having received the Darfur situation as referred by the UNSC, the Prosecutor announced that he was required under the Statute to assess and factor-in admissibility before starting an investigation.[216] Accordingly, should the Prosecutor decide that there is not a sufficient basis upon which to prosecute owing to the inadmissibility of a case under Article 17 of the Statute, she or he is duty bound to inform PTC and the party making the referral (a state or the UNSC).[217] In turn, if the situation was referred to the Prosecutor by the UNSC, the latter can

[211] See Art. 18 (1) ICC Statute. See also Phillips (1999: 73).
[212] See Benzing (2003: 625).
[213] See Stigen (2008: 238).
[214] See Art. 19 (1) ICC Statute.
[215] See Art. 53 (1) (*b*) ICC Statute.
[216] See 'Security Council refers situation in Darfur to ICC Prosecutor.'
[217] See Art. 53 (2) (*b*) ICC Statute.

request PTC to review the Prosecutor's decision not to proceed.[218] It then becomes clear that admissibility criteria will apply whether the situation has been referred by the UNSC or a State. This submission finds further support in the fact that it was never suggested at the ILC, Ad Hoc Committee or PrepCom during the negotiation process of the Statute that admissibility criteria should not apply to UNSC referred situations.[219]

Contrariwise, Article 18 (Preliminary rulings regarding admissibility) of the Statute only applies to self-referrals and proprio motu investigations. However, this does not mean inapplicability of admissibility criteria. Rather, it merely entails that a party cannot seek a preliminary ruling on admissibility when a matter has been referred to the Prosecutor by the UNSC.[220] Thus, whereas Article 18 on preliminary challenges to admissibility does not apply to UNSC referrals, the same cannot be said about Article 19.[221] Article 19 (Challenges to the jurisdiction of the Court or admissibility of a case) just like Article 17 does not distinguish between triggering mechanisms. Admittedly, Article 19 does not only empower the Court with discretion to determine admissibility of a case on its own motion but also enables a state with jurisdiction over a case or the defendant to challenge admissibility. Further, the Rules of Procedure and Evidence obligate the Registrar of the Court to inform 'those' who have referred a situation of any challenge to admissibility that has arisen pursuant to Article 19 of the ICC Statute.[222] Therefore, it can be argued that if the admissibility criteria were meant to be inapplicable to situations referred to the



[218] See Art. 53 (3) (*a*) ICC Statute.
[219] See Stigen (2008: 239).
[220] See Stigen (2008: 238).
[221] See Benzing (2003: 625).
[222] See Rule 59 (1) (*a*) Rome Statute Rules of Procedure and Evidence.

Prosecutor by the UNSC, the Rule should have read 'the state' as opposed to 'those' since only a state and the UNSC may refer a situation.[223]

On the strength of the preceding, it can plausibly be argued that the UNSC may only participate in the ICC on a complementary basis or forgo an ICC referral to assert its jurisdictional primacy in ad hoc tribunals.[224] Thus, the ostensible tenor of the Statute preserves complementarity even in UNSC referred situations to the Prosecutor. This is buttressed by the informal expert paper from the Office of the Prosecutor (OTP) which stated that the Prosecutor may have to assess admissibility in a situation referred by the UNSC.[225] Arsanjani comes to the same conclusion and notes:

> 'The result may not be fully consistent with the original intention of empowering the Security Council with the right of referral which was to avoid the creation of *ad hoc* tribunals.'[226]



To date, the UNSC is the most powerful institution globally in matters pertaining to international peace and security. This is evident from the enormous powers vested in it by the Charter. As such, the independence and impartiality of the Court is seriously questioned in matters involving the UNSC.

[223] See Stigen (2008: 239).
[224] See Philips (1999: 73).
[225] See Saxum (2009/2010: 8).
[226] Arsanjani (1999: 70).

Fletcher and Ohlin have thus stated:

> 'The pursuit of international justice sometimes depends as much on matters of administration as it does on questions of law, and how these matters of administration are treated by the Rome Statute reveals deeper conceptual uncertainties [...] the Court functions differently when it hears cases referred by the Security Council.'[227]

The unique involvement of the UNSC in international peace and security matters can be illustrated by the non-applicability of the territoriality and personality jurisdictional requirements of the Statute to situations referred to the Prosecutor by the UNSC.[228] This may go to suggest that matters emanating from a UNSC referral are placed on a different judicial track.[229] Further, in cases referred by a state party or when conducting proprio motu investigations, the Court's funding is assessed from contributions made by States Parties whereas in the case of a UNSC referral funding comes directly from the UN.[230] Based on this statutory provision, it can be argued that in the former the ICC is an independent Court presiding over international crimes whereas in the latter the ICC becomes an organ of the UN called upon to advance the UNSC's objectives of international peace and security.[231] In its resolution to refer the Darfur situation to the Prosecutor, the UNSC resolved that no UN funds should be used to facilitate the prosecutions.[232] Similarly, in Resolution 1970 (2011) to refer the situation in Libyan Arab Jamahiriya to the ICC, the UNSC decided that none of the expenses for the referral, investigation or prosecution would be borne by the UN.[233] These decisions by the UNSC were a total

[227] Fletcher and Ohlin (2006: 429).
[228] See Art. 12 ICC Statute.
[229] See Fletcher and Ohlin (2006: 429).
[230] See Art. 115 (*b*) ICC Statute.
[231] See Fletcher and Ohlin (2006: 429-30).
[232] See Security Council Resolution 1593 (2005).
[233] See UN Resolution 1970 (2011).

disregard of the Statute[234] and undermine arguments one would make that the Court is truly independent and impartial in matters involving the UNSC. In the author's view, this questionable independence and impartiality of the Court in its dealings with the UNSC casts a doubt on the practicality of applying the admissibility criteria in matters referred to the Prosecutor by the UNSC. Particularly, one of the grounds upon which the Court can render a case inadmissible is the 'lack of sufficient gravity to justify further action by the Court.'[235] Similarly, the Prosecutor may, subject to informing the PTC and the party making a referral, decide not to institute an investigation on account of insufficient gravity for a prosecution.[236] In these two scenarios, it remains highly doubtful and questionable if either the Court or the Prosecutor would decide that a UNSC referral lacks sufficient gravity. By referring a situation to the Court, the UNSC is satisfied that the situation is sufficiently grave to threaten international peace and security.[237] In such a case, the Court, just like the Ad Hoc tribunals, is called upon by the UNSC to exercise the highest goal of the Charter and international law. Inevitably, this creates a nexus between the juridical mandate of the Court on the one hand and the peace and security responsibilities of the UNSC on the other hand. In such cases, it becomes flagrantly unfathomable for the Prosecutor or even the Court to hold a UNSC referral inadmissible[238] thereby leaving the UNSC with the option, inter alia, to establish the costly ad hoc tribunals, a trend the UNSC is endeavouring to avoid.[239]



[234] See Art. 115 (*b*) ICC Statute.
[235] See Art. 17 (1) (*d*) ICC Statute.
[236] See Art. 53 ICC Statute.
[237] See Art. 39 Charter. See also Jalloh, Akande and Plessis (2011: 6).
[238] See Sarooshi (2004: 101).
[239] See Arsanjani (1999: 28).

