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**A CRITICAL ANALYSIS OF THE REFERRAL SYSTEM UNDER THE ROME
STATUTE OF THE INTERNATIONAL CRIMINAL COURT**

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I, **PATRICK MAPIYE**, do hereby declare that this dissertation is the result of my own original work, except to the extent indicated in the acknowledgements, references and by comments included in the body of the report, and that it has not been submitted in part or in full for any other degree to any other University.

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DEDICATIONS

This work is dedicated to my wife **LEARNMORE MAPIYE**, my three children **FAITH, MUFARO AND PRESTON MAPIYE**. Your patience, support and unconditional love during this long journey will forever be cherished. Stay blessed at all times. This is for you guys.

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With GOD everything is possible.

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ABSTRACT

This research sought to establish whether the referral system under the Rome Statute of the International Criminal Court is fulfilling the international community's quest to end impunity under international criminal law. The research provides a critical analysis of the referral system looking at its application in reality by the various actors so empowered to implement it. It is the argument of this research that the referral system has been hijacked by selective justice, revenge, politics and victor's justice rendering the referral system ineffective. Further, it is argued that the perceived injustice and disillusionment faced by State parties over the manner in which the referral system is being implemented is tearing the ICC apart unless radical changes are done to reform the status quo. The research also proffered some recommendations, though not exhaustive, to better the referral system.

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CHAPTER ONE

1:1 Introduction

The horrors of war on a global scale and internal armed conflicts was the driving force behind the adoption of the Rome Statute in 1998, and the subsequent coming into force of the International Criminal Court (ICC) in 2002, to bring to book perpetrators of grave atrocities and end impunity by punishing those who commit such heinous crimes¹. It was also envisaged that the investigation and prosecution of international crimes should be taken out of a context of power politics and would be conducted on a permanent basis and by an independent international judicial entity that operates according to the principle of the separation of power, which is the basic requirement of the rule of law². This ground breaking approach to international criminal law brought a new dimension to the international community response to impunity and fulfilled a dream of an international criminal court that symbolized the shared intention of the international community of bringing justice to victims of atrocities.

The ICC has the authority to adjudicate on claims brought to it, so it works on a referral system just like a normal court but for claims from all over the world. As a means of putting the wheels of international criminal justice into motion, the Rome Statute provided a trigger mechanism for referral of matters to the ICC. This mechanism calls for participation of State parties³, the United Nations Security Council⁴ and the Prosecutor acting *proprio motu*⁵, in referring matters before the court. This novel mechanism has embraced international participation of various stakeholders in pursuit of peace and justice on a global scale and to date has caused the prosecution of perpetrators of atrocities before the ICC. However an analysis of the above this trigger mechanism has created controversy and disquiet in the manner in which it is being implemented in reality.

¹ Preamble to the Rome Statute

² Köchler. Hans, "Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice" International Progress Organization Online Papers, 7 April 2009, www.i-po.org/koechler-ICC-politicization (accessed 03 April 2016)

³ Article 13(a) of the Rome Statute

⁴ Article 13 (b) of the Rome Statute

⁵ Article 13(c) as read with Article 15 of the Rome Statute

1:1 BACKGROUND TO THE STUDY

The character of international criminal law was born at the International Military Tribunal at Nuremberg, after the end of World War 2.⁶ The decision by the victorious allies at the end of war to follow a legal process and afford fair trial rights to the defendants was not only ground breaking from a legal perspective but also changed the land scape of international criminal law. In a bid to bring the alleged perpetrators to book, tribunals were set up in Nuremberg and Tokyo (Germany and Japan respectively), to deal with the individual war leaders. The tragedies in the former Yugoslavia and Rwanda once again jolted the international community into action through the United Nations Security Council (UNSC). The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established to deal with the perpetrators of the atrocities in their individual capacity. The same was done for Rwanda under the auspices of the International Criminal Tribunal for Rwanda (ICTR).

The continued quest by the international community for a specie of international criminal law that brought tangible justice to victims and accused persons alike, culminated in adoption of the Rome Statute⁷, which in turn gave birth to the International Criminal Court⁸ (ICC). Under this statute the focus is on the individual and not a state party. The preamble to the statute embodies and confirms the commitment of state parties to punish perpetrators of the most serious crimes of concern to the international community.⁹

However, it is to be noted that the effectiveness of ICC is linked to cooperation of States through the trigger mechanisms as enshrined in the Statute. The statute acknowledges the Court's lack of power to put the wheels of justice into motion. Given, this mechanism has struck some successes but has also drawn controversy and exposed the court to criticism from various quarters. The bone of contention lies in the perceived selective manner in which matters are being referred for investigation and subsequent

⁶ H J van der Merwe "The Influence of Politics on International Criminal Law: A Brief Primer (For Lawyers)" African Yearbook on International Humanitarian Law (2014)

⁷ The Rome Statute of 1998

⁸ International Criminal Court which came into effect on July 1 2002.

⁹ Preamble to the Rome Statute

prosecution before the Court by the empowered parties under the trigger mechanism. The same criticism that bedevilled the ad hoc tribunals, of selective justice and blackmailing of the court by the State parties and some members of the UNSC, has remained and is threatening the proper implementation of justice and the rule of law under international criminal law. The hidden hand of political manoeuvring and abuse of the process under the referral system has compromised the ICC credibility and delivery of justice by this important international body.

1:2 PROBLEM STATEMENT

In as much as the ICC provides a referral mechanism of matters for investigation by the court, there is a prevailing uncertainty and discomfort over the manner in which the referral system has been and is being applied. There appears to be a perversion of justice by those empowered to refer matters for investigation under the trigger mechanism. The lopsided, vengeful and selective victor's justice that tainted the Nuremberg, ICTY and ICTR tribunals seems to have once again reared its ugly head to the detriment of equal and fair justice for all. There is a growing trend of justice being rigged in favour of the victors regardless of horrendous atrocities committed by both the victors and the losers to a conflict be it national or international. The ideal position is for all alleged perpetrators of atrocities to be treated the same before the ICC. It is submitted that there is a real possibility of miscarriage of justice and the promotion of impunity in the manner in which the referral system is being administered under the ICC.

1:3 AIMS AND OBJECTIVES

1. To explore the referral framework under the International Criminal Court.
2. To critically analyze the implementation of the referral system as an effective response to impunity.
3. To carry out a comparative analysis of some of the referrals done to the ICC under the Rome Statute.
4. To provide recommendations as to how the system may be perfected for the better.

1:4 LITERATURE REVIEW

The Rome Statute's principles of complementarity governs ICC's decisions about criminal situations and case to prosecute¹⁰ and there is consensus from its supporters and critics alike that this court is needed to stop impunity and bring to book perpetrators of atrocities. Perpetrators of atrocities must be punished and the rule of law must be applied without fear or favour. However, in light of the disturbing trend of selective justice in the manner in which matters are being referred to the ICC, divergent views emerge and question the fairness of the referral procedure as to whether the ICC is negating the tenets of rule of law in its quest for justice.

Long before the ICC came into the picture, Judge Pal¹¹ sounded a warning to the world as to the skewed nature of international criminal law. In his dissenting opinion, he declared that victors from a brutal and atrocious war always dictate the pace of justice in line with their political dictates. Clark holds that the ICC has been fundamentally motivated by self-interested pragmatic concerns, avoiding the fraught task of investigating and prosecuting sitting members of government who are responsible for grave crimes.

