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***THE EFFECTIVENESS  
OF THE INTERNATIONAL CRIMINAL COURT  
AND  
THE IMPACT OF THE INITIATING ENTITIES***

***MAGRET CHINGONO***

***14 AUGUST, 2014***

**Master's Thesis  
Submitted in Partial Fulfillment of the Requirements for the Degree of Master of  
International Relations at the City College of New York**

***DR. JEAN KRASNO***

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## **Abstract**

This thesis studies the effectiveness of the International Criminal Court (ICC) by examining three variables namely the State parties, the Security Council and the Prosecutor of the ICC that were given powers by the Rome Statute to initiate cases. The hypothesis of this study is that although the ICC was created as a politically independent judicial institution to prosecute the most serious international crimes of genocide, war crimes and crimes against humanity, the Court's effectiveness is largely dependent on the entity that initiates the case. By reviewing cases that were initiated and referred to the Court since 2002 when the Statute came into force, this thesis identifies the initiator who is most crucial in rendering the ICC effective. Examining Court proceedings and the outcome of a case will help demonstrate the level of professionalism in handling cases by the Court. However, cooperation with the ICC by the Parties to the Rome Statute demonstrates that some entities are more influential in rendering the Court effective. This means that the higher the cooperation, for example in arresting the perpetrators, providing witnesses and evidence, the more effective the Court becomes.

## CHAPTER I

### INTRODUCTION

The International Criminal Court (ICC), which is commonly referred to as the Court, is a Court that was established in 2002 under the terms of the Rome Statute of 1998.<sup>1</sup> The Court is well staffed with eighteen judges, a prosecutor and a branch known as the registry. However, the existence of the Court is not in itself a guarantee that gross human rights violations will come to an end. There is therefore need for sustained cooperation between the Court and the entities that initiate cases if human rights violations are to be contained and if the effectiveness of the Court is to be achieved. Just as Ian Hurd rightly pointed out, the creation of the ICC was an idea that was established following the principles of the Nuremberg Tribunals of 1946 to end impunity.<sup>2</sup> Therefore, all parties concerned should work towards accomplishing this purpose. Thus, the appointment of three initiating entities: namely the states parties, the Security Council and the Prosecutor of the ICC were seen to be the best way to be able to promote and support the goals of the Court. Besides complementing each other, these entities would

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<sup>1</sup> Ian Hurd, *International Organizations: Politics, Law, Practice* (New York: Cambridge University Press, 2011), 217.

<sup>2</sup> *Ibid.*, 217

also act as a check on each other to make sure that none of them would dominate the goodwill of the Court.

This thesis therefore aims to examine the influence that the initiating entities have on the effectiveness of the Court. This will be accomplished by reviewing cases that were referred to the Court since 2002. For each case, the initiator will be identified and the case outcome will help us to establish the entity that is most influential in rendering the Court effective. The thesis will be organized as follows: Chapter I introduce the Rome Statute and the relevant articles that empower initiators of cases namely; state party, the Security Council and the Prosecutor of the ICC. Chapter II explores the literature review. The scholars that have been selected share their views on the functions of the Court and its relationship with the initiators of cases vis-à-vis the demands of the Rome Statute. The investigation of cases, arrests and the trial processes are captured in Chapter III. These processes are critical to note because they help in the interpretation of effectiveness. Chapter IV outlines the general cases that were referred to the Court. For each case, the initiator will be identified. The cases include; Libya, Sudan on Darfur, the Democratic Republic of Congo (DRC), Cote d'Ivoire, Uganda and Kenya.

Chapters V to VII review three cases in detail. These cases are Darfur/Sudan, the DRC and Kenya. The cases have been carefully selected because of their uniqueness. While each case is referred by a different initiator, the cases are all unparalleled in the history of the Court. Sudan and the case of Omar Al Bashir is examined in Chapter V. The Al Bashir case is a Security Council referral which is unique in that it is the first time in the history of the Court that a sitting Head of State has been issued with an arrest

warrant. The DRC and the Lubanga case is explored in Chapter VI. The Lubanga case is a state referral which is historic in that although it is the second case to be tried by the Court after President Museveni's referral of the situation in Uganda in 2003, Lubanga is the first person to be convicted by the Court.<sup>3</sup> Chapter VII discusses Kenya and the indictment of Uhuru Kenyata, a case that was initiated by the Prosecutor of the Security Council. The examination of these cases will help to show the extent of the relationship that exists between the Court and the initiating entities while the outcome of each case will help to reveal the entity that is most influential in rendering the Court effective.

### **The Rome Statute and the Initiating Entities**

In order to help put a stop to gross human rights violations, the Rome Statute provided relevant Articles that contain legal clauses that serve as a guideline on the functions of the Court and it also allowed referrals to be triggered by three entities which are states parties, the Security Council and the Prosecutor of the ICC. These entities are crucial in rendering the Court effective in ending gross human rights violations. Examples of gross human rights violations include the genocide that took place in Rwanda and the mass killings that took place in the former Yugoslavia. Yet, in order for the ICC to have jurisdiction over the accused person, the Court must be guided by certain articles of the Rome Statute which are; 1) Article 5 which states that the Court can have jurisdiction over an individual only if the person is suspected of committing genocide, war crimes and crimes against humanity, 2) the crime must have been committed on the territory of a state party or the accused must be a citizen of a state party (Article 12(2))

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<sup>3</sup> Jennifer Fallagant, "The Prosecution of Sudanese President Al Bashir: Why an SC deferral would harm the legitimacy of the ICC," *Wisconsin International Law Journal* 27 (2010): 727-756.

and, 3) the courts of the domestic jurisdiction must have failed to genuinely investigate or prosecute the matter.<sup>4</sup> While item 2 and 3 appear to be giving too much power to states parties, a Security Council referral does not have any boundaries, in that the Council can refer a case to the ICC where the crime took place in a non-state party (i.e., Sudan).

### **Overview of the Rome Statute and States Parties**

Article 14 (b) of the Rome Statute empowers States Parties to refer cases to the ICC. While Article 86 require states to cooperate fully with the Court in its investigation and prosecution of crimes that are within the jurisdiction of the Court, it does not necessarily follow that states will always do so. States usually refuse to cooperate with the Court due to the following reasons, a) when a state receives competing requests for the extradition of a suspect, b) when a cooperation request is prohibited by the State's national law, c) when there are concerns that the suspects' human rights will be violated once they are arrested and surrendered to the Court and finally for sovereignty claims.<sup>5</sup>

While paragraph 10 of the Statute's Preamble provides that the jurisdiction of the ICC is complementary to national criminal jurisdiction, the complementarity principle can also serve as a source of conflict. While the complementarity principle requires the Court to defer a case in order to allow the state with jurisdiction to investigate and prosecute a case, the principle becomes an issue when the Court's jurisdiction has been

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<sup>4</sup> Rome Statute, Article 5

<sup>5</sup> Rita Mutyaba, "An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court's Objective in Securing Suspects in its Ongoing Investigations and Prosecutions," *International Criminal Law Review* (2012): 937-962.



triggered.<sup>6</sup> This has been the case with Libya. In 2011, the Security Council referred the case of Libya to the Court pursuant to Article 13(b) of the Rome Statute and within a few months the SC adopted Resolution 1973 which created the basis for military intervention in Libya.<sup>7</sup> However, the impasse between the Security Council and Libya concerns failure by Libya to surrender Saif al-Islam to The Hague. On May 1, 2014, the ICC prosecutor, in a filing to the court's judges, noted that Libya intended to proceed with its domestic prosecution of Gaddafi, despite its continuing obligation to hand him over to the ICC.<sup>8</sup> While the Court may invoke Article 87 of the ICC treaty which permits the Court to issue a finding of non-cooperation, Libya may argue on sovereignty grounds while pointing out the right the state has to try Saif under the Libyan law as given by the principle of complementarity. State referrals include the cases on the DRC and Uganda.

### **Overview of the Rome Statute and the Prosecutor**

The establishment of the office of an Independent Prosecutor in the Statute provides an avenue for individuals and marginalized groups to pursue formal international justice. The ICC Prosecutor's proprio motu actions, is given powers in accordance with Article 5 of the Statute, to initiate cases. Even though the Prosecutor must act independently, certain guidelines of the Rome Statute must be followed. The procedure is that, when a situation is referred to the ICC, it must clear procedural hurdles

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<sup>6</sup> Harry Orr Hobbs, "The Security Council and the Complementary Regime of the International Criminal Court: *Eyes on the ICC*," *Academic Search Complete* (2012): 27.

<sup>7</sup> *Ibid.*, 27

<sup>8</sup> Richard Dicker, "Final ICC Ruling on Gaddafi," *Human Right Watch*, May 2014. <http://www.hrw.org/news/2014/05/21/libya-final-icc-ruling-gaddafi>.

to enable active investigation.<sup>9</sup> It is only after this procedure that the Prosecutor will act independently to investigate individuals who are suspected perpetrators of the atrocity crimes at issue. Thereafter, the Prosecutor is required to seek judicial approval of arrest warrants against particular persons bearing in mind that the ICC is not a court of universal jurisdiction that can prosecute anyone who has committed an atrocity crime anywhere in the world.<sup>10</sup> This means that certain preconditions apply to personal jurisdiction. For instance, the Statute requires that the individual who is charged with atrocity crimes must be a national of a State Party to the ICC, or the territory on which the crime was committed must belong to a State Party to the ICC.<sup>11</sup> The Prosecutor initiated the Kenyan case.

The Prosecutor's dual functions of initiator and prosecutor raises questions of jeopardizing ongoing peacemaking efforts particularly in light of Article 53 which other scholars interpret to mean that the Prosecutor should be exclusively preoccupied with the enforcement of laws.<sup>12</sup> However, regardless of these concerns of the Prosecutor's functions, there are no jurisdictional boundaries when it comes to Security Council referrals.

### **Overview of the Rome Statute and the Security Council**

The Security Council was created under Article 23 of the United Nations Charter and its sole responsibility is to maintain international peace and security. While the

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<sup>9</sup> David Scheffer and Ashley Cox, "The Constitutionality of the Rome Statute of the International Criminal Court," *Journal of Criminal Law & Criminology Academic Search Complete* (2008): 983-1068.

<sup>10</sup> *Ibid.*, 986

<sup>11</sup> *Ibid.*, 987

<sup>12</sup> Robert H. Mnookin, "Rethinking the Tension between Peace and Justice: The International Criminal Prosecutor as Diplomat." *Harvard Negotiation Law Review* 18 (2013): 145-174.

Security Council, acting under Chapter VII of the UN Charter and Rome Statute was given the power to refer cases to the ICC, the Court's major objective is to bring perpetrators of international crimes to justice. What we do deduce from these two entities is that they seem to have the same goals in common; that of maintaining international peace and security, obtaining justice for victims of egregious crimes and that of ending impunity.<sup>13</sup> While Article 16 of the Rome Statute allows for the promotion of peace and security, some scholars argue that bargaining for peace tends to spell a backward step for international criminal justice. This argument is in line with the action that was taken by the Security Council in 2012. The Security Council invoked Article 10 and requested the ICC not to commence a case against any personnel in a UN-peacekeeping operation from a non-party state for a twelve month renewable period beginning July 2012.<sup>14</sup> The Security Council, by virtue of its power to invoke Articles 16 and 10, is viewed by some critics as an entity which is counterproductive in advancing the work of the Court. The Security Council referred Sudan and Libya to the Court.