In commenting on PTC's ambivalence to judicially review admissibility let alone the 'gravity test' in the case of Ahmad Harun and Ali Kushayb (Darfur situation) referred to the Prosecutor by the UNSC in April 2007,[240] Bergsmo notes:

> 'This relatively cursory review of admissibility may be partially explained by the fact that the situation was referred by the Security Council, even though a Security Council referral itself may not pose any legal constraints on the ICC.'[241]

The preceding raise some doubt on the practicality of applying complementarity in situations referred to the Prosecutor by the UNSC. During the Rome Statute negotiations, India's Head of Delegation objected to allowing the UNSC to refer a matter to the Court.[242] India contended that the UNSC established ad hoc tribunals because no judicial mechanism existed then to try the crimes committed in Yugoslavia and Rwanda. But with the establishment of the ICC, fora exist to which party states could refer matters, unless the UNSC's referral would be more binding on the Court, the mechanism was unnecessary.[243]



To date, the UNSC remains the most powerful and highest-ranking rule-making authority in the Post WW II international legal order.[244] It can order a referral, at the same time refuse to pay for it thus snubbing its nose at the provisions of the Statute. In the author's view, pragmatism renders it highly unlikely that the Court would uniformly apply the admissibility criteria in UNSC referred situations.

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[240] See *Decision on the Prosecution Application under Article 58(7) of the Statute* (*Prosecutor v. Ahmad Muhammad Harun [Ahmad Harun] and Ali Muhammad Al Abd-Al-Rahman ['Ali Kushayb]*) (Preliminary) [2007] ICC para. 18.
[241] Arbour and Bergsmo (1999: 123).
[242] See 'Submission by India.'
[243] See 'Submission by India.'
[244] See Fletcher and Ohlin (2006: 433).

3. UNSC Resolution Determining Admissibility

A further question presupposes that a UNSC resolution to refer a matter to the Prosecutor declared that the concerned state is unwilling or unable genuinely to investigate or prosecute.[245] Resolution 1970 (2011) comes close to the case in point when it 'considers that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity.'[246] In the author's view, 'widespread' and 'systematic' as definitional elements for Crimes against Humanity[247] are findings of fact to be made by the Court. This is one of the elements which, if proved by the Prosecution, would enable the Court to find that the attacks on the civilian population in the Libyan Arab Jamahiriya amounted to Crimes against Humanity.[248] The Resolution's potential to perilously drift towards usurping the Court's responsibility to find and establish facts is thus imminent.

As seen earlier, a UNSC referral does not ipso facto render the admissibility requirement inapplicable. However, the question cannot be determined by exclusive reference to the Statute because the Preamble reaffirms the Charter's purposes and principles.[249] It is uncontroverted that the ICC Statute envisages an independent and impartial organisation.[250] However, it remains highly questionable if, practically, this independence and impartiality would preclude external influence from other bodies such as the UNSC. The author contends that the ICC would not be bound because the relevant provisions of the Charter (Articles 24, 25 and 103) address UN

[245] See Benzing (2003: 626).
[246] See Resolution 1970 (2011).
[247] See Art. 7 (1) ICC Statute.
[248] See *Prosecutor v Katanga and Ngudjolo Chui (Pre-Trial Chamber)* ICC, decision of 30 September 2008, paras. 395-97.
[249] See Preambular paragraph 7 ICC Statute.
[250] See Arts. 40 and 42 ICC Statute.

Member States in contradistinction to international organisations.[251] Moreover, the Charter does not provide, expressly or by implication that a UNSC resolution has a binding effect on international organisations.[252] Similarly, the Statute does not provide that UNSC resolutions are binding on the Court except in cases of a request for a deferral of an investigation.[253] Therefore, the Court would not be bound. Thus, the Statute expressly states that the functioning and jurisdiction of the ICC are to be governed by the Statute.[254]

However, one is still tempted to argue that states cannot circumvent the binding effect of a resolution by creating an organisation that may not be so bound. To this question, the author takes the view that unless the creation of the ICC by UN member states amounted to circumventing duties imposed on them by the UNSC, circumvention does not come into picture.[255] Moreover, there is nothing in the Statute or the Rules of Evidence and Procedure to suggest that such a resolution by the UNSC would be binding on the Court.[256] Apart from that, the Court is designated arbiter on admissibility.[257] Therefore, the resolution of the UNSC determining admissibility of a situation would lack binding effect on the Court.[258]



Contrariwise, others have contended that Chapter VII decisions of the UNSC are equally binding on international organisations in so far as they are established by UN Member States[259] because states cannot confer an international organisation with more powers than they have.[260] Therefore, states cannot circumvent their obligations under the Charter by creating an international

[251] See Arsanjani (1999: 22).
[252] See Arsanjani (1999: 22-25)
[253] See Art. 16 ICC Statute.
[254] See Art. 1 ICC Statute. See also Doria, Gasser and Bassiouni (2009: 458).
[255] See Stigen (2008: 242).
[256] See Doria, Gasser and Bassiouni (2009: 463).
[257] See Art. 19 (1) ICC Statute.
[258] See Art. 19 (1) ICC Statute.
[259] See Benzing (2003: 627).
[260] See Wet (2000: 181-94).

organisation that performs its obligations in breach of the UN and its organs.[261] To begin with, it is reasonable to observe that the UNSC may only 'utilise' an international organisation by way of Chapter VII resolutions within the framework set by the treaty establishing that organisation.[262] If this argument holds, it follows that the UNSC may not ignore the complementary nature of the Court's legal framework.[263] Further, the nemo dat quod non habet argument cannot stand because in creating the UN (arguably, the Nuremberg Tribunal too), states created institutions with powers they did not have.[264]

As to the binding effect of such a resolution on states, it can be said that UN member states have agreed to accept and carry out the decisions of the UNSC.[265] Further, where UN members are faced with an obligation under international agreement that conflicts the obligations under the Charter, the latter takes precedence.[266] Thus, States would be bound by such a resolution. Accordingly, whereas UN member states would be bound, the same cannot be said about the Court. However, the ICC's admissibility findings relate to specific individual cases whereas the UNSC findings would relate to entire situations. In the end, findings on entire situations become irrelevant as more specific cases emerge.