Heyder¹² also holds a sceptical view averring that in as much as the trigger mechanism was lauded during negotiations of the Rome Statute, fierce opposition from powerful

¹⁰ P. Clark "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda" in N. Waddell and P. Clark (eds.) *Courting Conflict? Justice, Peace and ICC in Africa*, Meeting Series Report, London: Royal African Society, March 2007, pp 37-44

¹¹ R. Pal, former Judge at the International Military Tribunal for the Far East (Tokyo) in 1945.

¹² C Heyder "The U.N. Security Council's Referral of Crimes in Darfur to the International Criminal Court in the Light of U.S. Opposition to the Court: Implication for the International Criminal Court's Functions and Status (2006) Volume 24 Berkeley Journal of International Law 650

states like the United States of America who wanted the UNSC to vet all matters for referral, in a way shows how powerful states will always attempt to dictate to the ICC.

According to Bass¹³, criticism has been levelled against international criminal courts as dispensing skewed justice. This statement was made in the context of the ad hoc tribunals formulated by the UNSC¹⁴ but the message still resonates today and may be equally applied to the ICC. It appears the losers of an equally brutal war are the ones who are dragged to the ICC for punishment leaving the other party untouched. This has raised concern and is tainting the image of the ICC.

In some circles, there is a perception that the ICC referral system is being abused by powerful and wily state parties to get rid of their opponents and improve their dominant position. Krish¹⁵ views the above as instrumentalisation of the ICC wherein states have come to use the referral system as an instrument to further entrench their power to the detriment of justice. A look at UNSC referrals show that such referrals have opened the ICC to a unique set of potential manipulations, if not already, and the procedure being taken advantage by the narrow political interests of the council members, especially the permanent five veto wielding powers.

The rule of law must be implemented consistently for people to take it seriously and not only when it is convenient to the global elite. Justice must not only be done but must be seen to be done for ICC to maintain its integrity and impartiality. The perceived selective justice under the ICC referral system has made a mockery of the court's claims to bring about an end to global impunity. The referral system has the potential of being turned into a breeding ground for impunity thereby reversing the objectives of the Court.

¹³ G J Bass "Stay the Hand of Vengeance: The Politics of War Crimes Tribunals" (2009)

¹⁴ ICTY and ICTR

¹⁵ N Krish 'International law in times of hegemony: Unequal Power and the Shaping of the International Legal order' (2005) 16:3 European Journal of International Law 369.

1:4 RESEARCH METHODOLOGY

A qualitative research method will be used but will be restricted to desktop research including the following; use of textbooks, international treaties and conventions. Also writings and commentaries by eminent academics and scholars on international criminal law published in various journals, legal forums and internet sources will be used.

1:5 CHAPTER SYNOPSIS

Chapter 1

Introduction and background to the referral system under the Rome Statute, statement of the problem, research objectives, literature review, research methodology as well as synopsis of chapters.

Chapter 2

This chapter will give the historical narrative of international criminal law from the Nuremberg tribunal to the current ICC regime with a focus on the interpretation of the referral mechanism under the Rome Statute.

Chapter 3

This chapter will deal with a critical analysis of the different referral procedures under the Rome Statute of the ICC in the light of the objectives and aspirations of the Rome Statute to stop impunity under international criminal law.

Chapter 4

This chapter will look at some of the challenges to the referral system within the Rome Statute of the ICC system which are hindering success of the referral procedures.

Chapter 5

This chapter is a conclusive one that ties the major arguments made of the analysis at the same time providing some recommendations as to how the system can be improved for justice to prevail under ICC regime and further strengthen the court.

CHAPTER TWO: INTERNATIONAL CRIMINAL LAW IN A HISTORICAL CONTEXT

2:1 Introduction

For decades, the human race has been dogged by atrocious wars, with no clear cut demand for accountability for violations of international criminal law. However, as the humanitarian principles of *jus ad bellum*¹⁶ formed, an interwoven fabric of norms and rules designed to prevent certain forms of harm and hardships befalling non-combatants as well as combatants who are sick, wounded, shipwrecked and prisoners of war¹⁷ came into being.

As the protective scheme of prescriptions and proscriptions increased both qualitatively and quantitatively,¹⁸ serious breaches of war were criminalized. Customary international law came to recognize and allow belligerent states to prosecute enemy soldiers in their custody for breach of the laws and customs of war. Unfortunately, the lack of well-defined international criminal laws to deal with individual perpetrators of atrocities proved to be the Achilles heel to the whole effort and provided a loophole for individuals to get away with their crimes.

However, the above did not deter the international community search for an effective international criminal legal system to bring perpetrators of grave crimes to justice. Various attempts were made to create an international justice system to prevent the commission of atrocities. The continuous search for a cure to impunity brought the international community to a next level of enforcement of international humanitarian law, through the prosecution and punishment by national or international tribunals of individuals accused of being responsible for serious violations of international humanitarian law.¹⁹

This new approach is different from the others described above in that it is concerned with individual criminal responsibility as opposed to state responsibility. Its aim is to

¹⁶ Latin term referring to laws of war, in reference to the Geneva conventions of 1949.

¹⁷ J. Maogoto, *War Crimes and Realpolitik: World War 1 into the 21st Century* (2004) 16.

¹⁸ 1949 Geneva Conventions I,II,III and the Additional Protocols 1 and 2.

¹⁹ A. Cassesse “ On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law” (1998) Vol 9 *European Journal of International Law* 2

enforce the obligations of individuals under International criminal law, whereas the preceding methods concentrated on the enforcement of the obligations of States under jus ad bellum.

This chapter will look at the legal historical context of international criminal justice from the establishment of various tribunals to the present ICC legal framework and its jurisdiction but the main focus will be to identify and analyse the applicable legal standards of the referral framework within the Rome statute, particularly under the trigger mechanism²⁰ which gives the ICC jurisdiction to hear matters of those accused of grave violations of international criminal law. Accordingly, it will provide an analysis of the law against which the referral system is premised under the Rome Statute.

2:2 Historical context

As the modern international system developed in the 19th century and multilateralism found its voice, efforts were made to make States voluntarily comply and be responsible to the international community for violations of certain international obligations.²¹ The first major attempt to stop international crimes through international criminal justice process arose after WW1. Reconciliation could not even begin without first bringing to justice those individuals whose unconscionable atrocities had violated the laws of humanity and who had been responsible as the authors of the war and for supreme offences against international morality and sanctity of treaties.²²

The devastation of war challenged the international community then, to think twice about state immunity and moved to bring the perpetrators of atrocities to justice. However, as Maogoto holds, this emerging commitment to human dignity was first to be derailed and then swept aside by resurgent nationalistic ambitions brewed in the cauldron of sovereignty and distilled by politics.²³ Politics and diplomacy took centre stage to the detriment of international criminal law.

²⁰ Article 13 of the Rome Statute

²¹ J. Maogoto(n 17 above)

²² J. Maogoto(n 17 above)

²³ An attempt to bring Kaiser Wilhelm II to justice failed after Netherlands refused to extradite him arguing that there was no precedent for such a prosecution.

2:3 The Nuremberg and Tokyo tribunals

The murky and poorly defined attempt at international criminal justice at the end of World War 1 not only failed to punish and deter the military leaders who initiated the war but enhanced their sceptical approach to international criminal law²⁴. It was to take another brutal and genocidal war before the international community took action and unshackled themselves from the chains of political expediency, under the guise of sovereignty and diplomacy, to make individuals responsible for atrocities to be brought before international tribunals for their own violations of international law at the international military tribunals at Nuremberg²⁵ and Tokyo²⁶. It was an acknowledgement that international criminal law was a possibility and in as much the victorious powers dictated the process, the foundation of international criminal law was laid down. The tribunals brought to the fore the questions of jurisdiction of such courts, definition of crimes and international criminal law principles.