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<sup>13</sup> Jennifer Fallagant, "The Prosecution of Sudanese President Al Bashir: Why an SC deferral would harm the legitimacy of the ICC." *Wisconsin International Law Journal* 27 (2010): 727-756

<sup>14</sup> *Ibid.*, 735

## **CHAPTER II**

### **LITERATURE REVIEW**

#### **Scholars views on State referrals**

While state referrals appear to be less problematic with Court cooperation, some critics point to the existence of loopholes which are likely to impact negatively on the effectiveness of the Court. For example, El Zeidy in his article, “The Ugandan Government Triggers the First Test of the Complementary Principle,” raises questions regarding the Ugandan self-referral on war crimes that were committed by the Lord Resistance Army (LRA).<sup>15</sup> While cooperation between Uganda and Court on the LRA issue is strong, Mohamed questions the time when the LRA committed the alleged crimes in Uganda which he argues does not tally with the limitations imposed by Article 11(1) of the Statute. The Rome Statute requires that only cases that were committed from 2002 when the Statute came into force could be tried by the Court. The other issue that Zeidy points out is that because Uganda represents both the territorial state and the state of nationality, issues of complementarity and waiver will further complicate the case because these issues are not conclusively addressed in the Statute or in the Rules of Procedure and Evidence.<sup>16</sup> Although the Prosecutor has the final decision on the issue of the waiver, to either initiate an investigation or not to pursue with an investigation, these complications tend to affect the effectiveness of the Court.

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<sup>15</sup> Mohamed M. El Zeidy, “The Ugandan Government Triggers The First Test Of The Complementarity Principle: An Assessment Of The First State's Party Referral To The ICC.” *International Criminal Law Review* 5.1 (2005): 83-119

<sup>16</sup> *Ibid.*, 86

2.1.3 David Krivanek's article, "Prospects for Ratification and Implementation of the Rome Statute by the Czech Republic" claims that the Czech Republic has been the only EU member state that had not ratified the Rome Statute.<sup>17</sup> The reason for non ratification is more to do with political rather than the legal aspect of the Czech constitution. The status of the Rome Statute is determined by Articles 10 & 10a of the Czech Constitution and the incorporation process requires the approval by parliament and ratification by the Czech President.<sup>18</sup> This shows that the ICC is not above any constitution. The Czech example also shows how political pressures obtaining in a country may override and limit the needs of the international community. For example, Section 19 of the Czech Constitution provides that the Republic can exercise universal jurisdiction over genocide and war crimes but not all crimes that are listed in Articles 6, 7 and 8 of the Rome Statute are contained in the Czech Criminal Code as crimes against humanity.<sup>19</sup>

Article 13 of the Rome Statute stipulates that the Prosecutor of the ICC becomes engaged in an investigation after a referral by a state party, by the Security Council acting under Chapter VII of the UN Charter or the Prosecutor using his proprio motu powers under Article 15 of the Rome Statute.<sup>20</sup> If the Prosecutor believes that there are reasonable grounds to commence an investigation, he then requests authorization from the Pre-Trial Chamber to initiate an investigation. However, the Czech criminal

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<sup>17</sup> David Křivánek, "Prospects For Ratification And Implementation Of The Rome Statute By The Czech Republic." *International Criminal Law Review* (2008): 161-184.

<sup>18</sup> *Ibid.*, 163

<sup>19</sup> *Ibid.*, 166

<sup>20</sup> Rome Statute

procedure obliges the prosecutor to initiate criminal proceedings once information that a crime has been committed is available.<sup>21</sup>

The work of the ICC becomes even more difficult because it does not have executive powers at its disposal. It must rely on cooperation of states parties to deliver suspected persons, evidence & other information. Moreover, immunity issues further complicate the relationship between the Court and state parties in particular non state parties to the Statute. In order to abolish immunities provided by the Czech Constitution for the Czech president, members of parliament & judges of the Constitutional Court, there will be need to modify the constitution which needs three fifth of the members of the Chamber of Deputies as well as three fifth of the members of the Senate to amend the document.<sup>22</sup> Although Krivanek's article discusses the implications of non ratification of the Rome Statute by the Czech Republic, it is most likely that most states that are non party to the Rome Statute are faced with the same dilemma.

### **Scholars' views on Security Council referrals**

A number of scholars have researched the link between the United Nations Security Council (UNSC) and the Court to see whether the UNSC is influential in the effectiveness of the Court. Rosa Aloisi points out in her article titled “A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court,” that international justice is threatened by the UNSC’s political power of referring and deferring situations to the Court.<sup>23</sup> The article focuses on the two instances of referrals

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<sup>21</sup> Křivánek, 170

<sup>22</sup> Ibid., 175

<sup>23</sup> Rosa Aloisi, “A Tale of two Institutions: The United Nations Security Council and the International Criminal Court.” *International Criminal Law Review* (2013): 147-168

which have been approved by UNSC which are Sudan and Libya. Aloisi further asserts that controversies regarding the UNSC's role as an initiator of cases emerged at the onset as this role has been viewed as politically driven rather than being determined by the magnitude of the crime.<sup>24</sup> Consequently, the (UNSC) faces the problem of enforcement on ICC non-member states as is the case with Sudan on Darfur and Libya.

Even though Chapter VII of the UN Charter empowers the UNSC to use its political power to force states to cooperate, the body is considered passive in providing financial, technical and administrative support to the Court.<sup>25</sup> Aloisi's contribution to the study is important in that it helps to strengthen the hypothesis of this thesis by pointing out cases where the UNSC used its referral powers. We will understand the effect of the UNSC's referrals in Chapter IV where the Sudan case is dealt with in details. Overall, the article points to the idea that the UNSC referrals seem to be having a negative impact on the implementation of justice by the Court.

Harry Orr Hobbs' article "The Security Council and the Complementary Regime of the International Criminal Court" examines the legal relationship between the Security Council and the International Criminal Court as it relates to the issue of the maintenance of international peace and security and the issue of Libya. The issue of Libya and its relationship with the ICC as a court with concurrent latent complementary jurisdiction puts the relationship between the SC and the ICC in a difficult position since the Libyan

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<sup>24</sup> Aloisi, 148

<sup>24</sup> Ibid., 158

authorities are insisting that its two nationals Saif al-Islam and Senussi will be tried in Libya according to Libyan law.

While Article 13b of the Rome Statute confers only complementary jurisdiction onto the Court, the territorial state retains the primary right to investigate and prosecute the alleged criminal acts. Although the principle of complementarity is supposed to provide a guideline on the relationship between the Court and the State, the Libyan situation has the potential to damage the standing of the Court and international criminal justice more generally because of the tug-of-war that exists between Libya and the Court. Hobbs states that opinion is divided in that while others argue that complementarity applies in all situations, others think that it only applies when a situation is referred to the Court by the Security Council or where a state is unwilling or unable to investigate or prosecute crimes. Lack of clarity on this issue might explain why the ICC has since its inception convicted only one person; Thomas Lubanga Dyilo.

Rita Mutyaba's article titled "An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court's objective in Security Suspects in its ongoing Investigations and Prosecutions," explains that the issuing of an arrest warrant for a sitting Head of State, President al Bashir, by the ICC is unprecedented in the history of the ICC.<sup>26</sup> While Presidents Slobadan Milosevic and Charles Taylor were tried by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) respectively, they were former heads of states at that time. Mutyaba further contends that the main bone of contention regarding the al Bashir case is the question of boundaries of immunity. The

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<sup>26</sup> Mutyaba, 939



Pre-Trial Chamber decided to strip al-Bashir of personal immunity while appropriate interpretation of immunity under the Rome Statute and customary international law has not been ironed out.<sup>27</sup> Resolution 1593 gave the SC powers under Chapter VII to determine that the situation in Sudan was a threat to international peace and security. What then followed was that the SC referred the situation to the Prosecutor of the ICC and al-Bashir case became the first Security Council referral under Article 13(b) of the Rome Statute and the first sitting Head of State to be issued with arrest warrants.<sup>28</sup> The al-Bashir case has so far proved to be a challenge for the ICC and a threat to international peace. First, Sudan is not party to the Rome Statute. Then, the regional organization to which Sudan is a member is against arrest warrants on al-Bashir and the point that is worth noting is that while the referral of the case to the Court was initiated by the Security Council, al-Bashir remains a free man.

### **Scholars' views on Prosecutor's referrals**

Hector Olasolo, in his article “The Triggering Procedure of the ICC” observes that, the Office of the Prosecutor has been given a key role in the Triggering Procedure that is provided for in Articles 13, 14, 15, 18, 53(1) (3) and (4) of the Statute.<sup>29</sup> Some critics question the Prosecutor's powers given the office's mandate on the triggering procedure. Olasolo further explains that the Rome Statute has given to the competent Chambers of the Court a supervisory role to ensure that the Office of the Prosecutor carries out its functions within the margin of appreciation granted to it and in full respect of the substantial and procedural legal standard set out in the Rome Statute and in the

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<sup>27</sup> Mutyaba, 939

<sup>28</sup> Ibid., 943

<sup>29</sup> Hector Olasolo, “The Triggering Procedure of the ICC.” *International Criminal Law* 5 (2005): 121-146.

Rules of Procedure and evidence. In a related article, Olosolo argues that the Prosecutor has become the gatekeeper of the ICC by the sheer fact that it plays the primary role of making decisions on the selection of situations of crisis subject to investigation.

## **CHAPTER III**

### **DEFINITION OF EFFECTIVENESS**

#### **The Rome Statute as a guideline to define effectiveness**

In order to be able to define the effectiveness of the International Criminal Court, we will need to examine three processes that the Court engages in order to determine the admissibility of cases that are referred to the Prosecutor by the referral entities. The Rome Statute provides stages that are to be followed by the Court in pursuing cases and these include the investigation, arrest and trial processes. These stages are embedded in the organs of the Court and they are important to look at because they will help us to establish whether not only the correct procedures were followed by the Court but how effective these components have been. For example, was the Court able to arrest the person and bring them to the ICC for trial? Was the court able to collect the needed evidence for trial? And finally, was there adequate access to witnesses to appear in Court or give testimony for the trial? These processes will be analyzed in Chapter V, VI and VII.

#### **An Overview of the distinct Organs of the ICC**

While the ICC has four distinct organs which are: three Trial Divisions, the Presidency, the Office of the Prosecutor and the Registry, this section will look at the trial divisions and the Office of the Prosecutor as they are the ones that are directly involved in the investigation process. The three trial divisions, which are the Pre-Trial, the Trial Chamber and the Appeals Chamber, and the Office of the Prosecutor, were created to

enable the Court to function effectively.<sup>30</sup> Their functions are as follows: each Trial Chamber conduct trials, the Appeals Chamber hears appeals and has the power to reverse and amend a decision or sentence or arrange for a new trial before a different Trial Chamber. The Office of the Prosecutor, after receiving a referral, decides if further inquiry is necessary and if it is, it opens an investigation.<sup>31</sup> What then follows is that, upon determination that there is a reasonable basis to proceed with an investigation; the Prosecutor will request the Pre-Trial Chamber to authorize commencement of an investigation. The DRC case is an example of what happens when the Prosecutor determines a case. When Joseph Kabila the President of the DRC referred all crimes committed in the DRC within the ICC's jurisdiction in March 2004, the Prosecutor subsequently opened the Court's investigation in June 2004 after observing that a further inquiry was necessary.