[261] See Benzing (2003: 627).
[262] See Benzing (2003: 627).
[263] See Benzing (2003: 627).
[264] See Doria, Gasser and Bassiouni (2009: 459).
[265] See Art. 25 Charter.
[266] See Art. 103 Charter.

# CHAPTER FOUR

In this Chapter, the author assesses complementarity in situations that are self-referred to the ICC. Whereas the Statute recalls that it is the duty of Member States to exercise their criminal jurisdictions over perpetrators of international crimes,[267] self-referring states 'seem' to abdicate this duty by claiming inability.

## 1. Basis of Duty to Prosecute

The affirmation of complementarity in the Statute implies that the primary responsibility to repress serious crimes of international concern falls on domestic criminal tribunals.[268] This duty is connected to the responsibility that each state has vis-à-vis the other states in maintaining fundamental values of international concern by asserting jurisdiction over crimes committed on its territory.[269] Therefore, it is derived from customary international law. For that reason, third states merely have authority to investigate and prosecute international crimes.[270] However, in so far as it relates to grave breaches of the Geneva Conventions, the Contracting Parties are under an obligation to prosecute or extradite the perpetrator irrespective of where, by whom or against whom the offence was committed.[271] Thus, by 'recalling' that it is the duty of States to exercise their criminal jurisdictions, the Statute acknowledges a pre-existing obligation to investigate and prosecute.[272]



[267] See ICC Statute Preambular paragraph 6.
[268] See ICC Statute Preambular paragraphs 4 and 6.
[269] See Werle (2009: 68-9).
[270] See Werle (2009: 70).
[271] See Art. 146 Geneva Convention IV.
[272] See Kleffner (2008: 242).

The Preamble refers to 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'[273] Thus, the duty is not restricted to 'the most serious crimes of international concern' only, but 'international crimes' the category of which is broader than the former. The phraseology denotes an obligatory rather that a voluntary role of domestic criminal jurisdictions in investigating and prosecuting international crimes. Further, the Statute 'affirm[s] that the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.'[274] This too suggests a mandatory obligation on States Parties. It then becomes a logical imperative to assess the legal significance of the said provisions.

2. Legal force of the Preamble



It is generally understood that the legal force of a Preamble rests in the interpretative standpoint for the operative provisions.[275] Thus, the mandatory role of States Parties in the investigation and prosecution of international crimes must underlie the interpretation of the operative provisions of the Statute. In this regard, central are those provisions that set forth the admissibility criteria. However, there is nothing in the law of treaties indicating that preambular provisions have an inferior legal force or no legal force at all, by virtue of the fact alone that they are set forth in the Preamble rather than the dispositif.[276] Thus a Preambular provision can be just as binding as a provision in the operative part. However, its normativity is a matter of degree,[277] mainly

[273] See ICC Statute Preambular paragraph 6.
[274] See Preambular paragraph 4 ICC.
[275] See Kleffner (2008: 237).
[276] See Kleffner (2008: 239). See also Fitzmaurice (1957: 229).
See also *Case Concerning the Gabcikovo-Nagymaros Project* (*Hungary v Slovakia)* [1997] ICJ Sep 7 151.
[277] See Weil (1983: 414-15).

determined by the precision and clarity of its content and the regime for enforcement.[278] Generally, preambular provisions will lack these tenets and therefore hold a low degree of normative force or lack it completely. Thus the absence of normative force does not result from its formal place in the preamble. In the final analysis, preambular normativity will depend on the individual provision in question.

Therefore, there is no logic to deny or give the Statute's preambular provisions lesser normativity than the Article 1 proclamation in the Genocide Convention, 1948.[279] This is particularly so with preambular paragraph six of the Statute which recalls that it is the duty of States Parties to invoke their criminal jurisdictions over those who commit international crimes.[280] By referring to 'duty', the Preamble makes it clear as to what exactly is expected of States as they respond to international crimes; they must exercise their criminal jurisdiction. It may be argued though that this duty is political or moral in nature as opposed to being legal. However, a thorough review of the Statute reveals that 'duty' has been used in a legal sense elsewhere in the Statute.[281] To this end, the assumption that identical terms in a treaty have an identical meaning[282] would suggest that 'duty' as referred to in the Preamble is legal in nature as opposed to merely being moral or political. This position is fortified by the maxim of treaty interpretation that, in principle, a treaty must be interpreted as consistent with existing law and not in violation of it.[283] In the present context, such an interpretation is in conformity with the



[278] See Kleffner (2008: 240).
[279] See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ 91 161-65 on the operative and non-preambular character of Art. 1 Genocide Convention 1948.
[280] See Kleffner (2008: 241).
[281] See Arts. 59 (4) and 127 (2).
[282] See Jennings and Watts (1996: 1273).
[283] See *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 142.

duty to investigate and prosecute which precedes the Statute and remains applicable independent of it.

3. General Introduction to Self-Referral Trigger Mechanism

In terms of jurisdiction, the Court has power to hear cases where, inter alia, a situation in which it appears that one or – more crimes within the jurisdiction of the Court have been committed is referred to the Prosecutor by a State Party.[284] When a State refers to the Prosecutor for investigation a situation that has occurred on its territory or where it's national is the perpetrator,[285] the action appears to conflict the State's duty to investigate, prosecute, convict and punish the perpetrator as envisioned by the Statute. Currently, four States Parties; Uganda, the DRC, the Central African Republic and Mali have referred situations occurring on their own territories to the Court, hence the term 'self-referral.'[286]

4. Self-Referral v Duty to Prosecute



As already seen, the Statute recognises States' duty to exercise their criminal jurisdictions in repressing international crimes. However, States Parties appear to abdicate this duty when they refer to the Prosecutor for investigation a situation over which they have direct jurisdiction. It has been argued that it is doubtful if territorial States would discharge this duty by referring a situation to the ICC and contending that they are ensuring that ICC crimes are investigated and prosecuted, albeit by the ICC rather than their own courts.[287] This argument is based on the premise that the unambiguously plain terms of preambular paragraph six contradict its extension

[284] See Art. 13 *(a)* ICC Statute.
[285] See Art. 14 (1) ICC Statute.
[286] See 'Situations and Cases.'
[287] See Kleffner in Stahn and Sluiter (2009: 46).

to cover the exercise of jurisdiction by the ICC.[288] Proponents of this construction go further to argue that even if a broader interpretation of preambular paragraph six were allowed, the State Party making the referral cannot guarantee that the ICC will invoke its jurisdiction. This could be the case where the referred situation lacks sufficient gravity[289] or that an investigation or prosecution would not be in the interest of justice.[290] Simply put, it is unconvincing to regard the exercise of jurisdiction by the ICC in this regard as a fulfillment of the State's obligation to investigate and prosecute.