2:4 International criminal tribunals for the former Yugoslavia and Rwanda

The eruption of war in the Balkans²⁷ and Rwandan genocide²⁸ once again jolted the international community into action in a bid to bring the perpetrators of atrocities to justice. Under the aegis of the UNSC,²⁹ a consensus arose leading to the creation of the tribunals in an attempt to maintain or restore international peace and security. With international pressure increasing over the serious violations of international humanitarian law, a resolution³⁰ was made by the UNSC, which underlined its intention to create an international tribunal to prosecute individuals for serious violations of international humanitarian law in the former Yugoslavia since 1991. Subsequently, in

²⁴ Maogoto (n 17 above)

²⁵ Nuremberg International Military Tribunal

²⁶ Tokyo Military Tribunal

²⁷ War started in the Former Yugoslavia in 1991.

²⁸ The Rwandan genocide took place in 1994.

²⁹ Chapter VII of the United Nations Charter.

³⁰ United Nations Security Council Resolution 827 (1993)

1993, the UNSC established an ad hoc international criminal tribunal³¹ with jurisdiction over war crimes, genocide, and crimes against humanity. The ICTY statute heavily borrowed from the Nuremberg Charter in relation to the Nuremberg principles, jurisdiction and the crimes. Building on these principles of international criminal law, trials were held, verdicts delivered and punishments meted against those convicted of committing atrocities.³²

Almost a year after the creation of the ICTY, history once again repeated itself. The international community became a spectator to genocide in Rwanda. The tragedy, spurred the international community, through the UNSC, into action leading to the creation of a tribunal.³³ The death of almost a million people during that war was so devastating that it was found prudent to create a specialised court to punish individuals involved in the commission of genocide, war crimes and crimes against humanity. The ICTR followed the precedent that was set in the ICTY in relation to definition of crimes, the legal principles and the manner in which the tribunal was to function and deliver justice. Individual suspects³⁴ were brought before this tribunal and tried. However it is to be noted that the establishment of these tribunals did not provide a panacea to impunity under international criminal law.

2:5 The Rome Statute and the International Criminal Court

At the Rome diplomatic conference in 1998, States from all parts of the world made history by creating the first permanent international criminal court with jurisdiction over grave violations of international humanitarian law. The Statute's establishment of a permanent international criminal court leaned much on the practical past experiences of the historical ad hoc international military tribunals and those established by the UNSC

³¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

³² The Prosecutor v Dusko Tadic ICTY Case No. IT-94-1-T

³³ International Criminal Tribunal For The Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in The Neighboring States, Between 1 January 1994 and 31 December 1994.

³⁴ For example, Prosecutor v Jean Paul Akayesu Case No. ICTR- 96-4-T

in the former Yugoslavia and Rwanda. The adoption of the Statute and the subsequent coming into effect of the ICC in July 2002 broke new ground under international criminal law, in a bid to end impunity.

Unlike the ICTY and ICTR which were creations of the UNSC and ad hoc in nature, the Rome statute established a treaty based international criminal court with jurisdiction over individuals for the crimes of genocide,³⁵ war crimes³⁶ and crimes against humanity³⁷ and the treaty is a binding agreement between the ratifying states. It is to be noted that this court exists as a part of an interdependent system of international law based on complementarity and the court's inherent need for cooperation from the parties to the treaty. However, note must be taken that the ICC acts more like an international jurisdictional safety net designed to pick up where national jurisdictions are unwilling or unable to exercise jurisdiction.³⁸

2:5:1 Jurisdiction of the ICC

The ICC was born from a treaty-based international legal institution of last resort that would preserve the primacy of national legal systems of the contracting parties. Jurisdiction of ICC is provided for under Part II and III of the Statute, only with respect to crimes committed after the entry into force of the Rome Statute of 1999, which is 1 July 2002. It has jurisdiction over the crimes of genocide, war crimes, crimes against humanity, and aggression.³⁹ In sum, it is a condition for the assumption of such jurisdiction that a state must be party to the Rome statute. The ICC does not have inherent jurisdiction to deal with every criminal case that is brought before it. For the purpose of this paper, adjudicatory jurisdiction of the ICC will be the main focus in the context of the referral system under Article 13 of the Statute.

³⁵ Article 7 of the Rome Statute.

³⁶ Article 8 of the Rome Statute.

³⁷ Article 6 of the Rome Statute.

³⁸ M. C. Bassiouni: *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities.*

³⁹ Aggression is not yet a prosecutable crime under ICC.

2:5:2 Jurisdiction under article 13: The trigger mechanism

As in all criminal legal systems, for a court to function there must be legally accepted ways and means to bring an accused before the court before jurisdiction can be assumed over such an accused and his conduct. The same equally applies to the ICC and to provide such a way, the drafters of the Statute found it imperative to provide a mechanism that was going to trigger jurisdiction of the ICC through a referral system. This mechanism is very important in relation to how matters are referred the court by the parties so empowered under this mechanism. This referral procedure is provided for under Article 13 of the Statute and is generally referred to as the trigger mechanism. This mechanism of the ICC is exercisable in three scenarios, which are by a State party⁴⁰, the UNSC⁴¹ and the Prosecutor.⁴² To date the court's exercise of jurisdiction has been triggered three times by a state party⁴³, twice by the UNSC⁴⁴ and once by the Prosecutor.⁴⁵

2:6 Article 13 of the Statute

Article 13 (a)

The ICC is empowered to exercise its jurisdiction with respect to a crime referred to the Prosecutor by a State Party in accordance with Article 14 of the Statute. Under this provision, only a State party to the Statute can trigger the jurisdiction of the ICC by referring a situation to the Prosecutor for investigation. This entails an ability to direct the Court's attention to situations involving grave criminal acts, with a view to initiate an exercise of jurisdiction over it. Note must be taken that this power to refer a matter to the ICC, is restricted to States Parties and there can be no ad hoc referrals by non-States Parties. A distinction is drawn between referrals of non-State party declarations

⁴⁰ Article 13(a) of the Statute

⁴¹ Article 13(b) of the Statute

⁴² Article 13(c) of the Statute

⁴³ Referrals by Uganda, Democratic republic of Congo and Central African Republic.

⁴⁴ Security Council referrals of the situations in Sudan and Libya. Resolutions 1593 (2005) and 1970 (2011), respectively.

⁴⁵ Prosecutor referral of the Situation in the Republic of Kenya, ICC PT. Ch. II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010.

pursuant to article 12 of the Statute. State party referrals must be done in accordance with article 14 of the Statute.⁴⁶

Article 13 b

Under this provision, UNSC may trigger the ICC's jurisdiction, in the case of crimes committed on the territory of non-States Parties. This is an acknowledgement of the fundamental role of the UNSC to confront situations of threats to the peace, breaches of the peace and acts of aggression. This unique if not controversial provision was an acceptance on the part of the drafters of the statute on the important role the international community can play in bringing cases to the court via the UNSC. Interestingly, the UNSC is not a party to the statute but is empowered to refer matters to the ICC. This provision requires that the UNSC act under Chapter VII of UN Charter.⁴⁷

Article 13 c

This article empowers the Prosecutor to initiate investigations at his own initiative. However the Prosecutor's exercise of this power must be done in accordance with article 15 of the Statute, which is a safeguard against abuse of this function. Article 15 entails that the prosecutor receives information about commission of grave violations from various quarters it is a must that he must analyze the seriousness of the information received by him.⁴⁸ All this will be preliminary work by the prosecutor before a full investigation is done. It is only after the Prosecutor is satisfied from the information received that he then seeks the authority of the Pre Trial Chamber to institute a full investigation⁴⁹. The ICC and the Prosecutor apply the reasonable test to ascertain whether an investigation is warranted.