### **The Rome Statute and the Investigation Requirements**

Article 54 of the Rome Statute governs the scope of the ICC investigations. The Prosecutor is required to gather all facts and evidence relevant to an assessment of criminal responsibility under the Statute.<sup>32</sup> Moreover, the ICC's proceedings involve three different standards of proof at different stages of the proceedings; 1) for an arrest warrant or summons to appear, article 58 requires reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court, 2) at the confirmation

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<sup>30</sup> Elizabeth C. Minogue, "Increasing the Effectiveness of the Security Council's Chapter VII Authority in the current situations Before the International Criminal Court." *Vanderbilt Law Review*, (2008): 647-680

<sup>31</sup> *Ibid.*, 649

<sup>32</sup> Alex Whiting, "Dynamic Investigative Practice at the International Criminal Court." *Law & Contemporary Problems* 76, (2014): 164-189

hearing, article 61 requires that the chamber find sufficient evidence to establish substantial grounds to believe that the person committed the crime charged and 3) at trial, article 66 requires the prosecution to prove that the accused committed the crimes beyond reasonable doubt while article 64 requires the trial chamber to provide for disclosure of documents or information not previously disclosed in advance of the commencement of the trial to enable adequate preparation for trial.<sup>33</sup> These processes are important for the Prosecutor to follow, failure of which would result in the defense counsel claiming lack of sufficient evidence to believe that the person committed the crimes.

### **The Arrest Procedure**

James Meernik in his article “Justice, Power and Peace: Conflicting Interests and the Apprehension of ICC Suspects,” had a point when he observed that the apprehension of suspects was the one absolutely most important thing that must be realized in order for the ICC to fulfill its mission to provide judicial accountability for violations of international humanitarian law.<sup>34</sup> This observation is indeed important in that violators of gross human rights would continue to do so if they observe that the international community is failing to protect the vulnerable members of communities.

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<sup>33</sup> Ibid., 165

<sup>34</sup> James Meernik, “Justice, Power and Peace: Conflicting Interests and the Apprehension of ICC Suspects.” *International Criminal Law Review* 13 (2013): 169-190.

The Rome Statute provided the way to pursue the arrest of the accused person which requires the ICC Prosecutor to submit an application requesting the Pre-Trial Chamber to authorize the issuance of a summons for the accused person to appear. However, the arrested person must be informed under which law he was arrested and the reasons for being held.<sup>35</sup>

The procedure for arrest is that after the Court has been notified that a situation of crimes within the jurisdiction of the Court had been committed, the Prosecutor will take the matter to the Pre-Trial Chamber to make a decision on a warrant of arrest. The Chamber will only issue a warrant of arrest if it finds that there are reasonable grounds to believe that the accused has committed a crime within the jurisdiction of the Court.<sup>36</sup> As regards the issue of admissibility, the statutory test of admissibility is found in Article 17 of the Rome Statute. The test has two distinct parts. The first part of the test involves an examination of past or present investigations or prosecutions carried out by a State for the acts that constitute the alleged ICC offence and the case is not admissible unless the State is unwilling or unable to carry out a genuine investigation or prosecution.<sup>37</sup> The second part of the test is one of gravity; if the case is not of sufficient gravity to justify further action by the Court, the case is inadmissible before the ICC.<sup>38</sup> This clarification on the procedure for arrest goes a long way in minimizing tension between states parties and the Court regarding the issue of admissibility.

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<sup>35</sup> Dragana Radosavljevic, "Mala Captus Dentus and the Right to Challenge the Legality of Arrest under the ICC Statute." *Liverpool Law Review* (2008): 269-285.

<sup>36</sup> Stephen Elliot Smith, "Inventing the Laws of Gravity: The ICC's Initial Lubanda Decision and its Regressive Consequences." *International Criminal Law Review*, 8 (2008): 331-351.

<sup>37</sup> *Ibid.*, 335

<sup>38</sup> *Ibid.*, 335

## **The Conditions for a Trial by the Court**

While the Rome Statute does not have detailed provisions regarding the conduct and phasing of the proceedings, Article 64 (6) (d) of the ICC Statute sets out that the Trial Chamber may order the production of evidence in addition to that already collected prior to the trial or presented during the trial by parties.<sup>39</sup> In addition, Article 69 (3) requires that the Court shall have the authority to request the submission for the determination of the truth while Regulation 43 of the Regulations of the Court stipulates that the presiding shall, in consultation with other members of the Chamber determine the mode and order of the questioning of witnesses.

Stipulations of Rule 140 (2) requires that;

- A party that submits evidence in accordance with Article 69, paragraph 3, by way of witness, has the right to question that witness
- The Trial Chamber has a right to question a witness before or after a witness is questioned by a participant referred to in sub-rules 2(a) or (b).
- The Defence shall have the right to be the last to examine witness.

At a Pre-Trial conference the Trial Chamber may call upon the Prosecutor to shorten the estimated length of the examination-in-chief for some witnesses as well as to determine the number of witnesses the Prosecutor may call and the time available for the

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<sup>39</sup> Stefan Kirshch, "The Trial Proceedings before the ICC." *International Criminal Law Review* 6, (2006): 275-292

Prosecutor for presenting evidence.<sup>40</sup> Also, during trial, each party is entitled to call witnesses and present evidence and if after the close of the case for the Prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on the one or more counts charged in the indictment, the Trial Chamber shall order the entry of a judgment of acquittal in respect of those counts.<sup>41</sup>

It therefore follows that effectiveness of the Court is determined by how well these steps progress and if the state where the crimes took place cooperates in the arrest, handing over evidence and facilitating access to witnesses. And, by looking at the requirements of the Rome Statute visa-a-vis the investigation requirements, the arrest procedure and the conditions for trial set by the Court, observers are also better able to assess the effectiveness of the Court.

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<sup>40</sup> Ibid, 280

<sup>41</sup> Ibid, 281



## CHAPTER IV

### GENERAL CASES

The Rome Statute came into force in 2002 and can only take up cases that were committed from July 1, 2002 and onwards. The Court has received a number of referrals, all of which are from Africa. This Chapter will examine the situations that were referred to the Court in a more general sense and only broad factors of the case in question will be discussed. Discussions will be centered on who initiated the case, the background history of the issue, the referral and how the Court has dealt with the case.

Some of the cases that were brought to the Court from the African Continent since the Rome Statute came into force include: Libya, Sudan, the Democratic Republic of Congo (DRC), Cote d'Ivoire, Uganda and Kenya. Of these cases, Sudan, the Democratic of Congo and Kenya are the case studies which will be dealt with in greater detail in Chapters V, VI and VII. The purpose of discussing the three case studies in depth will help us to establish whether the hypothesis of the thesis can be proven.

In his article "Africa's relationship with the International Criminal Court: More Political than Legal," Rowland Cole observes that even though the African Continent played an important role in the realization of the Court, the Africans now seem to be of the view that political considerations have taken the lead in the work of the ICC and this continues to form an obstacle to the realization of international criminal justice.<sup>42</sup> This view of the Court by Africans, if proven to be credible perhaps runs the risk of

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<sup>42</sup> Rowland J.V. Cole, "Africa's Relationship with the International Criminal Court: More Political than Legal." *Melbourne Journal of International Law* 14, (2013)

discrediting the Court whose services are needed much more now than before, considering that human rights violations seem to be on the increase in Eastern Europe, the Middle East and elsewhere. While the question that this thesis is trying to address concerns the effectiveness of the Court, going through the background history of some of the African cases and establishing how the Court dealt with the issues that were referred to it will help to shed some light in answering some of the questions that are being raised about the Court.

## LIBYA

Libya is an Arab country that is located in North Africa. It borders with Tunisia to the West, Egypt to the East, Sudan to the South East and Chad and Niger to the South. The country has tribal issues and it has been run along tribal lines since time immemorial. Tribal pressures are the main bone of contention in the country and to keep these pressures from running high there is therefore a need for impartial democratic governance. It seems that under the Qaddafi leadership, discontent among the different tribes of Libya was increasing because of the political system that Qaddafi had established was not ideal for the general populace. Because the system was run on partisanship lines, the system started to weaken leading to an uprising that finally took Qaddafi's own life in 2011.<sup>43</sup> When the uprising started in the eastern city of Benghazi, Qaddafi's harsh reaction angered the protestors even more. The Libyan people continued with their protests while demanding justice for human rights violations that had been perpetrated by the government during and before the uprising. An example of the human rights violations that were committed by the Qaddafi regime is racism. Dark skinned Libyans had been victims of racism and displacement by the regime in the cities such as Tawergah and Misrata.<sup>44</sup>

The reaction by the general populace to Qaddafi's rule shows that the political system that Qaddafi had instituted in Libya did not auger well with the people. Qaddafi has been reported to have resorted to the tactic of divide and rule and used his own tribe and two other major tribes whom he showered with favors and positions to secure his

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<sup>43</sup> Zoubir, Yahia H Rozsa and Erzsebet N. "The End of the Libyan Dictatorship: The Uncertain Transition." *Third World Quarterly* 33. (2012): 1267-1283.

<sup>44</sup> *Ibid.*, 1269

leadership position.<sup>45</sup> The Libyan people wanted a change from Gaddafi's 42 year rule, hence the reason for staging a rebellion. While Gaddafi is dead, the Libyan people deserve justice and accountability by those who committed atrocities during the rebellion.

### **Qaddafi' reaction to the Uprising and the Security Council's response**

Qaddafi's response to the uprising came in the form of detention of human rights lawyers, shooting of demonstrators by the security forces and air force bombing of civilians. As the Libyan revolt developed into an armed insurrection, the regime responded by crushing both the armed rebels and peaceful demonstrators.<sup>46</sup> The deterioration of the situation in Libya led to the adoption of Resolution 1970 by the UNSC. Resolution 1970 imposed a series of international sanctions on Libya while referring the situation to the Prosecutor of the ICC.<sup>47</sup> The Prosecutor of the ICC in turn concluded that the situation in Libya warranted an investigation after which the Pre-Trial Chamber issued arrest warrants against Muammar Gaddafi, Saif al-Islam Gaddafi and Abdullah Senussi.<sup>48</sup> Meanwhile the United Nations Security Council, through the adoption of Resolution 1973, under Chapter VII of the UN Charter, authorized the international community to use 'all means' necessary to protect Libyan civilians.<sup>49</sup> Resolution 1973 authorized Member States acting nationally or through regional organizations to protect civilians under attack in the country including Benghazi.<sup>50</sup> On the sanctions side, the resolution tightened an asset freeze and arms embargo. While

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<sup>45</sup> Ibid., 1270

<sup>46</sup> Ibid., 1271

<sup>47</sup> Harry Orr Hobbs, 29

<sup>48</sup> Ibid., 20

<sup>49</sup> Zoubir & Erzsebet, 1273

<sup>50</sup> UNSC Resolution 1973, <http://www.un.org/News/Press/docs/2011/sc10200.doc.html>

some critics questioned NATO's involvement in Libya, Resolution 1973 clearly authorized and gave NATO the power to support the Libyan rebels who eventually won the war.

### **Current Situation in Libya – National Transitional Council (NTC) vs. the Court on the trial of Saif al-Islam Gaddafi**

There is a standoff between the NTC, the Court and the chambers over the applicability of the Court's complementary regime under SC referrals. The Rome Statute states that the Court will defer investigation and prosecution to a state with jurisdiction unless that State is unwilling or unable genuinely to carry out an investigation or prosecution. While Libya continues to argue that it can try Saif al-Islam Gaddafi in Libya under the Libyan laws, the ICC Appeal Chamber rejected all the appeals brought by the Libyan authorities, citing lack of an effective justice system in Libya.<sup>51</sup> The Court is of the opinion that Libya does not have the capacity to handle the trial in the country. Yet the million dollar question is what would then happen if the impasse continues? According to Amnesty International, what is likely to happen is that the Security Council, the initiating entity to the situation in Libya, will have no choice but to hold the Libyan authorities accountable by demanding Libya to comply with its legal obligations.

### **Conclusion**

The Libyan situation is a Security Council referral which took place in 2011. At the time of writing this thesis, Saif al-Islam Gaddafi is in the custody of the Libyan authorities. Discussions between the Court and Libya are still ongoing. The Court wants

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<sup>51</sup> Amnesty International, <http://allafrica.com/stories/201405220419.html>

Saif to be handed over to The Hague to enable victims to exercise their rights to participate in the proceedings and to enable them to seek reparations but the Libyan authorities are adamant.