In addressing this apparent inconsistency, Kress notes:

> 'It would be too rigorous a reading of the words "exercise its criminal jurisdiction" within the sixth preambular paragraph to construe them to mean investigate, prosecute and, eventually, punish at the national level. In light of the overarching goal of the ICC Statute to end impunity, the territorial state should not be prevented from choosing a second option against impunity, namely to refer a situation to the ICC with a view to international investigation.'[291]

This entails that a territorial state's duty to exercise its criminal jurisdiction should be understood in a broader sense as the obligation to ensure that a genuine investigation is undertaken either by the State itself or by way of extradition to another State or even by way of surrender to the ICC. Such an interpretation is consistent with the spirit of the Statute.[292] Moreover, treaty law interpretation require terms in a treaty to be given their ordinary meaning in their context and in

[288] See Kleffner in Stahn and Sluiter (2009: 46).
[289] See Art. 17 (1) *(d)* ICC Statute.
[290] See Art. 53 (1) (*c*) and (2) *(c)* ICC Statute.
[291] Kress (2004: 945-46). See also Benzing (2003: 630).
[292] See El Zeidy (2008: 221).

the light of its object and purpose[293] – in this case, ending impunity. Thus, where a State Party is unable or unwilling genuinely to investigate or prosecute, there is no logic in rejecting that State's relinquishment of jurisdiction in favour of the Court especially if the situation satisfies the 'sufficient gravity' test.[294] If such were the case, there would be a looming possibility that the situation would not be dealt with at both fora thereby leading to injustice and impunity. A Swiss Delegate to the Rome Conference remarked, 'the goal of the Conference was to establish a permanent international court to punish [...] whenever national courts could not or would not perform their duty.'[295] Therefore, the duty imposed under preambular paragraph six should be interpreted from this angle. By declining to exercise jurisdiction in favour of the ICC, the step is taken to enhance the delivery of effective justice. In turn, this is consistent not only with the letter but also the spirit of the Statute and other international instruments in relation to the core crimes. Such a construction is in accord with preambular paragraph four which requires States to take positive action to ensure that crimes within the subject matter jurisdiction of the Court do not go unpunished. This of course is, and should be distinguishable from failure or refusal to prosecute emanating from apathy or a desire to shield perpetrators which may rightly be criticised as an affront to the fight against impunity.

Having established that States have a duty to exercise their criminal jurisdiction over those responsible for international crimes and that a self-referred situation to the Court is consistent with this duty, one is left to wonder whether such a referral amounts to a waiver of complementarity. On the one hand, the general assumption is that complementarity will avail States a pre-emptive measure against the Court's action either by instituting proceedings in their

[293] See Art. 31(1) VCLT.
[294] See El Zeidy (2008: 222).
[295] El Zeidy (2008: 220).

domestic criminal courts, by later on asking for a deferral[296] or by challenging admissibility.[297] On the other hand, self-referrals begin from the opposite assumption; the State making such a referral wants the Court to adjudicate thereby not demonstrating willingness or ability to investigate and prosecute.[298] This has raised an argument that self-referrals have the operational effect of waiving complementarity.[299]

5. Self-Referrals and Waivers

Waiver of complementarity has two dimensions – that the referring State does not contest admissibility or that it has renounced its jurisdiction in favour of the Court thereby waiving its primacy over the situation.[300] However, both interpretations of waiver have the same implications.

It is generally understood that waivers or renunciations of claims of rights of states must either be express or unequivocally implied from the conduct of the state alleged to have waived or renounced its right.[301] In the case of self-referrals, the lack of an express statement to that effect casts a doubt on the imputation of an unequivocal implied waiver by the mere fact of a self-referral alone.[302] Notably, a self-referral, just like any other referral, involves a 'situation' as opposed to a specific 'case'. Therefore, a self-referring state cannot guarantee that the persons or offences named in the referral will indeed be the only ones that the Court will sustain. This is aptly illustrated by the Ugandan self-referral which sought to limit the investigation to the

[296] See Art. 18 (2) ICC Statute.
[297] See Art. 19 ICC Statute.
[298] See Kleffner in Stahn and Sluiter (2009: 42).
[299] See Akhavan (2010:103). See also Benzing (2003: 629-30).
[300] See El Zeidy (2008: 214).
[301] See *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Preliminary Objection) [2005] ICJ Rep 1999 293.
[302] See Kleffner in Stahn and Sluiter (2009: 43).

organised armed group (the Lord's Resistance Army).[303] Moreover, even if the self-referring state made an express indication to waive the right to challenge admissibility, complementarity should still be applicable for a number of reasons.

First, complementarity is intended to function as a catalyst for states to investigate and prosecute international crimes.[304] Complementarity thus seeks to improve States' performance of their duty in the repression of international crimes which could be grossly undermined if self-referrals had the operational effect of waiving complementarity. This would promote impunity at the national level because self-referring states would be presented with a convenient opportunity not to investigate and prosecute international crimes even in the absence of inability or unwillingness. Secondly, treating self-referrals as waivers of complementarity is incompatible with a State's duty to utilise its domestic criminal jurisdiction for the repression of international crimes. Therefore, the preambular duty lays down the foundation for complementarity which in turn triggers the Court's jurisdiction when domestic criminal jurisdictions are unable or unwilling genuinely to discharge that duty. Further, subjecting self-referred situations to the admissibility requirement diminishes the risk of politicisation of the Court. On this score, it has been averred that the self-referral by the DRC was an attempt by the President to sideline his political opponents in the run-up to the 2006 elections.[305] Having a mechanism by which cases are declared inadmissible contributes to thwarting attempts to selectively externalise the adjudication of cases which are politically or otherwise inconvenient to investigate and prosecute domestically. Apart from that, in the absence of internationalised courts and third States' claim of jurisdiction, the Court would be overwhelmed with cases as it would be the only forum for



[303] See Kleffner in Stahn and Sluiter (2009: 44).
[304] See Arsanjani and Reisman (2005: 390-92).
[305] See Burke-White (2005: 563-68).

bringing perpetrators to justice. This would inundate the Court with cases and burst its modest resources.[306] If such were the case, the Court would be divested of a tool to decline the exercise of its jurisdiction because cases can adequately be dealt with at the national level. Further, the admissibility criteria takes into account sovereign concerns as well as those of the individual(s) involved which, in turn, promotes cooperation.[307]

The preceding buttresses the view that self-referrals are subject to the complementarity regime in principle. Accordingly, the Court found the Thomas Lubanga Dyilo case admissible since no State with jurisdiction over the case was acting. This suggests a contrario that the Court would have assessed unwillingness and inability if a State with jurisdiction over the matter had acted vis-à-vis the same person and the same conduct.