2:7 Conclusion

This chapter entailed the investigation of the international criminal law framework that is applicable to the challenges of ending impunity at the international stage. A brief historical context detailed how, for centuries, the international community formulated

⁴⁶ See case of The Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01-06

⁴⁷ Chapter VII of United Nations Charter

⁴⁸ Article 15 (1) of the Rome Statute

⁴⁹ Article 15(3) of the Rome Statute

various forms of lawful constraints to grave breaches of international humanitarian law, all in a bid to end impunity. Throughout this chapter, it was shown that the corpus of international criminal law developed to have clear and comprehensive rules that sought to punish individuals who acted with impunity. Most importantly, however, it has been shown how the referral system under ICC is applied. However, despite the fact that these rules are comprehensive and available, their application in reality is always under spotlight and intense scrutiny by various critics. In a bid to look at the reliability of the above defined referral system, a journey will be embarked on in the next chapter, giving a critical analysis of the application of the referral system in reality.

CHAPTER THREE

3:1 Introduction

In Chapter Two, a historical narration of the development of international law from the 19th century to the current regime of ICC was discussed highlighting the international community's attempts to end impunity. History shows that impunity has always dogged the international community leading to the formulation of ad hoc tribunals as a measure to stem the tide of impunity at the same time trying to deter would be perpetrators. However, it is apparent that this piecemeal approach to impunity through ad hoc tribunals failed to deter perpetrators of grave crimes under international humanitarian law. The advent of the Rome Statute providing for a permanent international criminal court has given hope to the quest to end impunity. With the above in mind, this chapter is going to discuss the referral procedures under Article 13 of the Statute. Further, a critical analysis will be done on the situations referred so far, the goal being to ascertain the effectiveness of the referral system in ending impunity.

3:2 Scope and meaning of Article 13 of the Statute.

Cryer⁵⁰ holds that most literature on the international criminal court discuss as if the individuals accused of committing grave breaches of international humanitarian law are already before the court. He views that such discussions ignore the fact that before any prosecution can happen; the individual must first be brought before the court. Indeed, it will be pyrrhic victory for any judicial process to proceed in the absence of an accused whether under national or international criminal law.

To provide for a trigger mechanism to the judicial process under the ICC, the drafters of the statute came up with Article 13, which is a referral procedure of matters to the court. This mechanism gives State parties to the statute, the UNSC and the Prosecutor power to refer matters to the court for prosecution. This provision plays an integral part in the referring of matters to the court.

⁵⁰ R. Cryer "Prosecuting the Leaders: Promises, Politics and Practicalities" (2009) Vol 1 *Gottingen Journal of International Law* 45

Taking into account that the ICC does not have a police force of its own, this was an acceptance on the part of State parties that without cooperation of states, the UNSC and the prosecutor, it was going to be difficult to bring situations before this court. Like the ICC predecessors, the ICTY and ICTR depended much on the cooperation of states for their successes. It appears, the ICC took on board this symbiotic link of state parties and the court in order to end impunity under international criminal law.

However, it appears this important provision has been implemented in a manner that is defeating the whole purpose of international criminal law that is to stop impunity. Questions on the referral of situations to the court have been raised and no satisfactory answers are coming. The euphoria that greeted the coming of ICC is turning into scepticism as reality strikes. It could be possible that the trigger mechanism has turned into be the proverbial tiger riding escapade.

3:3 Indirect consequences

It is indeed trite that all actors, that is state parties, UNSC and the Prosecutor, in the spirit of the Rome statute, must be able to refer matters to the ICC but the question is, are these referrals genuine. Burke- White⁵¹ holds that the existence of the ICC has offered a politically expedient solution for sitting heads of states to deal with potential electoral rivals. His assessment maybe true, if events on the ground are taken aboard.

3:3:1 State referrals by DRC and Uganda

The Democratic Republic of Congo is a state party⁵² to the Rome statute. It referred the case of Jean-Pierre Bemba Gombo to the ICC for prosecution under Article 13(a) of the Statute⁵³. It is a fact that Bemba committed serious violations of international criminal law in the CAR⁵⁴ but was his referral to the ICC by President Kabila's government in the interests of justice or it was a manipulation of the referral system to get rid of Bemba who was a formidable rival to Kabila? Congolese, international and United Nations

⁵¹ International Criminal Court: Complementarity in Practice: The ICC as part of a system of multi-level global governance in the DRC.

⁵² Ratified the Statute in March 2002.

⁵³ Prosecutor vs Bemba: Decision on the Prosecutor's Application for a Warrant of Arrest against Jean- Pierre Bemba Gombo, 10 June 2008.

⁵⁴ Bemba was convicted by the ICC recently for atrocities he committed in CAR.

reports concerning the wars revealed serious allegations of international crimes done by all sides⁵⁵ to the conflict in DRC. Both the government and the rebels committed violations of IHL in the country but surprisingly it was only Bemba who was sent to the ICC.

The same questions arise with the state referral of Lord Resistance Army leadership to the ICC by Uganda. The war between the government and the LRA has raged for decades in Uganda and has killed thousands of people. Joseph Kony⁵⁶ and other members of his command have found themselves under the radar of the ICC. Warrants of arrests have been issued against them for violations of international criminal law. The warrants stem from the referral of the situation in Northern Uganda that was done by the government of President Yoweri Museveni. It cannot be denied that the LRA has committed grave violations of IHL and indeed they must be made accountable for their actions. However, it is not proper to refer only one party to the ICC at the same time leaving the other party out. It smacks of selective justice. It can be argued that this approach is providing a leeway for sitting heads of state to manipulate the trigger mechanism to get rid of their opponents. It is possible that the referral system has been hijacked by tyrants to their advantage. Wily and cunning government leaders have managed to instrumentalise the referral system to their benefit thereby promoting impunity at international criminal law.

3:3:2 Referrals by the UNSC

Under article 13 (b) of the Statute, a situation is referred to the Prosecutor by the UNSC acting in terms of Chapter VII of the United Nations Charter. The UNSC is not a state party to the statute but by virtue of its role of maintaining peace and stability in the world, the drafters of the statute incorporated it into the referral system. The UNSC took no part in the creation of the ICC, unlike its active role in the creation of the two *ad hoc*

⁵⁵ M. Adjani , DRC: Impact of the Rome Statute and ICC, May 2010.

⁵⁶ Leader of the Lord Resistance Army in Uganda which is a rebel movement.

tribunals. However note must be taken that some of its members were participants in the negotiations at the final Diplomatic Conference in Rome in 1998.⁵⁷

Taking into account the clout of UNSC, its incorporation into the ICC referral system could not have been avoided though it was a subject of a long and tiresome debate during the negotiations.⁵⁸ The legal validity of the statute giving power to an entity that is not a party to the treaty may be questionable as it goes against the nature of treaties binding parties to it. The irony of it all can be explained as an inevitable compromise between politics and justice and by a stroke of pen, under articles 13(b) and 16 of the Statute, ICC was tied to the politics of UNSC.