## COTE D'IVOIRE

Cote d'Ivoire, is a West African country that borders Liberia, Guinea, Mali, Burkina Faso and Ghana. During the 1960s and 1970s when the country was under the helm of Houphouet-Boigny, the country was a power house in West Africa because of its production of cocoa and coffee.<sup>52</sup> Although many considered Houphoet-Boigny a Pan-Africanist, the staunch leader maintained very good relations with his former masters, the French. An argument by some scholars was the country did well because the French were in control of the economic situation in the country and the Colonial Pact dictated. The point is that Houphoet-Boigny's link with French resulted in a permanent military base in Abidjan.<sup>53</sup> This in itself will help us to understand the kind of relationship that existed between Cote d'Ivoire and France when Houphoet-Boigny was at the helm of power.

The situation in Cote d'Ivoire took a bad turn in the late 1980s when Laurent Gbagbo came to power and the country experienced an economic downturn which was followed by a coup d'etat. Even though President Gbagbo tried to form a government of national unity with rebel leaders in 2002, these peace efforts failed to hold.

### **The Political situation in Cote d'Ivoire in 2010 and 2011**

A political crisis ensued in 2010 when presidential elections were held and the crisis deepened even further in 2011. The year 2010 marked the end of Gbagbo's second unelected mandate when the Special Representative of the Secretary-General (SRSG)

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<sup>52</sup> Abou B. Bamba, "An Unconventional Challenge to Apartheid: The Ivorian Dialogue Diplomacy with South Africa, 1960-1978." *International Journal of African Historical Studies* (2014): 77-99

<sup>53</sup> *Ibid.*, 79

together with France and the US certified Ouattara's election victory with over 50% of the votes.<sup>54</sup> The crisis worsened when Gbagbo continued to declare himself a winner while refusing to step down. The stalemate that followed as a result of the refusal by these two contending candidates to back down resulted in serious human rights violations which left 3000 people dead including children and 150 women who were raped by Gbagbo forces.<sup>55</sup> The continuation of human rights violations in the country led the Prosecutor to open the Cote d'Ivoire case at his own initiative and referred the situation to Pre-Trial Chamber I. The decision to make this initiative by the Prosecutor was made following the filing of a declaration by Ivorian authorities under Article 12 of the ICC Statute.<sup>56</sup> The Pre-Trial Chamber I in turn confirmed the charges of crimes against humanity against Gbagbo and moved the case to trial. Gbagbo was captured by the Ivorian authorities in April 2011 and he was transferred to the Hague in November 2011 following issuance of an arrest warrant by the Court.<sup>57</sup> The charges against Gbagbo include murder, rape, persecution and other inhuman acts committed between December 2010 and April 2011.

### **Cote d'Ivoire and the Rome Statute – Should Cote d'Ivoire abide by the Rome Statute?**

Although Cote d'Ivoire is not state party to the Rome Statute, Gbagbo however submitted a declaration under Article 12(3) of the Rome Statute accepting the Court's jurisdiction beginning September 2002 while he was still in office. And, when Ouattara

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<sup>54</sup> Giulia Piccolino, "David against Goliath in Cote d'Ivoire? Laurent Gbagbo's war against Global Governance." (2012): 1-23

<sup>55</sup> Dicker, HRW

<sup>56</sup> Piccolino, 22

<sup>57</sup> Ibid., 23



came into power, he confirmed Cote d'Ivoire's acceptance of jurisdiction in December 2010 and in May 2011.<sup>58</sup> In addition to issuing an arrest warrant against Gbagbo, unsealed warrants were also issued against Simone Gbagbo, the former President's wife and Charles Ble Goude, Gbagbo's former Youth Minister on charges of crimes against humanity.<sup>59</sup>

The Ivorian authorities responded by surrendering Goude to the Hague on the ICC's arrest warrant. As for Simone Gbagbo, the Ivorian authorities argue that they will try her under Ivorian law. Although Human Rights Watch reports that the Ivorian authorities have the option of challenging the ICC's jurisdiction over Simone Gbagbo's case, Ivorian Civil Society and the United Nations officials have expressed concern that prosecutions against only the Gbagbo camp may stoke further tensions and damage the ICC's credibility in the country.<sup>60</sup>

### **Current Situation in Cote d'Ivoire and Criticism of the Prosecutor**

Although the starting date of trial for former President Gbagbo is yet to be announced, it appears that judges who preside over Pre-Trial Chamber I are of the view that the Prosecution had failed to put forward enough evidence to support the charges. Meanwhile scholars who are familiar with the Gbagbo case question whether the election conflict that resulted in human rights violations in Cote d'Ivoire was a fight between Gbagbo and Ouattara or whether it had something to do with political squabbles between the former colonizer (the French) and Gbabo. Yet, regardless of whatever the cause of

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<sup>58</sup> Alexander Knoops and Tom Zwart, "Who is persecuting Laurent Gbagbo?." (2014): *New African* No. 527: 16-17.

<sup>59</sup> Piccolino, 16

<sup>60</sup> Dicker, HRW

the tension was, human rights violations were committed in Cote d'Ivoire and those who were directly involved must be brought to justice. Also questions about Ouattara's involvement are likely to raise the eyebrows of the international community and of those who lost their loved ones in light of the Prosecutor's lack of action against Ouattara. It should be pointed out that these are some of the issues that are likely to tarnish the effectiveness of the Court.

One of the issues that is being debated arose from the view that, while the Court is relying on a declaration made by Cote d'Ivoire in 2003, the declaration only covers events preceding its submission and not acts which took place some seven years after it was made.<sup>61</sup> Although the Court was quick to defend itself by stating that that the ICC was acting on a declaration that Ouattara submitted to the Court, critics point to the impartiality of the Court which is failing to issue arrest warrants to Ouattara's camp in spite of the mounting evidence that has been documented by Human Rights Watch and other researchers.

### **Gbagbo's request rebuffed by the Security Council**

The defence lawyers requested for Gbagbo's interim release which was denied. Some scholars argue against the Prosecutor's refusal to consider Gbagbo's request for interim release. They state that the Prosecutor's argument that Gbagbo still had power ambitions and that his release has the potential to link him to his national and international contacts that might allow him to abscond are determined purely by political and not legal considerations.<sup>62</sup> While some of these concerns being raised may sound

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<sup>61</sup> Knoops & Zwart, 17.

<sup>62</sup> Ibid., 17

trivial, they are indeed important when it comes to legal technical considerations when the case finally gets to be tried. However, the other thing to put into consideration is that, it is not up to the prosecutor but the Security Council, who can pass a one-year moratorium.

## **Conclusion**

The Cote d'Ivoire situation is a Prosecutor's proprio motu action which took place in 2011 after gross human rights violations were committed by both pro-Gbagbo's forces and some people who are in Ouattara's camp. Former President Laurent Gbagbo is in custody in the Hague following the death of about 3000 innocent civilians. While the date for the trial is yet to be set by the Court, many issues which range from the Court's mandate to try Gbagbo in the Hague and lack of issuance of arrest warrants to the Ouattara camp by the Prosecutor of the ICC are being raised. Even though critics of the Court also question the Prosecutor's professionalism for using political considerations instead of legal considerations in addressing Gbagbo's request for interim release, it should be noted that fear of flight in regards to bond release is a legitimate legal reason. Although the new Prosecutor is said to have started well in her deliberations, the international community awaits to see how the case will evolve, particularly taking into account that the new Prosecutor of the ICC, Fatou Bensouda is a woman of African origin.

## UGANDA

### **The Republic of Uganda**

The Ugandan situation to the ICC was a state referral. President Yoweri Museveni referred the situation in the country to the ICC in 2003. But before we venture into the case, we have to look at the history that led to this situation.

Uganda is an East African country which borders the Democratic Republic of Congo, Kenya, South Sudan, Rwanda and Tanzania. The issue that brought the Ugandan situation to the ICC concerns the civil war that ravaged the northern part of the country for a long time. The northern part of Uganda which is commonly referred to as “Acholiland” had been embroiled in a civil war that took place between the government and the Lord's Resistance Army (LRA) that was led by Joseph Kony for over twenty years.<sup>63</sup> Although Uganda's internal destabilization which came in the form of civil wars and coup d'etats have a history that dates back before 2002, it was Yoweri Museveni who finally referred the situation in the country to the ICC.

### **Background History of the Ugandan Civil War**

During the 1980s, the political situation in Uganda was volatile due to a series of coup d'etats that took place prior to the civil war that was started by Joseph Kony. For example, in 1985 Olara-Okello overthrew the government of Milton Obote and within a year Yoweri Museveni and his army, the National Resistance Army (NRA) in turn staged

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<sup>63</sup> James Bevan, “The Myth of Madness: Cold Rationality and Resource Plunder by the Lord's Resistance Army Civil Wars 9.” (2007): Military and Government Collection: 343-358.

a coup that ousted Okelo from office and this resulted in a bloody civil war that was led by Joseph Kony.<sup>64</sup>

The history of the Lord's Resistance Army dates back to 1986 when the National Resistance Army (NRA) led by Yoweri Museveni overthrew General Tito Okelo who was an Acholi, from the northern part of Uganda. After the overthrow, those who were in power were disgruntled and in order for them to be able to protect the empires they had built for themselves, they decided to support Joseph Kony who had started the rebellion.<sup>65</sup> By 1991, Kony and the LRA resorted to large scale attacks on civilians, raiding schools and clinics while engaging in cruel activities such as cutting off limbs, ears and lips and gauging out eyes of vulnerable Acholi people.<sup>66</sup> In order to sustain his activities, Kony exploited civilians and carried out the abduction of children for use as child soldiers. According to some statistics, as many as 25000 to 30000 children were abducted and used as child soldiers by the LRA since 1987.<sup>67</sup> Abuse and the abduction of children left the Acholi people in a situation where they suffered a double tragedy. First, the Acholi people suffered human rights violations when Museveni advanced to wrestle power from Okelo, then they also suffered from the inhuman treatment and loss of their children when the self-portrayed spirit medium, Joseph Kony, led the rebellion.

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<sup>64</sup> Bevan, 345

<sup>65</sup> Paul Jeffrey, "Hope for Uganda." (2008): Military and Government Collection 4: 10-13

<sup>66</sup> Bevan, 351

<sup>67</sup> Ibid., 355

## **2002 – The Tipping Point for the LRA**

The year 2002 is regarded as the turning point for the LRA because most of their activities were contained when Uganda reopened diplomatic relations with Sudan.<sup>68</sup> This development negatively affected the operations of the LRA since Kony's men had bases for training and hiding in Sudan. The diplomatic relations enabled the Ugandan People's Defence Forces (UPDF) to pursue the LRA in Sudan and to curtail the movement of food and communication to LRA's bases.<sup>69</sup> Although Kony did not put down arms, this development seems to have played a role for Kony to accept peace talks between himself and the Museveni's regime which were mediated by the government of South Sudan and which resulted in a ceasefire in 2006.<sup>70</sup> The ceasefire did not hold for long because Kony decided to go back into the bush. Kony is still at large up to this day.

### **Kony's Indictment**

President Museveni referred the situation in the country to the ICC in 2003 and in July 2004, the ICC Prosecutor began an investigation into LRA crimes and then issued arrest warrants to five LRA commanders namely Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Kukwiya in 2005.<sup>71</sup> The charges against these commanders include murder, rape, sexual slavery and forcing children to serve as combatants. While Uganda signed the Rome Statute in 2002, the country became the first state to make a referral to the ICC.