6. Self-Referrals and the Procedural Framework for Complementarity

When a situation has been self-referred to the Prosecutor, he or she has to determine its admissibility for the purpose of instituting investigations.[308] This requirement on the part of the Prosecutor is mandatory rather than permissive. The assessment by the prosecutor is not dependent on the self-referring state's own perception as to the admissibility of the case.[309] If the Prosecutor determines that there is a reasonable basis upon which to institute an investigation, he is still obligated to notify all States Parties and those States which would normally exercise jurisdiction over the matter.[310] It must be mentioned that there is nothing legally or procedurally that restrains a State that has made a referral from raising a preliminary challenge to the admissibility of a case. If the self-referring State makes a preliminary challenge to the

[306] See Stahn and Sluiter (2009: 47).
[307] See Stigen (2008: 250).
[308] See Art. 53 (1) ICC Statute.
[309] See Kleffner in Stahn and Sluiter (2009: 49).
[310] See Art. 18 (1) ICC Statute.

admissibility of a case, it can only raise another admissibility challenge in the substantive proceedings if there is a significant change of circumstances or on grounds of additional significant facts.[311]

Further, in terms of the right to challenge admissibility as envisioned by the Statute, treating self-referrals as waivers of complementarity has a direct impact on the right of an accused or the person against whom an arrest warrant or summons to appear has been issued.[312] There is an argument that such an individual's claim to challenge admissibility may be 'waived' by the referring state.[313] A further argument claims that an individual's challenge of admissibility based on the referring State's ability or willingness to investigate and prosecute[314] as opposed to a challenge based on the ne bis in idem principle[315] is not tantamount to an individual's right. Rather, it only confers an individual 'standing to raise an issue that pertains to state sovereignty.'[316] By this view, challenging the admissibility of a case is conceived as a mechanism meant to protect the right of States to exercise their domestic criminal jurisdiction over international crimes. Therefore, an individual cannot claim a right that has been waived by the referring State.[317]



Such an argument is incompatible with the fundamentality attached to complementarity that domestic criminal jurisdictions are under an obligation to investigate and prosecute international crimes. Therefore, the issue at all material times is whether or not the self-referring state is complying with that duty rather than whether it is in its interest not to invoke the right to exercise

[311] See Art. 18 (7) ICC Statute.
[312] See Art. 19 (2) *(a)* ICC Statute.
[313] See Kleffner in Stahn and Sluiter (2009: 52).
[314] See Art. 17 (1) *(a) (b)* ICC Statute.
[315] See Art. 17 (1) *(c)* ICC Statute.
[316] See Benzing (2003: 599).
[317] See *Prosecutor v Tadic* (Interlocutory Appeal on Jurisdiction) ICTY Appeals Chamber, IT- 94-I-A7R2 (2 October 1995) 56.

its jurisdiction.[318] As earlier seen, such an obligation cannot be waived.[319] Therefore, an accused or a person for whom an arrest warrant or a summons to appear has been issued could claim that the self-referring State is active, willing or able to investigate and prosecute.

The cases of Thomas Lubanga Dyilo and Mathew Ngudjolo Chui arising from the DRC's self-referral cast light on the foregoing in so far as the Court did not treat the self-referral as a waiver of complementarity. In the Lubanga case, inter alia, PTC – I noted:

> 'For the purpose of the admissibility analysis of the case against Mr Thomas Lubanga Dyilo, the Chamber observes that since March 2004 the DRC national judicial system has undergone certain changes […] Therefore, in the Chamber's view, the Prosecution's general statement that the DRC national judicial system continues to be unable in the sense of article 17 (1) (a) to (c) and (3), of the Statute does not wholly correspond to the reality any longer.'[320]



This reasoning suggests that the Court was theoretically willing to find the case inadmissible if certain action had been taken by the DRC. More recently, in issuing an arrest warrant against Mathew Ngudjolo Chui, PTC – I stated that it was ready to find the case admissible without prejudicing the filing of a challenge to the admissibility of a case and any subsequent decision in that regard.[321] These cases illustrate that despite the situation having been self-referred by the DRC, the Court did not anticipate any impediment to future admissibility challenges either at the instance of the self-referring state or other parties envisioned by the Statute. Therefore, the

[318] See Kleffner in Stahn and Sluiter (2009: 52).
[319] See El Zeidy (2005: 101).
[320] *Decision on the Prosecutor's Application for a Warrant of Arrest (Prosecutor v Thomas Lubanga Dyilo)* Case No. ICC-01/04-01/06-8-US-Corr, 10/02/2006.
[321] See *Decision on the Prosecutor's Application for a Warrant of Arrest (Prosecutor v Mathew Ngudjolo Chui)* Case No. ICC-01/04-02/07.

foregoing discussion demonstrates that a matter that is self-referred to the ICC does not waive the complementarity regime of the Statute.

7. State Withdrawal of a Self-Referred Situation

This discussion is based on the Ugandan officials' statements expressing the intention to withdraw the self-referral made to the ICC in 2003.[322] The threat itself was reiterated several times by the Government.[323] Notably, the question of withdrawing a self-referral has not been officially brought up before the Court yet, but raises the possibility. In this context, withdrawal is used in its literal sense; taking back or retreating from the referral made by a State Party. At the outset, it must be mentioned that 'withdrawal' in the current context is not provided for in the Statute, the Rules or Regulations of the Court.[324] Therefore, a review of the applicable law to the Court offers an alternative.[325]



An important beginning point is the observation made by the ICJ that the state of international practice is such that one cannot infer from the absence of an Article that allows the entry of reservations in a multilateral treaty that contracting parties are thereby restrained from entering into certain reservations. Rather, factors such as the character of a multilateral Convention, its purpose, provisions, mode of preparation and adoption should be considered.[326] Similarly, an inference cannot be drawn from the absence of an article providing for withdrawal of self-referrals or ad hoc declarations that the act is prohibited by the Statute. The mere absence by itself is an insufficient basis for a definitive assessment. This is in tune with the VCLT which provides that lack of a provision concerning withdrawal from a treaty does not bar such an act if

[322] See 'Amnesty International.'
[323] See Branch (2007: 187-88).
[324] See El Zeidy in Stahn and Sluiter (2009: 64).
[325] See Art. 21 ICC Statute.
[326] See 'ICJ Advisory Opinion' (1951: 22).