Sudanese President⁵⁹ was the first sitting president to be referred⁶⁰ to the ICC for violation of international criminal law and currently he is under a warrant of arrest⁶¹ issued by the ICC stemming from the referral. It is to be noted that there is nothing wrong with al Bashir being referred to the ICC if he is in violation of IHL. No individual must be allowed to get away with violations of IHL. However, note must be taken of the fact that Sudan is not a party to the Statute and in such a scenario can it be subjected to the jurisdiction of the court? Although that state is not a party to the ICC Statute, it is obliged to cooperate with the ICC by virtue of a Security Council resolution which referred the situation in Darfur to the ICC⁶². Furthermore, under Article 25 of the UN Charter⁶³, Sudan is obliged to accept and carry out decisions of the Security Council.

It is agreed that Sudan as a member of the United Nations cannot run away from its obligations. The UNSC is the police force of the UN and as such by referring matters to

⁵⁷ J. Washburn “The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century,” (1999) Vol 11 Pace International Law Review 364

⁵⁸ L. Moss “The UN Security Council and the International Criminal Court: Towards More Principled Relationship,” (2012) Friedrich Ebert Stiftung 3.

⁵⁹ Omar Hassan Ahmad Al Bashir, current President of Sudan.

⁶⁰ Security Council Resolution 1593 (2005)

⁶¹ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009.

⁶² D. Akande “The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities” (2009) *Journal of International Criminal Justice* 7

⁶³ Article 25 of the UN Charter.

the ICC it is fulfilling its role under the UN Charter which is of maintaining peace and stability. Indeed the above argument holds water but the worry is whether the conduct of UNSC under article 13(b) of the Statute is promoting the tenets of the statute. Is there fairness and justice in the manner it refers matters to the ICC or its promoting impunity.

The referral of Sudan⁶⁴ to the ICC by the UNSC is a case in point. In terms of Article 13 (b) of the Rome Statute, any referral of a situation by the UNSC must be made without qualifications as to the categories of people to be investigated or prosecuted by the Court but the referral of Sudan shows some disturbing trend of manipulation that clearly departs from the spirit of Article 13(b) of the Statute.⁶⁵ The UNSC resolution⁶⁶ exempts individuals of non-state parties to the Statute from the jurisdiction of the ICC. This provision smacks of double standards on the part of the UNSC. Why exempt individuals of other non-state parties from the jurisdiction of ICC whilst on the other hand subject a head of state of another state which is not a state party to the Statute? What it entails is that is that there are some states and individuals who are above the regime of international criminal law. Individuals of other non-state parties like the USA are free to commit grave violations of IHL with impunity and still not be subject to the jurisdiction of the ICC. This corruption of the referral system by UNSC is one of the most unfair systems under the Rome statute and exposes international criminal law to ridicule.

The same happened with the resolution on Libya⁶⁷ which is on all fours⁶⁸ in relation to exemption of non-state parties from the jurisdiction of ICC. Libya is also not a state party to the Statute but it was referred to the ICC under the same conditions of exempting individuals of non-state parties from ICC jurisdiction. More so, the referral limited the jurisdiction of ICC to events after 05 February 2011, which is in direct contrast to the ICC,s power to investigate matters from 01 July 2002. The Court and the Prosecutor allowed themselves to be led by the nose through the beaten path in a blinkered way leading one to question their objectivity.

⁶⁴ Security Council Resolution 1593 (2005)

⁶⁵ Dr. H. Kochler “Double Standards in International Criminal Justice: The Case of Sudan,” (2005) International Progress Organization 1,

⁶⁶ Paragraph 6 of Sudanese Resolution

⁶⁷ Security Council Resolution 1970 (2011).

⁶⁸ Paragraph 6 of the Libyan Resolution

There appears to be selective justice by the UNSC in relation to referral of matters to the ICC. The UNSC is promoting impunity at international criminal law by turning a blind eye to an equally guilty party to a conflict. A breeding ground for impunity is being created by UNSC referrals and that does not promote the objectives of the Statute. It is also a mockery to the principle of equality before the law as some individuals are allowed to operate above international criminal law.

3:3:3 The case for Syria

A tragedy in Syria is unfolding right under the nose of the UNSC but no action is being taken. Syria did not ratify the Rome statute hence is not a party to the ICC however the Syrian government is bombing civilians day and night with the support of Russia⁶⁹. The rebels are also killing civilians unabated with sympathy of the western countries like the US. Both Russia and the USA are members of the Security Council and have veto wielding powers. In such a scenario, is there any hope of having the Syrian situation referred to the ICC? An attempt to refer the situation in Syria to the ICC failed after Russia and China vetoed⁷⁰ a draft resolution on the matter. Even if the matter is brought again to the Security Council, chances are that Russia will veto any resolution to refer it to ICC. There is indeed justification to be sceptical of the UNSC role in ending impunity. Political considerations that dogged the ad hoc tribunals have once again surfaced to the detriment of international criminal law in Syria. The Syrian government and the rebels will continue to commit grave violations of ICC taking advantage of politicking at the Security Council.

3:3:4 Referrals by the Prosecutor

Prior to ICC, (ICTY) and (ICTR) prosecutorial authority operated directly under the control of the UNSC and within narrow territorial limits.⁷¹ Contrastingly, under the ICC the Prosecutor is largely independent of control of the UNSC and vests the power to

⁶⁹ Syria invited Russia to help it in the fight against rebels.

⁷⁰ Draft resolution S/2012/77 of 4 February 2012 was a second one to be vetoed by China and the Russian Federation. First one was vetoed in October 2011. Recently, the French and Russian resolutions over Syria were rejected by the UNSC.

⁷¹ A.M. Danner “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court” (1999) Vol 97 *The American Journal of International Law* 510

investigate and prosecute serious crimes in a single individual, its independent prosecutor. However, both in international and municipal criminal law systems, prosecutors play a critical role in⁷² in the administration of justice.

Cassese⁷³, asserted to the UN General Assembly that the Prosecutor was a vital cog to the ICTY. Danner⁷⁴ holds that the question whether or not to authorize the Prosecutor to initiate investigations absent a prior complaint by a state or the Security Council was not an easy one and it became one of the most contentious issues in the negotiations over the ICC⁷⁵. Fears were that the Prosecutor could become a lone ranger in his investigations or be used politically to target weaker individuals or highly sensitive matters. The USA took a particularly strong stance against the idea of a prosecutor with *proprio motu* powers.⁷⁶ Eventually a compromise was reached with the inclusion of the independent prosecutor having the authority to initiate investigations without a formal state complaint or Security Council referral.⁷⁷

In terms of Article 13(c), the prosecutor is allowed at his own initiative to start an investigation in accordance with article 15 of the statute and the Prosecutor shall be responsible for the investigation and prosecutions of persons who bear great responsibility for serious violations of international humanitarian law⁷⁸. The Prosecutor is tasked with analyzing the seriousness of the information received from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he deems appropriate.⁷⁹ It appears the prosecutor is given a lot of discretion as to what kind of information he receives and from whom. Are there any checks and balances to this discretion to the extent that the Prosecutor will not go on a

⁷² R J Goldstone & N Fritz “In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers”(2000) Vol 13 *Leiden Journal of International Law* 655

⁷³ A Cassese, Address to the General Assembly of the United Nations (Nov. 14, 1994), 1994 ICTY Y.B. 134

⁷⁴ D Akande(n 62 above)

⁷⁵ D Akande(n 62 above)

⁷⁶ See Statement of the United States of America Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor(June 22, 1998) 147

⁷⁷ Article 13(c) of the Statute

⁷⁸ Article 15(1)of Statute

⁷⁹ Article 15(2) of Statute

vindictive errand? If the Prosecutor is satisfied on a reasonable basis that a situation warrants an investigation, he applies to the pre-trial chamber for authority to commence an investigation⁸⁰. But is this safeguard enough to protect the prosecutor from manipulation by NGOs and state parties taking into account that the ICC relies heavily on State cooperation and NGOs.