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<sup>68</sup> Jefferey, 12

<sup>69</sup> Ibid., 13

<sup>70</sup> Bevan, 354

<sup>71</sup> Ibid., 356

## **Conclusion**

There are many issues raised inside and outside the country concerning Uganda's referral to the ICC. These issues range from the question of admissibility, impartiality, amnesty, accountability and reconciliation most of which were initiated within the country by the Ugandans themselves. Although Kony is still at large, some scholars question the impartiality of the Court as questions continue to be raised regarding massacres which Museveni and his men are alleged to have committed against the Acholi people before toppling Okelo's government.

On the issue of admissibility some critics argue that Uganda has not shown that it is unwilling or unable to genuinely carry out investigations or prosecutions as stipulated under Article 17 (1)(a) of the Rome Statute. It therefore follows that if this is the case, the ICC does not have a mandate on this situation. In addition, in 2000, Uganda at the request of victims passed a national Amnesty Act which allowed anyone who denounces violence, regardless of rank, to return to his/her community without fear of possible prosecution. In this regard, the ICC's arrest warrants that were issued in spite of the Amnesty Act are viewed as having a negative effect on the efforts that the Uganda people are making towards peace building.

In 2007, the government and the LRA signed an agreement on accountability and reconciliation which states in Article 3.1 that traditional justice mechanisms shall be promoted as a central part of the framework for accountability and reconciliation. These efforts are being made by the Ugandans themselves to create peace and reconciliation as well as promote national healing using Uganda's traditional justice system. Yet, others

argue that these efforts should only be used to complement the criminal justice process that the ICC is pursuing in Uganda.



## CHAPTER V

### CASE STUDY – THE REPUBLIC OF KENYA

#### **The Republic of Kenya**

The world map shows that the Republic of Kenya is a country that is situated in East Africa and lies on the Equator. It borders Uganda, Tanzania, South Sudan, Ethiopia and Somalia.

#### **Kenya's General Election of 2007**

In 2007, Kenya held its general elections. The election was marred with violence which, according to Sievers and Peters, took the form of ethnic conflict between communities that had voted for Mwai Kibaki of the Party National Unity (PNU) and those who had voted for Raila Odinga of the Orange Democratic Movement (ODM).<sup>72</sup> The announcement of Mwai Kibaki as the winner of the election triggered and fueled unrest in country. While the victory of Kibaki continued to be questioned and disputed by the opposition, the civil society and domestic and international observers, the internal strife worsened daily between the supporters of Kibaki and those of Odinga. Although Kofi Annan came in and brokered a power sharing deal which brought some calm in the

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<sup>72</sup> Axel Harneit-Sievers and Ralph-Michael Peters, "Kenya's 2007 General Elections and its Aftershocks." (2007) *Africa Spectrum* 43: Horn of Africa: 133-144.

country in 2008, the help came too late.<sup>73</sup> At least more than 1500 innocent lives were lost and about 350 000 families displaced with hundreds of women having been raped.<sup>74</sup>

It would appear that just like in the Libyan situation, the underlying issues in the Kenyan politics are mainly to do with ethnic tensions. In Kenya these tensions have more to do with issues of land and resource distribution. For examples, Mwai Kibaki commands a Kikuyu strong following and while Raila Odinga's base includes the Kalenjin, Luo and Luhya tribes.<sup>75</sup> These ethnic prejudices seem to have been problematic during elections since the country acquired its independence in 1963. Jomo Kenyatta and Arap Moi are said to have used one-party state rule and used repressive rule as a way of containing these tensions.<sup>76</sup> If Kenyan elections are known to suffer from ethnic tensions, which of the two contending leaders was responsible for the 2007 post-election violence? Reports emanating from the Kenyan media show that while the PNU for the most part carried out much of the violence, the ODM was also equally to blame.

### **The Waki Commission**

Following the 2007 post-election violence which led to the deaths of more than a thousand people including rape and displacement of hundreds of families, an independent Commission of Inquiry known as the Waki Commission and a Special Tribunal were set up to investigate the cause of these disturbances. Yet, not much was accomplished in terms of bringing to light those who were responsible for committing the atrocities. The

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<sup>73</sup> Harneit-Sievers and Peters, 135

<sup>74</sup> Ssenyonjo Mnyasuli, "The Rise of the African Union Opposition to the International Criminal Court's Investigation and Prosecutions of African Leaders." (2012): *International Law Review* 13: 385-428

<sup>75</sup> Johnson, Kirsten, Jennifer Scott, Treney Sasyniuk, David Ndeti, Michael Kisielewski, Shada Rouhani, and Lynn Lawry, et al. "A National population-based assessment of 2007-08 election related violence in Kenya" *Conflict & Health* 8:(2014): 1-25

<sup>76</sup> Harneit-Sievers & Peters, 139

Waki Commission, in an attempt to find a solution to this problem, recommended a two-pronged approach to the problem: 1) that a hybrid special tribunal with a mandate to prosecute crimes committed as a result of the post election violence be instituted, 2) and that as an alternative, names of the alleged perpetrators be sent to the ICC Prosecutor, Louis Moreno Ocampo to conduct further investigations.<sup>77</sup> Even though the Kenyan government and courts had a full year to act on the Waki recommendations to bring those who were responsible for the massacres to justice, no credible action was taken by the government authorities.

### **The Government of the Republic of Kenya's reaction to the Waki Commission**

Perhaps not knowing what to do with the Waki Commission that had opened a can of worms, the Kenyan authorities instead of taking steps to make a follow up on the recommendations of the Waki Commission, used some tactics to buy time. The tactics included shifting goal posts and supporting the ICC at one point and the hybrid special tribunal at another point.

The passing of a whole year with nothing concrete in sight shows in way that the Kenyan government was not keen to address the problem it was confronted with. Some critics of the Kenyan crisis believed that the Kenyan authorities were not interested in prioritizing this problem because they wanted to protect some authorities who might have been responsible for the atrocities. Sriram Chandra et al. noted that during the entire 2009 the government of Kenya used tactics that included members of Parliament voting down the Waki Commission, citing lack of confidence in the Commission as one of the

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<sup>77</sup> Ibid., 140

reasons.<sup>78</sup> Yet, the credible reason for voting down the Waki Commission was fear of a possible prosecution of authorities who were now in power in the event that the Commission turned effective.

### **The Prosecutor's reaction to the situation in Kenya**

In 2009, the Office of the ICC Prosecutor tried to convince the office of the then President, Mwai Kibaki to initiate domestic proceedings on the matter but the government was not forthcoming. It kept shifting positions between their support for the hybrid tribunal and the ICC.<sup>79</sup> Meanwhile, there appeared to be a consensus between the Prosecutor and Kenyan Civil Society regarding the entity that was appropriate to deal with the Kenyan situation. Not only was the Prosecutor supportive of the ICC to handle the Kenyan situation, the Prosecutor also supported the establishment of a Special Tribunal. Other parties such as Kenyan Civil Society organizations also supported the Prosecutor's position.<sup>80</sup> In fact, the Prosecutor's proposition seemed to be the best option because the entities that he proposed namely the ICC, the tribunal and the Truth, Justice and Reconciliation Commission were each meant to handle different situations that needed to be addressed. The way the three proposed entities were going to functions is as follows: a) the ICC was conceived ideal for dealing with atrocities while b) the tribunal was expected to look into other issues that were not too serious and c) a Truth, Justice and Reconciliation Commission was needed for establishing an accurate historical

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<sup>78</sup> Sriram, Chandra Lekha and Steven Brown, "Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact." *International Criminal Law Review* (2012): 219-244

<sup>79</sup> Manuel Ventura, "The Reasonable Basis to Proceed Threshold in the Kenya and Cote d'Ivoire Proprio Motu Investigation Decision: The International Criminal Court's Lowest Evidentiary Standard?" (2013) *Law & Practice of International Courts & Tribunals*: 49-80

<sup>80</sup> Sriram & Brown., 223

account of abuses that took place since independence and to deal with restitution issues.<sup>81</sup> This approach, if implemented, has the potential to bring long lasting peace as far as ethnic tensions are concerned in Kenya.

When 2009 passed with nothing in light that showed that the Kenyan government was taking concrete steps or actions to deal with the perpetrators of the 2007 massacres, the ICC Prosecutor requested in 2010 that six individuals be summoned to appear before the Court. These were names that were contained in the famous Waki envelope that was handed to the Prosecutor by Kofi Annan. The six suspects were William Samoei Ruto (Minister of Higher Education, Science and Technology), Henry Kiprono Kosgey (Member of Parliament and Chairman of the ODM), Joshua Arap Sang (Radio Host), Francis Kirimi Mathaura (Head of the Public Service and Secretary to the Cabinet), Uhuru Migai Kenyatta (Deputy Prime Minister and Minister of Finance), and Mohammed Hussein Ali (Chief Executive of the Postal Corporation). The first stage that the Prosecutor is required to engage in is to conduct an analysis of the seriousness of the available information. Then, he must file an application to proceed with an investigation if there was a reasonable basis for an indictment, pursuant to Article 15 (3).<sup>82</sup> When the Prosecutor took the necessary steps and initiated the case, the Kenyan government did not take the Prosecutor's action lightly. In response to the Prosecutor's initiative, the Government of Kenya filed an application in 2011 citing Article 19 as the basis of its challenge to the Pre-Trial Chamber's ruling of admissibility.<sup>83</sup> The Kenyan government argued that it was carrying out investigations in respect to persons at the same level in the hierarchy being investigated by the ICC and to prove its point, it attached annexes to

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<sup>81</sup> Ibid., 226

<sup>82</sup> Ibid., 224

<sup>83</sup> Ibid., 225

documents that it sent to the Court.<sup>84</sup> The government of Kenya also tried to counter the Prosecutor's initiative by passing a unanimous motion to withdraw from the Rome Statute.<sup>85</sup> However, the Chamber, notwithstanding all these efforts, dismissed the government's efforts. The Chamber argued that the government's submissions lacked specificity as it did not provide proof that concrete steps in the investigations were being carried out and that the kind of sufficient investigation required by the Chamber must provide evidence of a sufficient degree of specificity and probative value as spelled out in Article 19 of the Rome Statute.<sup>86</sup>

Unfortunately this move did not help the government simply because the Rome Statute requires that a formal withdrawal request takes effect after one year. Moreover, the Court's jurisdiction over the case could not be removed regardless of the withdrawal. Thus, out of the six cases, two cases were rejected by the Pre-Trial Chamber II in 2012.<sup>87</sup> Of the four remaining cases, William Ruto and Joshua Arap Sang of the ODM party were indicted on charges that contain crimes against humanity including murder, forcible transfer and persecution allegedly committed against PNU supporters.<sup>88</sup> The other two remaining cases include the current President Uhuru Kenyatta whose charges also specify crimes against humanity, including murder, forcible transfer, rape, persecution and other inhuman acts allegedly committed against ODM supporters in retaliation to attacks against the PNU supporters.<sup>89</sup> Meanwhile, statistics on sexual violence, according to a study carried out by Kirsten et al., was reported to be on the increase during the election

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<sup>84</sup> Ibid., 643

<sup>85</sup> Ibid., 645

<sup>86</sup> Ibid., 645

<sup>87</sup> Johnson & Kirsten et al., 23

<sup>88</sup> Ibid., 24

<sup>89</sup> Fatou Bensouda, "The ICC: Out of Steam, and losing credibility fast!" (2013) *New African*: (24-27).

violence period and that both male and female perpetrators were affiliated with the government. Perhaps this might help to explain why the Kenyan government failed to bring to light the culprits who were involved in the 2007 post-election atrocities.