it is established that the parties intended to admit the possibility of withdrawal, or a right of withdrawal may be implied by the nature of the treaty.[327] However, even if this Article may relate to situations of withdrawal from an entire treaty containing no provision to that effect, rather than withdrawal from a particular provision in that treaty, the current question can still be answered by way of analogy.[328] Resort to the preamble in which the 'spirit of a Statute lies' is particularly highlighting to ascertain the nature and purpose of the ICC Statute. The Preamble read in conjunction with Article 1 reveal that the Statute was mainly created to punish the most serious crimes concerning the international community and to put an end to impunity for the perpetrators of such crimes. In multilateral treaties of such special type and nature, the ICJ has stated that:

> 'The Contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the Convention. Consequently, in a Convention of this type one cannot speak of individual advantages or disadvantages to States.'[329]



To mirror withdrawal of a referral in the manner suggested by the Ugandan Government against the foregoing reveals that such a decision would defeat the common interest of the international community and conflict the nature and purpose of the ICC Statute. Moreover, even the Statute only provides for the withdrawal from the treaty.[330] This is consistent with the VCLT in so far as it provides that the right of a party to withdraw from a treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.[331]

[327] See Art. 56 (1).
[328] See El Zeidy in Stahn and Sluiter (2009: 67).
[329] 'ICJ Advisory Opinion' (1951: 23).
[330] See Art. 127 ICC Statute.
[331] See Art. 44 (1).

Moreover, the international law doctrine of pacta sunt servanda requires that treaties must be performed in good faith.[332] Thus the Ugandan Government would have been estopped from withdrawing the referral.

Likewise, the effect of withdrawing from the ICC Statute is such that the withdrawing State is not absolved of the obligations arising under the Statute while it was a Party. Neither would it affect the cooperation requirement with the Court in relation to criminal investigations and proceedings commenced prior to the effective date of the withdrawal. Similarly, the withdrawal would not prejudice the continued consideration of any matter which was already under consideration by the Court before the effective date of the withdrawal.[333] Thus, it is not only impossible to withdraw a self-referred situation to the ICC but also to terminate the obligations accruing before the effective date of the withdrawal. Therefore, the Uganda Government could not have withdrawn the self-referred situation to the Court. It could only withdraw from the treaty without severing the already attaching obligations thereby rendering the withdrawal illogical and merely academic.



[332] See Art. 26 VCLT.
[333] See Art. 127 (2) ICC Statute.

# CHAPTER FIVE

## 1. Conclusion

Complementarity is such a fundamental principle that on the one hand, it protects and upholds state sovereignty while affording the Court jurisdiction to adjudicate on international crimes on the other hand. It achieves this by conferring on states parties the primary duty to investigate, prosecute and punish perpetrators of international crimes. At the same time, a state's inaction, inability or unwillingness to exercise this primary duty triggers the Court's jurisdiction. This way, complementarity strikes a balance between the national interest in states' maintenance of their sovereignty over criminal matters where they have a jurisdictional link and the interest of the international community in repressing international crimes. Complementarity as a concept is transformed into a legal framework through the admissibility criteria for which the statutory procedural set-up reveals that regardless of the triggering mechanism, the admissibility requirement applies. Thus, complementarity is a bed-rock upon which the Statute is founded. However, challenges arise when the UNSC has adopted a Chapter VII resolution under the Charter to refer a situation to the Prosecutor. The UNSC's influential position makes it unlikely that the Court or the Prosecutor would uniformly apply the admissibility requirement.

Further, complementarity is so fundamental that treating self-referrals as waivers of complementarity would be a complete reversal of this important tenet. Moreover, the self-referred cases that have traversed the Court so far have upheld the complementarity regime. Consequently, it can affirmatively be stated that self-referrals do not and should not have the operational effect of waivers.

On the question of withdrawing a self-referred situation to the ICC, it can be said that there is no provision for that recourse in the Statute, the Rules or the Regulations. Both the VCLT and the Statute only provide for withdrawal from the treaty. However, even if the Vienna law was applied to withdrawal of a situation by analogy, the nature and purpose of the ICC Statute is such that the interest of the international community as a whole, by far supersede that of individual states. This makes withdrawal of a self-referred situation to the Court untenable. Even assuming that a state successfully withdrew from the ICC a self-referred situation, such a state would still be bound to perform the obligations that arose before the withdrawal, to cooperate with the Court for the purpose of the proceedings that started prior to the withdrawal and would not prejudice the continued consideration by the Court of any matter that arose before the effective date of the withdrawal. In turn, this renders withdrawal of a self-referred situation an academic exercise vis-à-vis the matter that is already before the Court at the time the withdrawal is made.



2. Recommendations

This year, the Court celebrated ten years of fighting impunity. During this term, the Court has been seized with 16 cases arising out of eight situations. One judgment has been delivered so far (Thomas Lubanga Dyilo) while six cases are at the trial stage and nine at pre-trial stage. However, there has been relatively little judicial pronouncement on complementarity by the Court in so far as it relates to the queries raised in this paper. Admittedly, complementarity and the admissibility criteria raise many questions for which there have been insufficient answers from the Court. Although the few decisions so far provide some insight on the subject, the picture is not complete. Notably, most of the queries raised by the author in this paper can only be affirmatively answered by judicial interpretation on the respective statutory provisions. Typical of newly established institutions, they need time and experience to find their proper path.

Therefore, the challenge is incumbent upon the various stakeholders involved in the international criminal justice dispensation system; the Judges, the Prosecutor and the Defence to raise these pertinent issues as various cases traverse the Court. The Statute has a sufficient legal framework but the respective parties have not raised these contentious issues thereby leaving a gap between the contentions and judicial rulings. The author can only implore the respective parties to relentlessly raise these queries so that the law is made certain and predictable and thereby satisfying a basic tenet of rule of law.

Lastly, since the two pillars of complementarity rest on respect for primacy of domestic criminal jurisdictions and efficiency and effectiveness, the prosecutorial policy should be reversed from internationalising local justice to localising international justice – this could be attained by promoting positive complementarity through encouraging bilateral and multilateral cooperation to support and assist domestic criminal jurisdictions. This way, the Court would be making a substantial contribution to ending impunity while enhancing sustainable domestic capacity. State Party compliance could be secured by a practice of 'naming and shaming' non-compliant states thereby exerting pressure on them. The Assembly of States Parties (ASP), as the superintending body over the Court, could then take measures against states that fail to discharge their duty.



**FINAL WORD COUNT: 17, 454**

# Bibliography

## A. Primary Sources

### i. Legislation


1. Control Council Law No. 10 (CCL No. 10).
2. Geneva Conventions IV.
3. Genocide Convention 1948.
4. Rome Statute of the International Criminal Court.
5. Rome Statute Rules of Procedure and Evidence.
6. United Nations Charter.
7. United Nations General Assembly Resolution 177 (II) 1947.
8. United Nations Security Council Resolution 1593 (2005).
9. United Nations Security Council Resolution 1970 (2011).
10. United Nations Security Council Resolution 808 (1993).
11. Vienna Convention on the Law of Treaties, 1969.

ii. Case Law

12. *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Preliminary Objection) [2005] ICJ 1999 293.

13. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ 91 161-65.

14. *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ 7 151.

15. *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections) [1992] ICJ 247-250.

16. *Decision on the Prosecution Application under Article 58(7) of the Statute* (*Prosecutor v. Ahmad Muhammad Harun [Ahmad Harun] and Ali Muhammad Al Abd-Al-Rahman ['Ali Kushayb])* (Preliminary) [2007] ICC para. 18.

17. *Decision on the Prosecutor's Application for a Warrant of Arrest (Prosecutor v Mathew Ngudjolo Chui)* Case No. ICC-01/04-02/07.

18. *Decision on the Prosecutor's Application for a Warrant of Arrest (Prosecutor v Lubanga)* ICC-01/04-01/06-8) dated 17/03/2006.

19. *Judgment (Prosecutor v. Furundžija)* [2000] ICTY para. 247.

20. *Judgment in Sentencing Appeals (Prosecutor v. Tadić)* [2000] ICTY.

21. *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ 125, 142.

B. Secondary Sources

i. Books

22. Ambos, K *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-Based Approach* (2010) Springer: London.

23. Bergsmo, M (ed) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010) Torkel Opsahl Academic EPublisher: Oslo.

24. Cryer, Friman, Robinson et al *An Introduction to International Criminal Law and Procedure* 2ed (2010) Cambridge University Press: Cambridge.

25. Cryer, R *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) Cambridge University Press: Cambridge.

26. De Wet, E *The Chapter VII Powers of the United Nations Security Council* (2004) Hart Publishing: Oregon.

27. Doria, Gasser and Bassiouni (eds) *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) Koninklijke Brill: Leiden.

28. Driscoll and Zompetti (eds) *The International Criminal Court: Global Politics and the Quest for Justice* (2004) International Debate Education Association: New York.

29. El Zeidy, M.M *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008) Martinus Nijhoff Publishers: Leiden.

30. Feinstein and Lindberg *Means to an End*: *U.S. Interest in the International Criminal Court* (2009) Brookings Institutional Press: Washington, D.C.

31. Glasius, M. *The International Criminal Court* (2006) Routledge: New York.

32. Gow, M *Special Report on the International Criminal Court: Finding Justice for Victims, Ending Impunity for Perpetrators* (2002) World Vision International: California.

33. Jennings and Watts *Oppenheim's International Law* 9 ed. (1996) Longman: London.

34. Kleffner, J.K *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008) Oxford University Press: Oxford.

35. Lattanzi and Schabbas (eds) *Essays on the Rome Statute of the International Criminal Court* (2009) Editrice il Sirente: Alto.

36. McGoldrick, Rowe and Donnelly (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (2004) Hart Publishing: Oregon.

37. Ralph, J *Defending the Society of States: Why America Opposes the International Criminal Court and its Vision of World Society* (2007) Oxford University Press: Oxford.

38. Sadat and Scharf (eds) *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (2008) Martinus Nijhoff Publishers: Leiden.

*39.* Sands, P (ed) *From Nuremberg to the Hague: The Future of International Criminal Justice* (2003) Cambridge University Press: Cambridge.

*40.* Schabas, W.A *An Introduction to the International Criminal Court* 2ed (2004) Cambridge University Press: Cambridge.

41. Schabas, W.A *An Introduction to the International Criminal Court* 3ed (2007) Cambridge University Press: Cambridge.



*42.* Schiff, B.N *Building the International Criminal Court* (2008) Cambridge University Press: Cambridge.

*43.* Stahn and Sluiter (eds) *The Emerging Practice of the International Criminal Court* (2009) Martinus Nijhoff Publishers: Leiden.

*44.* Stigen, J *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008) Martinus Nijhoff: Leiden.

45. Struett, M.J *The Politics of Constructing the International Criminal Court NGOs, Discourse, and Agency* (2008) Palgrave Macmillan: New York.

46. Werle, G *Principles of International Criminal Law* 2 ed (2009) T.M.C Asser Press: Netherlands.

ii. Book Chapters

47. Arbour and Bergmo 'Conspicuous Absence of Jurisdictional Overreach' in Hebel, Lammers and Schukking (eds) *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999) T.M.C Asser Press: The Hague.

48. Holmes, T.J 'Complementarity: National Courts versus the ICC' in Cassese, Gaeta and Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) Oxford University Press: Oxford.

49. Kaul, H.P 'Preconditions to the Exercise of Jurisdiction' in Cassese, Gaeta and Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) Oxford University Press: Oxford.



50. Kleffner, J.K 'Auto-referrals and the Complementary nature of the ICC' in Stahn and Sluiter (eds) *The Emerging Practice of the International Criminal Court* (2009) Martinus Nijhoff Publishers: Leiden.

51. Sarooshi, D 'The Peace and Justice Paradox: The International Criminal Court and the United Nations Security Council' in McGoldrick, Rowe and Donnelly (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (2004) Hart Publishing: Oregon.

iii. Journal Articles


*52.* Akande, D '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.

*53.* Akande, D 'The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice*: 333-352.

*54.* Akhavan, P 'Self-Referrals before the International Criminal Court: Are States the Villains or Victims of Atrocities?' (2010) 21 *Criminal Law Forum*: 103-120.

*55.* Arsanjani, M.H 'The Rome Statute of the International Criminal Court' (1999) 93 *American Journal of International Law*: 22-43.

*56.* Benzing, M 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity' (2003) 7 *Max Planck Year Book of United Nations Law*: 591-623.

*57.* Bergsmo, M 'The Jurisdictional Regime of the International Criminal Court' (1998) *European Journal of Crime, Criminal Law and Criminal Justice*: 324-63.

*58.* Brown, B.S 'US Objections to the Statute of the International Criminal Court: A brief Response' (1999) *New York University Journal of International Law and Politics*: 885-891.

59. Burke-White and Kaplan 'Shaping the Contours of Domestic Justice: The International Criminal Court and Admissibility Challenge in the Uganda Situation' (2009) 7 *Journal of International Criminal Justice*: 257-79.

60. Cakmak, C 'The International Criminal Court in World Politics' (2006) 23 *Professors World Peace Academy*: 3-40.

61. Cassese, A 'Reflections on International Criminal Justice' (1998) 61 *The Modern Law Review*: 1-10.

62. Condoreli and Ciampi 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) 3 *Journal of International Criminal Justice*: 590-99.