In *Prosecutor v Brima, Kamara and Kanu*,⁸¹ the court held that the Prosecutor in his investigations must apply discretion in good faith on the basis of sound professional judgement. The Prosecutor of the ICC on his part has reiterated⁸² that his focus is not on the small fry but on those who bear greatest responsibility to international crimes. The view of the Prosecutor seems to be in line with the preamble⁸³ to the Rome Statute but the worry is whether he is walking the talk with regards to his referral of matters to the ICC. However, the Prosecutor may exercise discretion to decline to investigate cases, even where he believes that a crime within the jurisdiction of the Court has occurred.

The Prosecutor of the ICTY and ICTY testified to the UNSC that she has been forced to select cases from many other deserving ones.⁸⁴ The above admission by the Prosecutor puts to doubt the sincerity of the *proprio motu* referrals to the ICC. Discretion of the prosecutor has been criticized as making it easy for arbitrary, the discriminatory, oppressive and inequality of treatment.⁸⁵ In view of the above, has this demon of selective justice been exorcised under Article 13(c)? Danner avers that judicial oversight and assembly of states power to remove the Prosecutor provides the most

⁸⁰ Article 15(3) of Statute

⁸¹ SCSL-04-16-A, 3 March 2008 (AFRC Appeal)

⁸² Paper on some Policy issues before the office of the Prosecutor, September 2003.

⁸³ Preamble number four of the Statute

⁸⁴ ICTY Press Release GR/P.I.S./642–e, Address by Carla Del Ponte, Prosecutor of the International Criminal

Tribunal for the Former Yugoslavia, to the United Nations Security Council (Nov. 27, 2001).

⁸⁵ C D Breitel “Controls in Criminal Law Enforcement” (1960) Vol 27 University of Chicago law Review 427

obvious limit on prosecutorial discretion at the Court⁸⁶. But is that oversight enough to rein in a renegade Prosecutor? The answer seems to be in the negative.

From a reading of Article 15 of the Statute, it appears there is an overreliance by the prosecutor on NGOs to bring him information and communications about violations of IHL and this looks like a dangerous precedent to international criminal law. Indeed, NGOs play an important role in investigating and bringing to the fore commission of atrocities. But to whom are these NGOs accountable and what measures are there to control the flow of false or one sided communications to the Prosecutor?. It has been argued that the significant power exerted by NGOs in the ICC enhances or weakens the accountability of the Court⁸⁷. It is with merit to say there are not enough safeguards to protect the Prosecutor from manipulation by NGOs.

The referral of situation then in Kenya is a case in point. Kenya was the first referral proprio motu by the prosecutor.⁸⁸ After civil unrest in Kenya the prosecutor moved for referral of the situation to the ICC for prosecution. He had received various communications from NGOs, political activists, opposition politicians and other sources over grave violations of human rights. The case against Uhuru Kenyatta fell apart spectacularly after it emerged that some of the testimony obtained by the prosecutor was tainted with coercion and bribery on the party of witnesses⁸⁹. The court was left with no choice but to dismiss allegations against him as there was no enough evidence that was forthcoming. Such technical errors by the Prosecutor harm the interests of international criminal law. Furthermore, they are always two sides to political violence and one wonders what criteria the Prosecutor used to charge Kenyatta and his colleagues leaving out members of the opposition led by Raila Odinga of the Orange Movement. Was it not selective justice that in a way allowed some members of the opposition in Kenya to get away with serious violations of IHL?

⁸⁶ A M Danner (n 62 above)

⁸⁷ A M Danner (n 62 above)

⁸⁸ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010.

⁸⁹ Uhuru Kenyatta referral to the ICC.

3:4 Conclusion

The discussion above has made a critical evaluation of the referral mechanism under Article 13 of the Rome statute with a bias towards ascertaining the effectiveness of the referral procedure. It has been shown that in as much as the trigger mechanism is a noble procedure in an attempt to combat impunity under international law, there are realistic procedural impediments to it. It has been made apparent that State parties, UNSC and the Prosecutor, in their quest to refer matters to the ICC have in a way instrumentalised the system to the detriment of international criminal law. Justice must not be a privilege of a few but a right for all. Impunity has found succour from the abuse of the referral system and selective referral of cases exhibited by the actors under article 13 of the Statute.

CHAPTER FOUR

4:1 Introduction

In chapter 3, a critical analysis of the referral system was done in an attempt to ascertain whether referral of situations to the ICC is being done in the spirit of stopping impunity under international criminal law. It has been shown that indeed this procedure is important in putting the wheels of international criminal justice in motion. However it has been demonstrated that all is not well when it comes to the implementation of the referral procedure by the empowered actors under the ICC regime. In view of the above, this chapter is going to look at some of the challenges that the referral procedure faces. It is the aim of this chapter to highlight some of the ironies that the Statute contains which present dangerous threats to the referral system.

4:2 Deferral of cases under Article 16 of the Statute

The Rome Statute⁹⁰ provides that no investigation or prosecution of any matter for violation of IHL may be commenced or proceed for a period of twelve months if the UNSC through a resolution adopted under Chapter VII of the UN Charter, has requested the Court to that effect. The request may be renewed by the UNSC under the same conditions so requested in the resolution. It has been argued that the provision attempts to reconcile any potential conflict between the interests of peace and the interests of justice. The above argument, with all due respect, is on shaky ground and cannot be supported and the discussion below is why.

Indeed, the UNSC must never shake on its obligations in maintaining peace and stability in terms of the UN Charter. However, is this not ironic that the Court and the Prosecutor who are said to be independent from politics are being put under the thumb of a political body which is not a party to the Statute? This is a mockery to the referral system under Article 13. The referral of situations by state parties to the Prosecutor and the Court may come to nothing if Article 16 is invoked by the UNSC. Furthermore, there is no limit to the number of times this deferral can be renewed and that brings to the fore the spectre of an indefinite moratorium on an investigation of grave violations of IHL.

⁹⁰ Article 16 of the Rome Statute

Such a moratorium may be a shield to perpetrators of grave violations of IHL and is apparently self-defeating.

On the other hand the decision by the UNSC not to act on a request by the AU, Arab League (AL), Non-Aligned Movement (NAM) and Organization of Islamic Countries (OIC) for a deferral of proceedings against Al Bashir has created tension between the AU, UNSC and ICC to the extent that the AU resolved not to cooperate with the ICC over Al Bashir proceedings⁹¹. What the UNSC failed to grasp was that the AU, NAM, AL and OIC carry more than half the weight of the Rome treaty and any arrogance towards such a constituency was bound to bring fissures to the ICC processes.

4:3 State Cooperation and Article 98 of the Rome Statute

Article 86 of the Rome Statute provides that State Parties are under an obligation to cooperate fully with the ICC, in its investigation and prosecution of crimes. State cooperation plays an important role in the referral of matters to the ICC. In terms of Article 13(a), State parties have a role to trigger an investigation of a situation by the Prosecutor. Ironically, Article 98 of the Statute declares that a State party is under no obligation to cooperate with the court if such cooperation violates a state's obligation under international law or agreement and unless and until such a State party consents.

In light of the above contradiction in the Statute, are state parties under a serious obligation to cooperate with the directions of the ICC? The answer appears in the negative. Under international customary law, serving heads of state are accorded immunity from the criminal jurisdiction of foreign states.⁹² The person of the head of state is regarded as inviolable⁹³ when abroad and immunity from criminal jurisdiction includes immunity from arrest.⁹⁴

⁹¹ African Union, Assembly, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13 (XIII) 3 July 2009, Assembly/AU/Dec.245(xiii) Rev. 1, paragraph 8-10

⁹² R. Van Alebeek *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) 169

⁹³ H. Fox *The Law of State Immunity* (2008) 667.