### **The Issue of Complementarity and the Prosecutor's Initiative**

The complementarity principle enshrined in the Rome Statute sets out the nature of the relationship between the ICC and national jurisdictions and provides the means by which the admissibility of cases brought before the ICC can be determined. While Article 15 of the Rome Statute provides that the Prosecutor can initiate investigations proprio motu into crimes under the jurisdiction of the Court, the Prosecutor, was, in the case of Kenya, required to show credible grounds for opening the case since the complementarity regime of the Rome Statute seeks to strike a balance between safeguarding the sovereign rights of states and the goal of ending impunity for the most heinous crimes.<sup>90</sup>

The issue of complementarity becomes problematic when it comes to striking the balance between safeguarding sovereignty of states and the need to end impunity. Nevertheless, the issue of punishing those who commit heinous crimes is a concern for the international community, hence the creation of the ICC.

Complementarity is a fundamental cornerstone of the ICC framework. It has to be dealt with cautiously because it has the potential to make or break the reputation of the Court. It acts as a gatekeeper between a state's primary duty to investigate and prosecute international crimes and the Prosecutor's independent ability to step in when a state is unable or unwilling to do so.<sup>91</sup> But, was the Chamber correct when it agreed that the

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<sup>90</sup> Ibid., 24

<sup>91</sup> Ibid., 48

elements of gravity and complementarity were met for the ICC to take the prosecution of the Kenyan post-election violence into its own hands? The study by Elizabeth Kumundi which analyzed the Majority Decision of the ICC Pre-Trial Chamber II of 31 March 2010, allowing the Prosecutor to open an investigation into the situation in Kenya claims that the Chamber was correct.<sup>92</sup> Yet, the troubling issue is that the Justice Philip Waki Commission seems to contradict the analysis of both the Court and Elizabeth Kumundi. While the Chamber and Kumundi are in agreement that the Kenyan post-election violence met the threshold for the Court to intervene, a report by Fatou Bensouda, the current ICC Prosecutor seems to be in direct contradiction by stating that the former Prosecutor Moreno Ocampo intimated that the Waki Commission was not sure whether there was enough evidence to meet the threshold required by the ICC. The report further states that Justice Waki explained his position to some NGO activists when he stated that,

...the evidence the Commission had gathered was not in their assessment sufficient to meet the threshold of proof required for the criminal matters in Kenya and that he believed that the Commission' evidence forms a basis for more investigation on the alleged perpetrators.<sup>93</sup>

Could the explanation by Judge Waki also help to explain why Belgian Judge Christine Van Den Wyngaert dropped out of the case? Judge Wyngaert questioned the Prosecutor's conduct in the investigation of the case. She thought that the Prosecution did

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<sup>92</sup> Fatou Bensouda, "The ICC: Out of Steam, and losing credibility fast!" (2013) *New African*: (24-27).

<sup>93</sup> Johnson, Kirsten et al., 23



not meet the threshold of his obligation at the time when he sought confirmation from the Chamber; an observation which she thought was explained during the proceedings before the Chamber.<sup>94</sup> Perhaps one is tempted to take Judge Wyngaert's concerns into perspective especially if one takes into consideration the fact that the African Union is also up in arms with the way the Hague-based court is being run. The AU is of the view that the Security Council is using careless analysis to distort the purpose of the Court. The AU further alleges that the ICC is being used to install leaders of the powerful Western countries' choice in Africa with the aim of eliminating the ones they do not like.<sup>95</sup> It appears, however that the Africans' concerns are partly substantiated by some scholars who claim that the Court was used by powerful Western countries to bring about regime change in Libya.

Therefore, in order to show the credibility of the Kenyan case, the Prosecutor relied on evidence that was provided by the Waki Commission as well as using reports from a range of Kenyan and International NGOs.<sup>96</sup> As regards to the issue of the Principle of Complementarity, both the judges and the Prosecutor had to utilize the standards enumerated in Article (17) (1) of the Rome Statute. Article (17) (1) enumerates that, the Court will not have jurisdiction if the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.<sup>97</sup> The Prosecutor's argument was substantiated because the Kenyan government had failed to prove its willingness to carry out the investigation particularly in light of the fact that the government had a whole year (2009)

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<sup>94</sup> Ibid., 26

<sup>95</sup> Ibid., 27

<sup>96</sup> Sriram Chandra Lekha 228

<sup>97</sup> Ibid., 228

at its disposal to deal with the case. Even though the government of Kenya argued that the issue was under their jurisdiction and that the government was looking into it, their case was not valid since the Rome Statute suggests that the question of complementarity hinges on the question of actual investigations or prosecutions and not prospective ones. The government had not proved that actual investigations or prosecutions were being carried out.

### **Interpretation of the issue of Complementarity in the Kenyan issue**

There is a clear distinction between a state's failure to pursue prosecutions and not being willing to pursue domestic prosecutions. In order to be able to understand the difference between the two, we need to look at what the Rome Statute says about unjustified delays and the unwillingness or inability to pursue cases. While Article 17 (1)(a) states that the ICC can determine the inadmissibility of a case if the state is unwilling or unable genuinely to carry out the investigation or prosecution, Brighton argues that Article 17 (1)(a) does not only set out a two pronged test based solely on unwillingness or inability but that it established a two-tier test which encompasses 3 distinct elements.<sup>98</sup> According to Brighton, the activity element involves the tier which asks if the case is being investigated or prosecuted by a state with jurisdiction and if the response is positive. Complementarity then becomes automatic, but if the response is in the negative, then the determination shifts to the second tier which encompasses the unwillingness and inability elements which are defined in Article 17(2).<sup>99</sup> This tier

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<sup>98</sup> Mniasuli, 387

<sup>99</sup> Ibid., 387

determines whether the nature and quality of domestic proceedings renders intervention by the ICC necessary.

The Rome Statute also distinguishes between unjustified delays and the unwillingness or inability to pursue cases through its interpretations of Article 17. While article 17(2)(a, b) discusses an unjustified delay in proceedings which is consistent with the intent of bringing the person concerned to justice, Article 17(2)(a, c) refers to proceedings that are undertaken with the purpose of shielding a person from prosecution. It would appear that the Kenyan situation fell under article 17(2)(a, c).<sup>100</sup> This is explained by the way the Kenyan government continued to shift positions while ignoring the recommendations of the Waki Commission. The judges, on the issue of complementarity, felt that there was no need to assess whether Kenya is unwilling or unable to prosecute. Instead the judges needed to consider whether there were investigations in respect of likely future subjects of ICC prosecutions. The Prosecutor's approach was a new approach which promoted a “three-pronged strategy” in which top level perpetrators would be handled by the ICC, middle level perpetrators were to be handled by the hybrid tribunal and the Truth Commission would be left to deal with reparations, institutional reform and traditional justice.<sup>101</sup>

## **Conclusion**

As noted above, Chapter V discusses the Kenyan situation following the 2007 post-election results. As a country that was a state party to the ICC in 2007, Kenya was expected to abide by the requirements of the Rome Statute when atrocities were committed by supporters of the two major parties that were contesting in the 2007

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<sup>100</sup> Rome Statute Article 17 (2)

<sup>101</sup> Ssenyonjo, 389

election. When Kenya failed to expose the culprits who had committed the 2007 atrocities, the Prosecutor, using the powers enshrined upon him through Article 15 of the Rome Statute of the ICC referred the situation to the Pre-Trial Chamber II seeking authorization to initiate investigation.

Did the Prosecutor follow the right procedures in his pursuit to seek justice for the thousands who lost their lives or those who got raped or displaced in the 2007 Kenyan post-election violence? Admissibility was determined, arrest warrants were issued to those individuals who were cited in the Waki Commission but the current status quo is that Uhuru Kenyata and William Ruto, two of the four indicted people were selected by the people of Kenya to run for the highest office of the land. The Belgian Judge Christine Van Den Wyngaert dropped out of the case for lack of confidence in the Prosecutor. The African Union is up in arms with the way the institution is being run. The AU alleges that the ICC is being dictated to by powerful Western countries who want to bring regime changes in Africa. The more the Kenyan government argues that it is taking care of the situation which falls within its jurisdiction by way of pursuing the investigation vigorously, the more the Chamber demands the Kenyan government to produce concrete evidence to its claim.

The Kenyan situation is a Prosecutor proprio motu initiated case. Even though cooperation between the initiating entity which in this case is the Prosecutor and the Court is high, the effectiveness of the Court's is not yet proven by this fact since the case is still pending. The major hurdle in this case is the issue of admissibility. There is a tug of war between the Court and the state on who has jurisdiction over the situation. We are yet to see how the situation will unfold since many actors are being drawn into the issue.

The African Union's concerns should not be taken lightly even though the Union's allegations are yet to be proven.

## CHAPTER VI

### CASE STUDY – THE DEMOCRATIC REPUBLIC OF CONGO

#### **The Democratic Republic of Congo and the Lubanga Trial**

The Democratic Republic of Congo, formerly known as Zaire, is a gigantic country which is situated in Central Africa. It borders nine countries namely, the Republic of Congo, Tanzania, Central African Republic, South Sudan, Uganda, Rwanda, Burundi, Zambia and Angola. Because of its vastness, the country is experiencing challenges to provide security along its borders.

Thus, for quite some time, the eastern part of the country known as the Ituri region has been famously known for harboring war lords from the DRC, Uganda and Rwanda.<sup>102</sup> One of the Congolese notorious war lords, Thomas Lubanga Dyilo hailes from Ituri. As one of the co-founders of the Union des Patriotes Congolais (UPC), Lubanga was also the Commander-in-Chief of the party's military wing, the Forces Patriotique pour la Liberation du Congo (FPLC).<sup>103</sup> The UPC's agenda was to gain political and military control over the Ituri district in the northeast of the DRC.

The Democratic Republic of Congo is a country that had been faced with perennial internal disturbances dating back from the time of Mobutu Sese Seko and the

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<sup>102</sup> Michael E. Kurth, "The Lubanga Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age and gravity." (2013): Goettingen Journal of International Law: (431-453).

<sup>103</sup> Ibid., 443

problems still continued even after the Mobutu' regime had long gone. In 1998, the country faced a rebellion that was led by Laurent Desire Kabila which ousted Mobutu Sese Seko from power. And, within no time, Laurent Desire Kabila also faced a rebellion. Tanks to the SADC forces, who after being seized with the situation, came to the rescue of the Congolese government. Joseph Kabila is now at the helm of power in the Democratic Republic of Congo. The son Joseph took over after his father died under circumstances that were not clearly explained to the Congolese people.

### **Who is Thomas Lubanga Dyilo?**

According to Trial Watch, an organization that is determined to bring justice to victims of international crimes, Thomas Lubanga Dyilo is a Congolese national who was born in 1960 in Djiba, Ituri District of the Democratic Republic of Congo. Lubanga holds a degree in Psychology from Kisangani University and he turned to politics to politics in 1999. In 2000, Lubanga founded his own political party known as the Union des Patriotes Congolais (UPC) as well as its armed wing the Forces Patriotiques pour la Liberation du Congo (FPLC). It is a result of the formation of the UPC and the FPLC that Lubanga actively recruited children under the age of 15 years and forced them to undergo military training so that they could participate in hostilities and becoming bodyguards for high ranking officers in the FPLC in the Ituri region where these officers were operating from. Lubanga became stronger and stronger. In 2002, his party gained control of the town of Bunia. Lubanga became the Commander-in-Chief of the FPLC and his forces were accused of the massacre of civilians in Ituri between 2002 and 2003. More than 800 civilians were reported to have been killed in Ituri by the UPC.