63. Fletcher and Ohlin 'The ICC-Two Courts in One?' (2006) 4 *Journal of International Criminal Justice*: 428-33.

64. Frolich, R 'Current Developments at the International Criminal Court' (2011) 9 *Journal of International Criminal Justice*: 931-46.

65. Gioia, F 'State Sovereignty, Jurisdiction and "Modern" International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 *Leiden Journal of International Law*: 101-31.

66. Gowlland-Debbas, V 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' (1994) 88 *American Journal of International Law*: 643-77.

*67.* Heinsch, R 'The Crime of Aggression After Kampala: Success or Burden for the Future? (2010) 2 *Goettingen Journal of International Law:* 713-43.

*68.* Jain, N 'A Separate Law for Peacekeepers: The Clash between the International Criminal Court and the Security Council' (2005) 16 *European Journal of International Law*: 239-54.

*69.* Jalloh, Akande and Plessis 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies*: 5-50.

*70.* Kress, C "Self-Referrals" and "Waivers of Complementarity:" Some Considerations in Law and Policy' (2004) 2 *Journal of International Criminal Justice*: 944-48.

71. Kreβ and Holtzendorff 'The Kampala Conference on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice*: 1779-1217.

*72.* Lauwaars, R.H 'The Interrelationship Between United Nations Law and the Law of Other International Organisations' (1983-84) 82 *Michigan Law Review*: 1604-19.

*73.* Lipscomb, R 'Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan' (2006) 106 *Columbia Law Review*: 182-212.

*74.* McCormack and Robertson 'Jurisdictional Aspects of the Rome Statute for the New International Criminal Court' (1999) *Melbourne University Law Review*: 636-55.

*75.* Melandry, M 'The Relationship Between State Sovereignty and the Enforcement of International Criminal Law Under the Rome Statute: A Complex Interplay' (2009) 9 *International Criminal Law Review*: 531-45.

*76.* Newton, M.A 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' (2001) 167 *Military Law Review*: 20-73.

77. Oosthuizen, G.H 'Some Preliminary Remarks on the Relationship between the envisaged International Criminal Court and the United Nations Security Council' (1999) 46 *Netherlands International Law Review*: 313-42.



*78.* Philips, R.B 'The International Criminal Court Statute: Jurisdiction and Admissibility' (1999) 10 *Criminal Law Forum:* 61-85.

*79.* Pichon, J 'The Principle of Complementarity in the Cases of the Sudanese Nationals *Ahmed Harun* and *Ali Kushayb* before the International Criminal Court' (2008) 8 *International Criminal Law Review*: 185-228.

*80.* Ralph, J 'International Society, the International Criminal Court and American Foreign Policy' (2005) 32 *Review of International Studies*: 27- 44.

*81.* Saxum, E.J 'The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity' (2009/2010) 6 *Eyes on the ICC*: 1-12.

*82.* Scharf, M 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position' (2001) 64 *Law and Contemporary Problems*: 68-116.

*83.* Scheffer, D.J 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law*: 12-22.

*84.* Tiribelli, C 'The Exercise of Jurisdiction of the International Criminal Court: A Legal and Political Compromise which Renders its Effective Functions a Rather Complicated Matter' (2008) 20 *Sri Lanka Journal of International Law*: 1-24.

*85.* Tomuschat, C 'The Legacy of Nuremberg' (2006) 4 *Journal of International Criminal Justice*: 830-44.

*86.* Wedgwood, R 'The International Criminal Court: An American View' (1999) 10 *European Journal of International Law*: 93-107.



*87.* Weil, P 'Towards Relative Normativity in International Law' (1983) 77 *American Journal of International Law*: 413-42.

*88.* Weldehaimanot, S.M 'Arresting Al Bashir: The African Union's Oppositions and the Legalities' (2011) 19 *African Journal of International and Comparative Law:* 208-35.

*89.* Wet, E 'Judicial Review as an Emerging General Principle of Law and its Implications for the International Court of Justice' (2000) 47 *Netherlands International Law Review*: 181-210.

90. Wilt, H 'Universal Jurisdiction Under Attack: An Assessment of African Misgivings Towards International Criminal Justice as Administered by Western States' (2011) 9 *Journal of International Criminal Justice*: 1043-66.

iv. Online Sources

91. Amnesty International 'Uganda: Government cannot Prevent the International Criminal Court from Investigating Crimes' 16 November 2004 available at *http://www.asiapacific-amnesty.org/library* (accessed on 29 September 2012).

92. 'ICC Situations' available at *http://www.icc-cpi.int/Menus/ICC/Situations* (accessed 12 October 2012).

93. Casey, L 'Hearing before the Sub-Committee on International Operations' 23 July 1998 available at *http://www.frwebgate.access.gpo.gov* (accessed 25 May 2012).

94. Laughland, J 'The ICC and Universal Jurisdiction' available at *http://www.iccwatch.org/pdf/article* (accessed 12 October 2012).

95. Mistry and Verduzco 'The UN Security Council and the International Criminal Court' available at *http://www.pgaction.org/activity/2012/chatham-icc-sc* (accessed 23 June 2012).

96. Morris, M 'High Crimes and Misconceptions: The ICC and Non-Party States' available at *http://www.law.duke.edu/journals* (accessed 27 June 2012).

97. Ocampo, L.M 'Press Conference in relation with the surrender to the Court of Mr. Thomas Lubanga Dyilo' 18 March 2006 available at *http://www.icc-cpi.int* (accessed 11 October 2012).

98. 'Paper on some policy issues before the Office of the Prosecutor' available at *http://www.amicc.org/docs/OcampoPolicyPaper* (accessed 12 October 2012).

99. Rastan, R 'The Power of the Prosecutor in Initiating Investigations' available at *http://www.icclr.law.ubc.ca* (accessed 14 July 2012).

100. Schabas, W.A 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2007) available at *http://www.isrcl.org* (accessed 14 October 2012).

101. 'Security Council refers situation in Darfur to ICC Prosecutor' available at *http://www.icc-cpi.int/press/pressreleases/98.html* (accessed 5 May 2012).

102. 'Situations and Cases' available at *http://www.icc-cpi.int* (accessed 26 September 2012).

103. 'Submission by India' available at *http://www.un.org/icc/speeches/717ind.htm* (accessed 5 June 2012).

104. 'United Nations Treaty Collection (UNTC)' available at *http://www.treaties.un.org* (accessed 3 March 2012).

105. 'UNSC Referral of Libya Gives ICC the Opportunity to prove it's worth' available at *http://www.issafrica.org* (accessed 14 October 2012).

106. 'US opposition to ICC' available at *http://www.globalpolicy.org/* (accessed 6 April 2012).