⁹⁴ Arrest Warrant Case (Democratic Republic of Congo v. Belgium), 2002 ICJ Reports 22

However, under the Statute, immunity of head of state is specifically removed⁹⁵ to the extent that it is not an excuse to say under international customary law protects a sitting head of state from arrest. Taking into account that the ICC depends much on state cooperation to execute its warrants, is it feasible for State parties to negate their commitments under international customary law in order to fulfill their obligations under ICC? Events on the ground point to a conflict of interests between state parties and ICC. The refusal by the South African government to arrest the Sudanese President when he attended the AU summit in that country alludes to the fact that international customary law will always take precedence over ICC, to the detriment of international criminal justice.

The above does not augur well for the referral system under Article 13 and clearly amounts to double standards in the Statute. What this entails is that if a State party signs a bilateral agreement with another not to hand over suspects to the ICC, then such a state can find shelter under Article 98 arguing that a referral of a situation of a national of another state party in its jurisdiction will be a violation of an international agreement. This could not have been the intention of the drafters of the Statute, as Article 98 is promoting impunity.

4:3:1 Article 98 and USA

Under the guise of Article 98 of the Statute, many African countries⁹⁶, most of whom are state parties to the Statute, have been pressured⁹⁷ to sign bilateral agreements(BIA) with the USA which is not a party to the Statute. The main aim of the BIAs has been to prevent state parties from the handing over or referral of situations to the ICC involving citizens of the USA without first seeking its consent. These individuals could be military personnel or government employees of the USA. The above is in contradiction with state parties' obligations to refer situations to the ICC. Stone holds that these bilateral agreements are inconsistent with state obligations under the Rome treaty and the effect

⁹⁵ Article 27 of the Rome Statute.

⁹⁶ Uganda and the Central African Republic are some of the African countries that signed a BIA with the USA.

⁹⁷ L. Stone, *The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries*.

of doing so would be to provide impunity⁹⁸ to a person credibly suspected of having committed a crime within the jurisdiction of the ICC.

4:4 Justice versus Peace debate

The debate of justice and peace in relation to international criminal law has raised a lot of controversy and in some cases has placed a huge obstacle to stopping impunity. The question will always be what is important between justice and peace where allegations of grave violations of international criminal law are raised. China, a member of the UNSC, opposed the arrest warrant issued against President Al-Bashir, arguing that it was going to interfere with the peace process in Darfur⁹⁹. The argument was that the interests of peace and security could not be compromised as there was need for the full cooperation of the Sudanese government and without al Bashir it was going to be difficult. Practical as it may sound, China's stance demonstrates the tussle between justice and peace under international criminal law.

In South Sudan war has raged on for years and there is evidence of atrocities being committed by both the government and the rebels but no referral of the situation has been done even by the Security Council under article 13(b) of the Statute. It appears the focus has been on finding a peaceful solution to the conflict. Quite a number of peace initiatives have been chalked down but to no avail and the conflict continues. These peace initiatives have provided shelter to perpetrators of atrocities in South Sudan. Indeed some commentators, are of the view that the so-called peace processes are merely mirages and political rhetoric¹⁰⁰, and provide no basis to delay bringing perpetrators of grave crimes to justice.

⁹⁸ J Crawford "The Rome Statute of the International Criminal Court and bilateral agreements sought by the United States under article 98(2) of the Statute" (2003)

⁹⁹ D Akande, M Du Plessis & C C Jalloh "An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC," (2010) 10

¹⁰⁰ H Stuart "UN and ICC: Not the Easiest Relationship," Radio Netherlands Worldwide, 21 September 2008.

4:5 Conclusion

In this chapter a discussion was done on some of the challenges faced by the referral system under the Statute. It has been demonstrated that in as much as the statute is there to stop impunity, some of the provisions within the statute play a contradicting role in the fight against impunity under international criminal law. What the Statute gives by the right hand it takes with the left hand to the detriment of justice and the referral system.

CHAPTER FIVE

5:1 Introduction

This chapter is a conclusive one on the critical analysis of the referral system under the Rome statute of the ICC, assessing how effective is the referral system under the current regime of the Statute. It is divided into three parts. The first part is a brief outlay of the purpose of this paper and the arguments put forward for exploring the referral system. The second part gives a summary of the major arguments proffered in the preceding chapters. The third part looks at the recommendations put forward to strengthen the referral system under the Statute. The final part ties the major arguments discussed in this paper.

5:2 Purpose of the research

The main objective of the research was to make a critical analysis of the referral system under the Rome Statute of ICC, to point out some of the challenges to the system and how they are undermining the fight against impunity. It was also an opportunity to show that the “demons” of the previous tribunals under the UNSC, of selective justice and instrumentalisation of international criminal law institutions, have been given shelter under the Rome statute leading to promotion of impunity. It was also an attempt to motivate the need for proper application of international criminal law and move away from the biased vengeful justice that is loaded with selfish political ambitions of victor’s justice.

5:3 Summary of Chapters

This research set out by laying out the frame work for a critical analysis of the referral system under the Rome Statute of the ICC. Chapter Two gave a historical context and the legal framework of the international criminal law from the end of WWII to the current ICC regime under Article 13 of the Statute. Chapter Three proceeded to make a critical analysis of the legal framework of the referral system and how it has been applied in combating impunity. Practical situations were analyzed to give a reality check to the referral system. It was thus concluded that in as much as the referral system is available, it has been emasculated by selective justice, political manipulation thereby

negating the purpose it was designed for, that is to bring perpetrators of grave violations of international criminal law to justice. The referral system has been turned into a breeding ground for impunity by some of the actors to the Statute.

Chapter Four looked at some of the major obstacles to the success of the referral system within the Rome Statute. There are a number of contradicting provisions within the Statute which are doing an enormous disservice to the full implementation of the referral system. This chapter is a cry for a revisit to these provisions by the State parties in order to give a proper impetus to the referral procedures under the Statute.

In sum, the paper argued that in as much as the Rome Statute provides for a referral mechanism to bring to justice perpetrators of grave crimes under international law, there are some challenges in the manner in which it is being applied in reality. The euphoria that greeted the coming into effect of the ICC is slowly turning into a whimper to the chagrin of victims of violations of international criminal law.

5:4 Recommendations

5:4:1 Referrals by State Parties under Article 13(a) of the Rome Statute.

Like any treaty, its success or failure lies within the commitment of the parties to abide by their obligations in a fair and objective manner. The same applies to the current regime under the Statute. Without state cooperation in the form of referrals of grave violations of IHL to the court, the ICC may become irrelevant. However, state parties must not take advantage of their obligations to undermine the Court or bring it into disrepute. There is need for state parties not to instrumentalise the referral system to suit their domestic political agendas. A situation where victors to a brutal national conflict find it convenient to send the losers¹⁰¹ to the ICC must find no place in modern international criminal law.

It is proposed that in the interests of justice, where a referral is done by a State party to the ICC, the Prosecutor must not take the referral at face value and make rash pronouncements and investigations. The Prosecutor must to maintain visible neutrality

¹⁰¹ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire, ICC-02/11-14, 03 October 2011.

and where possible, investigate both sides to a conflict¹⁰² without fear or favor. Indeed there are practical challenges to the Prosecutor putting a State party under investigations taking into account that the same Prosecutor relies on that State party for investigations and surrender of perpetrators.¹⁰³ Notwithstanding the lack of cooperation that may be faced by the Prosecutor if he plays the neutral card, it is better to have no justice at all than to have one sided justice. The integrity of the Court must not be tainted with favoritism and selective justice as that will bring skepticism to international criminal. State cooperation must enhance justice and not to be used to settle personal scores. Justice must not only be done but must be seen to be done.