## **The Democratic Republic of Congo refers the situation in Ituri to the ICC**

Faced with this internal strife in the eastern part of the country, the Government of Joseph Kabila referred the situation in Ituri region to the ICC. By invoking Article 14 of the Rome Statute of the ICC, the government of the Democratic Republic of Congo referred the situation in Ituri to the ICC in 2004.<sup>104</sup> Article 14 of the Rome Statute states that:

A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charge with the commission of such crimes.<sup>105</sup>

In 2005, Lubanga was arrested by the government and he was detained by state authorities in Kinshasa for one year before he was transferred to The Hague. At the ICC, Lubanga was charged and found guilty as a co-perpetrator for enlisting and conscripting children and using them to participate in hostilities from September 2002 to August 2003.<sup>106</sup>

### **Determination of Admissibility**

Unlike the Kenyan situation, the Court, in the Lubanga case, was not faced with the monumental task of determining admissibility of the case. The reason for this is that the case was a state referral; there was therefore no need for processes such as the

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<sup>104</sup> Ibid., 443

<sup>105</sup> Rome Statute, Art. 14

<sup>106</sup> Kurth, 444



issuance of an arrest warrant or summons to appear. Moreover the government of the DRC arrested Lubanga and handed him over to the ICC. Thus, on August 2006, the Prosecutor filed a document containing the charges, after which Pre-Trial Chamber I confirmed that there was sufficient evidence to establish substantial grounds to believe that Thomas Lubanga was responsible as a co-perpetrator of the enlisting and conscripting children under the age of 15 into the FPLC and using them to participate actively in hostilities from 2 June to 13 August 2003.<sup>107</sup> However, the Prosecution was still faced with the task of fulfilling the requirement of Articles 61 and 66. Article 61 of the Rome Statute requires that the Chamber find sufficient evidence to establish substantial grounds to believe that the person committed the crime charged and at trial. Article 66 requires the Prosecution to prove that the accused committed the crimes beyond reasonable doubt and Article 64 requires the Trial Chamber to provide for the disclosure of documents or information not previously disclosed in advance of the commencement of the trial to enable adequate preparation for trial. Although the Court managed to try Lubanga who then became the first person to be convicted by the ICC, the Prosecution has a difficult time to fulfill some of the requirements of the Rome Statute of the ICC. For example, Trial Chamber 1 ordered, in July 2008, for the release of Lubanga Dyilo. The reasons for his release were made after the Chamber claimed that the Prosecutor failed to fulfill the requirements of Article 54(3)(e). Article 54(3)(e) addresses the issue of non-disclosure of exculpatory material. Pre-Trial Chamber I

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<sup>107</sup> Chile Oboe Osuji, "Prosecutor v. Lubanga, Characterization of facts (International Criminal Court), Introductory Note." (2010): International Legal Materials: 474-501.

argued that there was evidence of non-disclosure of more than 200 documents which contained exculpatory information which was also supposed to be used by the defence.<sup>108</sup>

The ICC Trial Chamber ordered a stay of proceedings in the Lubanga case. The Chamber concluded that the Prosecution had abused its competence under Article 53(3)(e).<sup>109</sup> While the Prosecutor argued that the documents were obtained on condition of confidentiality hence the failure to make a disclosure, the Trial Chamber insisted that the Prosecutor was required to abide by Article 67 of the ICC Statute. While Article 67(2) of the ICC Statute require that the Prosecutor shall disclose to the defense all exculpatory evidence that tends to show innocence of the accused or mitigate the guilt of the accused, Article 54(3)(e) provides that, unless otherwise specified in writing, documents held by MONUC ... shall be understood to be provided in accordance with and subject to arrangements envisaged in Article 18, paragraph 3 of the Relationship Agreement.<sup>110</sup> The Prosecutor was supposed to have made initiatives to facilitate the disclosure of the documents prior to the trial date. Because disclosure of exculpatory evidence goes to the heart of an accused' right to a fair trial, lack of such a disclosure by the Prosecutor may be concluded to mean that the scale of justice was tilted against Lubanga since the defence was incapacitated in counterbalancing the greater resources of the Prosecution.

Although the Prosecutor succeeded in the final analysis to convince the Trial Chamber to reverse its Impugned Decisions, such errors will go down the history of the

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<sup>108</sup> Elena Baylis, "Function and Dysfunction in Post-Conflict Justice Networks and communities." (2014): Vanderbilt Journal of Transnational Law 47: 625-698.

<sup>109</sup> Lazic Djurdja, "Introductory Note to the International Criminal Court: Prosecutor V. Thomas Lubanga Dyilo (Appeals Chamber, Decision on Victims Participation): (2008) International Legal Materials: 968-971.

<sup>110</sup> Kai Ambos, "The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A comprehensive Analysis of the Legal Issues." (2012): International Criminal Law Review 12: 115-153.

ICC and they will be noted as issues which have the potential to make or to break the reputation of the Court.

### **Was the nature of the Armed Conflict Determined in the Lubanga Case?**

From the onset, the issue of determination of the nature of the armed conflict was problematic. While the Prosecution qualified the conflict associated with Lubanga as a non-international one, the Pre-Trial Chamber I referred the conflict as a sequenced international/non-international solution. Meanwhile, the Chamber argued that the conflict was an international one but it later changed it to non-international.<sup>111</sup> Yet, it was of great importance to have the conflict qualified since different groups were reported to be operating in Ituri. Ambos disagrees with the Chambers rejection that the conflict was non-international. He believes that the three neighboring countries, the DRC, Rwanda and Uganda fought their wars through proxies, using Uturi as their base. Moreover, Ambos expresses his concerns over the Chamber's insistence that the forms of conduct comprise three separate offences, namely "conscripting, enlisting and using" yet the concept of the offense fell under one element "child soldiers."

### **Were the requirements of Article 61 and 66 fulfilled in the The Lubanga Trial**

Thomas Lubanga Dyilo was tried and convicted in The Hague for the enlistment and conscription of children under 15 years in his army, Forces Patriotique pour la Liberation du Congo (FPLC) on 14 March 2012. This was the first judgment of the International Criminal Court. Caroline Buisman explains in her article, "Delegating Investigations: Lessons to be learned from Lubanga Judgement" that the office of the

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<sup>111</sup> Ibid., 123

Prosecutor faced a hurdle in proving the ages of the child soldiers.<sup>112</sup> In order to get the proof of the ages of children conscripted in the Forces Patriotique pour la Liberation du Congo (FPLC), on the spot investigation had to be carried out in Ituri yet the situation was still volatile and active with militia movements. However, the investigation team that was led by Bernard Levigne, a French magistrate, testified that early investigations in Ituri posed challenges for the team such that the tactics they initially applied were discarded. The team had to rely heavily on investigations that were being undertaken by the United Nations Peacekeeping Mission in Congo (MONUC). Initially, the investigators contacted village chiefs and former school teachers to verify the age of specific victims but the method was discarded as it was considered too dangerous for the children and their families.<sup>113</sup> Kurth also noted that generally, investigators used the Greulich and Pyle (GP) and the Tanner and Whitehouse (T & W) methods and in the Lubanga case, the investigators used the G & P methods plus teeth examination of the third molar.

Although the defense argued that Lubanga was opposed to the recruitment of children and that he had ordered his subordinates to demobilize children under the age of 18 years, the Judges were not persuaded, they further argued that he (Lubanga) used children below the age 15 as bodyguards, gave speeches and attended rallies where conscripted and listed children under the age of fifteen were present.<sup>114</sup> While Lubanga tried various tactics to evade the charges that were being pressed against him, the video footage of children who were seen in the Lubanga entourage was reported to have

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<sup>112</sup> Caroline Buisman, “Delegating Investigations: Lessons to be learned from Lubanga Judgment.” (2013): *Journal of International Human Rights* 11: 30-82.

<sup>113</sup> Kurth, 443

<sup>114</sup> Ibid., 447

brought the crime scene to the courtroom and it was also viewed as the best piece of evidence the Prosecutor was able to produce.

In the final analysis, Lubanga was convicted. The Judges treated each charge separately and sentenced him to 13 years for conscripting child soldiers, 12 years for enlisting child soldiers and 15 years imprisonment for using child soldiers actively in hostilities.<sup>115</sup> The Chamber was also generous in the end. It deducted the time Lubanga spent in detention in The Hague but refused to do so for the time he spent in detention in the DRC. On the DRC detention, the Chamber argued that it did not find sufficient evidence to ascertain that Lubanga was detained in Kinshasa because of crimes of child recruitment.<sup>116</sup> Given the dire financial situation of the defendant, the Chamber did not impose an additional fine to benefit the Trust Fund for victims. The Prosecutor argued that a 14-year sentence fails to give sufficient weight to the gravity of the crimes against children and the extent of the damage caused to the victims and their families. Lubanga's defense argued that the Trial Chamber erroneously concluded that the recruitment of children into the FPLC was widespread and that the evidence produced by MONUC should not have been accepted by the Court. Ultimately, the judges sentenced him to 14 years.

## **Conclusion**

The Democratic of Republic of Congo's situation is a state referral. The government of the DRC arrested Lubanga and handed him over to the ICC, therefore an arrest warrant was issued by the Prosecutor as a formality of the Court.

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<sup>115</sup> Ibid., 449

<sup>116</sup> Ibid., 449

Although the Prosecutor had problems proving the ages of the alleged victims of enlistment and conscription, the other problematic issue was for the Court to determine the nature of the armed conflict. These issues were however ironed out in the final analysis and Thomas Lubanga Dyilo was convicted in The Hague for the enlistment and conscription of children under 15 years in his army, the Forces Patriotique pour la Liberation du Congo (FPLC) on 14 March 2012.

Just like in the Kenyan situation, cooperation between the initiating entity which in this case is the State and the ICC is high. On the other hand, the effectiveness of the Court has been proven by the fact that all the procedures of the Rome Statute were followed which rendered the Court able to determine a guilty verdict in Lubanga's case.

## CHAPTER VII

### CASE STUDY – SUDAN

#### **The Republic of Sudan and the International Criminal Court**

The Republic of Sudan is found in North Africa. It borders Egypt, Eritrea, Ethiopia, South Sudan, Libya, Central African Republic and Chad.

#### **Historical analysis of Sudan and the Darfur Crisis**

There are different schools of thought on the reasons for the conflict that ravaged Sudan since it attained its independence from the British. Although these conflicts came in the form of civil wars that pitted the North against the South of the country, no single factor could explain why there was animosity between the citizens of Sudan. Murecha and Chigora observed that since attaining independence from Britain, a number of civil wars took place in Sudan until 2005 when a peace deal known as the Nairobi Comprehensive Peace Agreed was concluded.<sup>117</sup>

From the two different schools of thought, there are those who claim that the bone of contention among various ethnic groups of Sudan has something to do with resources while the other group contends that the issues are mostly to do with ethnic tribal differences. The latter explanation appear to carry some substance since that position has been supported by a number of scholars and organizations that include Usman A. Tar,

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<sup>117</sup> Kudzaishe Marecha and Percyslodge Chigora, “The Sudanese Conflict: War Crimes and International Criminal Court.” *Alternatives: Turkish Journal of International Relations* (2011): 37-49

Julie Flint, Human Rights Watch (HRW) and Women Waging Peace (WWP). These scholars argue that the Darfur crisis can be explained as a genocidal conflict between the indigenous African tribes and the Afro-Arab tribes in the region.<sup>118</sup>

The rebel groups of Darfur who organized against the government complained that the region of Darfur was marginalized from the rest of the country and in particular from the northern region. The government of Sudan on the other hand dismissed the allegations by the rebels by pointing out that the government had made improvements in Darfur such as building schools, universities, hospitals and health centers etc. These issues seem to have created a big rift between the government and the rebels who then organized themselves and continued to carry out attacks on the government. Although the government denied the reports, indications were that the government enlisted the Arab Janjaweed militia who went about terrorizing the people of the Darfur. This led to the displacements of millions of the Southern people of Darfur, an issue that led to the indictment of al-Bashir by the ICC in 2008.