5:4:2 Referrals by the UNSC under Article 13(b) of the Statute

The role of the UNSC under Chapter VII of the United Nations Charter, that is to bring peace and stability to the international community, can never be underestimated. Within the framework of the ICC, it is a valuable organ for the referral of matters to the Court. Its wider reach through the United Nations allows it to have more policing powers even over non state parties to the Rome Statute. However, this important role under international criminal law must never be applied with a jaundiced eye where UNSC services are required by the Court.

As argued in the previous chapters, when the UNSC was incorporated into Article 13 of the Statute, State parties could not have foreseen the dangers of giving this political and undemocratic institution powers to meddle in ICC processes for justice. The UNSC is an institution where politics, self-interest and diplomacy take precedence over judicial processes.¹⁰⁴ Veto wielding states mostly flex their powers in the wrong direction to the detriment of justice under international criminal law. Apparently, this could not have

¹⁰² The appearance of the then Prosecutor of the ICC Luis Moreno Ocampo, in London together with the Ugandan President Yoweri Museveni at the announcement of the referral of the Lord Resistance Army leaders to the ICC raised a lot of eyebrows with regards to his impartiality.

¹⁰³ Rwandan President Paul Kagame threatened to stop cooperating with the ICTR when the Prosecutor indicated that he was going to investigate officials of the RPF for grave violations of IHL during the civil war. Pressure was brought to bear on the Prosecutor to drop the investigation.

¹⁰⁴ The current impasse within the UNSC over the Syrian situation is evidence to the politicking by some veto wielding members of the UNSC.

been the intention of the State powers when they incorporated the UNSC into the referral system.

It is submitted that for justice to prevail with regards to UNSC referrals, a criteria must be set up to guide the process of referrals to the Court. For a start, it will be proper for the Council to agree not to use the veto power when it comes to issues of grave violations of international criminal law. Though this may be seen by the veto wielding powers as an erosion of their clout, it is a better option so as to bring transparency to the referral system. Power without responsibility is of no use to international justice. Another option will be to have a referral by the UNSC reviewed by members of the United Nations General Assembly (UNGA) before it is directed to the Prosecutor. The assumption is that a vote in the UNGA is more representative and not prone to manipulation than in the UNSC. The increasing calls by some members of the UN for a reform of the UNSC clearly points to support for the proposition that transparency and democracy must start from within the UN structures and cascade downwards

5:4:3 *Proprio Motu* referrals by the Prosecutor under Article 13(c) of the Statute.

The *proprio motu* prosecutor has the authority to initiate prosecutions independently of the authorization of the Security Council or a State Party¹⁰⁵. The ICC Prosecutor is sandwiched between a hard rock and a hard place in the structure of the ICC, where the demands of law and politics meet. The question whether or not to authorize the Prosecutor to initiate investigations absent a prior complaint by a state or the Security Council became one of the most contentious issues in the negotiations over the ICC¹⁰⁶. Fears of the Prosecutor becoming a renegade, targeting highly sensitive political cases or a weak figure or being subject to manipulation by states, NGOs, and other groups, created much debate. Though the Prosecutor's decision to initiate an investigation is subject to intense judicial review in the form complex admissibility procedures by a

¹⁰⁵ C. Heyder "The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status" (2006) Vol 24 Berkeley Journal of International Law 650

¹⁰⁶ M Bergsmo & J Peji Article 15: Prosecutor, in Commentary on the Rome Statute of the International Criminal (1999) 359

pretrial chamber before the Prosecutor could actually proceed with the investigation, is that oversight enough? It is proposed that the referral by the Prosecutor falls short in three areas, that is on his discretion to start an investigation, reliance on NGOs and his attitude to the justice versus peace question

In the current ICC set up, the decision by the Prosecutor to only charge Thomas Dyilo Lubanga¹⁰⁷ of recruiting child soldiers has drawn some criticism. Was that charge the most serious one in light of the murderous campaign carried out by Lubanga in the Eastern DRC? It is submitted that the Prosecutor failed in his discretion. The judicial review by the court should not just look at the legal aspects of a referral but also at the wisdom of the Prosecutor when he uses his discretion.

The reliance by the Prosecutor on NGOs in the gathering of information on atrocities is likely to put him in an unenviable position and subsequent capture by the same for their selfish interests. NGOs are not accountable to any institution within the Rome Statute and as such cannot be relied upon to be impartial in their reporting of situations. As one scholar has observed, some of these NGOs are “part of the accountability problem rather than part of its solution.”¹⁰⁸ Just as the Prosecutor must firmly maintain his independence from states, he must also distance himself from NGOs.

In as much as the Prosecutor is part of the justice machinery within the ICC he should not be dogmatic in his quest for justice to the extent of ignoring the calls for “peace first and justice later” approach by some members of the ICC family. The Prosecutor’s arrogant attitude to the request by the AU to stop investigations and the subsequent issuance of warrant of arrest against Al Bashir has created some problems. Feeling being ignored, the AU has now resolved¹⁰⁹ not to cooperate with the ICC on the Sudan

¹⁰⁷ See case of The Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01-06

¹⁰⁸ P J Spiro *The New Sovereignists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000, at 12.

¹⁰⁹ African states agreed to refuse cooperation on requests by the ICC in handing over Omar Al Bashir, the President of Sudan to the ICC after the ICC issued a warrant of arrest against Bashir. See Assembly of the African Union, Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII), adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Libyan Arab Jamahiriya, 3 July 2009 , para10.

case. The above could not have happened if the Prosecutor had given an ear to the fears of the AU. Indeed it's a delicate balance the Prosecutor must strike but he needs to be reasonable at times.

5:5 CONCLUSION

The presence of the ICC and the referral procedure in the international criminal law set up can never be taken lightly in the fight against impunity. However the euphoria that greeted the Court in 2002 is slowly turning into dismay due to the manner the actors under Article 13 of the Rome Statute of the ICC are handling matters. The discussion in preceding chapters has shown that poor implementation of the referral system has led to manipulation of the whole process. Selective justice, revenge, politics and instrumentalisation of the referral apparatus has created a breeding ground for impunity and suspicion that the ICC is there to deliver justice for the victors. Further it has been demonstrated that the inconsistencies within the Statute are doing more harm than good to the whole fight against impunity. The recent withdrawal of Burundi¹¹⁰ and the initiation of the process by South Africa¹¹¹ to leave the ICC and the reasons proffered by the two states in leaving must be a wakeup call to all the actors under the Rome Statute for a reform of the referral system.

¹¹⁰ On 18 October 23, 2016, the Burundian Parliament voted to leave the ICC.

¹¹¹ On 21 October South Africa notified the United Nations Secretary General of its intention to leave the ICC.

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ACRONYMS

AL	Arab League
AU	African Union
DRC	Democratic Republic of the Congo
ICC	International Criminal Court
ICTR	International criminal tribunal for Rwanda
ICTY	International criminal tribunal for Yugoslavia
IMT	International Military Tribunal
NAM	Non Aligned Movement
SCSL	Special Court for Sierra Leone
UN Charter	United Nations Organisation Charter
UN	United Nations Organisation
USA	United States of America
WWII	World War 2