### **Who is Omar Hassan Ahmad al-Bashir?**

According to the Encyclopedia Britannica, al-Bashir was born on January 7, 1944, in Hosh Wad Banaqa, Sudan into a peasant family that later moved to Khartoum where he received his secondary education and later joined the army. He fought in 1973 with the Egyptian army against Israel.<sup>119</sup> He led a successful coup against the country's leadership in 1989 and he became the chairman of the Revolutionary Command Council

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<sup>118</sup> Ibid, 39

<sup>119</sup> [www.britannica.com/EBchecked/topic/54890/Omar-Hassan-Ahmad-al-Bashir](http://www.britannica.com/EBchecked/topic/54890/Omar-Hassan-Ahmad-al-Bashir)



for National Salvation which ruled the country. In 1991, he together with Hasan al Turabi, a Muslim extremist and leader of the National Islamic Front (NIF) began to Islamize the country and they introduced Islamic Shariah law in 1991. In October, 1993, the Revolutionary Council was disbanded and al-Bashir was appointed president of Sudan. In 2002, al-Bashir was elected President of Sudan and the war with the Sudanese Peoples Liberation Army (SPLA) continued to rage on. In 2003, rebel black African groups in Darfur launched an attack on al-Bashir's government. To combat the uprising, President al-Bashir enlisted the aid of the Arab militia known as the Janjaweed whose brutal methods terrorized civilians, prevented international aid organizations from delivering food and medical supplies and displaced more than two million people. In response, the Security Council voted to send the case of Darfur to the ICC in 2005. Although al-Bashir agreed to form a peace pact with the SPLA in 2005, the Prosecutor of the ICC called for an arrest warrant against several leaders for crimes committed against humanity, war crimes and genocide in Darfur.

The ICC Prosecutor later requested an arrest warrant against al-Bashir in 2008, but the Sudanese government denied the charges. This was followed by the ICC approving an arrest warrant in 2009 whose charges included war crimes and crimes against humanity. In 2010, the ICC issued a second arrest warrant against al-Bashir which also included genocide.

### **Conflict between Customary law and Articles of the Rome Statute**

Although under customary international law, sitting heads of state have had immunity from criminal prosecution before the domestic courts of foreign states; the new

dynamics show that international law is changing. These new dynamics are evidenced in Article 28 of the Rome Statute establishing the ICC which holds that neither the immunity of a head of state nor the official position of a suspected international criminal will bar the Court from exercising its jurisdiction.<sup>120</sup> Article 28 of the Rome Statute seems to be in stark contrast with the traditional international legal position on immunity which stipulates that a head of state has immunity, including among other things, immunity from criminal and civil jurisdiction from arrest or prosecution from a foreign state. Therefore, the issuance of an arrest warrant for President al-Bashir, a sitting head of state will go down in history as it has set a new precedent. Did the Chamber erred in issuing a sitting head of state with a warrant of arrest?

### **The position of the Chamber on the arrest warrant of President al-Bashir of Sudan**

Zuzanne Bullock, in her article “Prosecuting President Al Bashir, and the short Arm of Justice” explained the position that the Chamber unequivocally determined that the traditionally sacrosanct concept of immunity of heads of state no longer applied before an International Court or Tribunal. The Chamber also stated that as international law currently stands, jurisdiction over non member states has to be derived from a higher authority and that in the case of Sudan, higher authority exist by virtue of UNSC Resolution 1593 which referred the situation in Darfur to the ICC. Moreover, this resolution, according to Bullock, implies power to arrest and prosecute President al-Bashir. Hence, the reason why the UNSC passed Resolution 1593 in 2005 which

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<sup>120</sup> Marecha & Chigora, 47

referred the situation in Darfur to the ICC and urged all States, concerned regional organization and other international organizations to cooperate fully with the Court. This was followed by the Pre-Trial Chamber's decision on the Prosecution's application for a warrant of arrest against al-Bashir and it asserted the ICC's jurisdiction over him despite his position as the current head of state even though his country is not a party to the Rome Statute. The Pre-Trial Chamber stated that Article (27)(1) and (2) provides that the Rome Statute applies to all people equally regardless of their position and that the capacity as a head of state did not exempt a person from criminal responsibility. All parties were requested to cooperate with the Court in accordance with Article 89(1) and 91 of the Rome Statute for the arrest and surrender of al-Bashir.

### **Malawi's position vis-à-vis' Pre-Trial Chamber's ruling on President al-Bashir**

When the Republic of Malawi failed to comply with the ICC's ruling which urged all states to comply with UNSC Resolution 1591, they claimed that their actions were in line with the AU's position regarding al-Bashir's indictment and the dictates of Article 98(1) of the Rome Statute. In October 2011, the Republic of Malawi received President al-Bashir on a state visit in spite of the fact that the position taken by the Government of Malawi was in contradiction of UNSC's Resolution 1591. When the Republic of Malawi was confronted by the Pre-Trial Chamber, the Republic of Malawi claimed that it was acting within the African Union position on the matter which upheld the immunity of serving heads of state not parties to the Rome Statute.<sup>121</sup> In response, the Pre-Trial Chamber stated that Article (19) (1) of the Rome Statute established the ultimate

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<sup>121</sup> Ibid., 63

authority of the ICC to decide if immunities should be applied and respected in an individual situation.<sup>122</sup> The Chamber rejected Malawi's argument that al-Bashir was immune from prosecution because he was a serving head of state and Sudan was a non-signatory to the Rome Statute. The Chamber concluded that it was now a principle in international law that immunity of either former or serving heads of state cannot be invoked to oppose a prosecution by an international Court whether or not the states were Party to the Rome Statute.

### **Nigeria's response to the Pre-Trial Chamber's ruling on President al-Bashir**

The Premium Times reported that the indicted al-Bashir visited the Republic of Nigeria on July 14, 2013.<sup>123</sup> This visit came after the heels of President al-Bashir visits to Chad, Djibouti and Malawi respectively. As if the Pre-Trial Chamber's ruling was nothing serious to go by, Nigeria, the powerhouse of the Economic Community of West African States (ECOWAS) defied the ICC ruling and went ahead to host al-Bashir with the usual courtesies that are accorded to visiting heads of state.

In response to the outcry from rights activists to arrest al-Bashir, the Republic of Nigeria stated that it was acting in line with the African Union's position which rejected al-Bashir's arrest arguing that such an action will only serve to hamper peace efforts in Sudan.

### **Is the Pre-Trial Chamber out of step with AU?**

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<sup>122</sup> D. Akande and S. Shah, "Immunities of State Officials: International Crimes and Foreign Domestic Courts." *European Journal of International Law* (2010) 4: 815-852.

<sup>123</sup> <https://www.premiumtimesng.com/news/140945-sudans-al-bashir-arrives-nigeria-to-red-carpet-welcome.html#sthash.TxB3LpXl.dpbs>

While the Chamber admitted that there existed an inherent tension between Articles 27(2) and 98(1) of the Rome Statute, the Chamber however maintained that Malawi and the AU could not rely on Article 98(1) to justify non-cooperation. The Chamber concluded that customary international law of immunities no longer applied when an international court requested the arrest and surrender of a head of state wanted for international crimes and that Article 98(1) in this instance did not apply.<sup>124</sup> While many scholars view the arrest warrant by the ICC following the UNSC resolution 1593 as lawful, they argue that the request to state parties to arrest and surrender al Bashir is not and that it is in contrary to Article 98(1) of the Rome Statute. The same critics ask whether the Chamber's blanket assertion that immunity no longer applies before an international criminal court would apply to leaders such as Obama or Bush. They feel that this might never be the case given the power structure of the Security Council. These observations might help to explain why the Africans are taking a resentful position on the ICC as an institution.

While the Chamber's ruling clearly specifies that the AU and its member States need to obey UNSC's resolutions without questioning the logic behind those rulings, the AU's concerns on al-Bashir's indictment seems to be getting stronger by the day. Some critics argue that the logic applied by the Chamber in its decision is partially flawed. These critics argue that the effect of the decision by the Chamber renders customary international law of immunities applying to current Heads of State obsolete. But that it would also apply to Article 98 of the Rome Statute itself. For example, while Akande observes that it is unfortunate that the Chamber ignores the fact that the Rome Statute is a treaty instrument binding on only the signatories, he is also cognizant of the fact that by

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<sup>124</sup> Marecha & Chigora, 65

virtue of being a member of the United Nations, Sudan has also entrusted the Security Council with the power to take any action it deems fit to maintain international peace and security, including referral of the situation to an international court or tribunal. At the same time, Akande is also of the view that by relying on the ICJ's opinion juris in the arrest warrant cases and the judges' obiter dicta, immunity may not exist before international criminal courts or tribunals. Such courts have jurisdiction established as a general principle by the Chamber.<sup>125</sup>

## **Conclusion**

While Sudan is a UNSC referral, cooperation on the implementation of the arrest warrant of President al-Bashir has never been forthcoming. In fact, as a case that has set some precedence in the history of the ICC, the situation in Sudan has created tension between the Court and the African Union. While some scholars support the UNSC's resolution 1593 that gave the Prosecutor power to issue al-Bashir's warrant of arrest, the Chamber admits that there is tension between Articles 27(2) and 98(1) of the Rome Statute. By looking at the progression of the al-Bashir case, it might be foolhardy to suggest that the Sudan situation is likely to render the ICC effective.

The other point is that the Security Council, under the Rome Statute, has the authority to grant a one-year, renewable moratorium on an arrest warrant, but has not seen fit to do so for both President Omar Hassan Ahmad al-Bashir and President Uhuru Migai Kenyatta.

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<sup>125</sup> J.M. Iverson, "The Continuing Functions of Article 98 of the Rome Statute." *Goettingen Journal of International Law*. (2012) 131-151.

## **CHAPTER VIII**

### **CONCLUSION**

The thesis examines the effectiveness of the International Criminal Court. The hypothesis of the thesis is that, even though the ICC was created as a politically independent institution to prosecute the most serious international crimes of genocide, war crimes and crimes against humanity, the Court's effectiveness is largely dependent on the initiating entities. While the initiating entities are: states parties, the Prosecutor and the Security Council, there is need for cooperation among these entities if the Court's effectiveness is to be achieved.

In order to establish whether the claim of the hypothesis has been proven, all cases that were referred to the Court since July 1, 2002 when the Rome Statute came into force were examined. Since the cases that the thesis has dealt with are divided into two broad categories namely, general cases and in-depth case studies, the results of each case have helped to show who the initiating entity has been. The results of each case also show whether the Court had been effective or not. Interestingly, regarding the six cases, each initiating entity has referred two cases to the Court.

The following components were used to measure the effectiveness on the Court: i) was the Court able to arrest the person and bring them to the ICC for trial, ii) was the Court

able to collect the needed evidence for trial and iii) whether adequate access to witnesses to appear in Court or give testimony for the trial had been secured. Effectiveness is high where all three components have been established by the Court. Effectiveness is low when only two of the components have taken place, and lowest when only one or none of the components was activated.

In order to establish whether the initiating entity cooperated with other parties to the Rome Statute such that the Court was rendered effective, cases were analyzed to see if they met the threshold that was used to measure effectiveness.

### **Security Council referrals – Libya and Darfur/Sudan**

As UNSC referrals, the situation in both Libya and Darfur/Sudan are currently in stalemate. Even though the UNSC followed all the procedures to indict President al-Bashir, not only is Sudan refusing to cooperate with the UNSC, the African Union is also refusing to comply with the requirements of the Chamber. However, the thesis has also shown in both cases that, no arrest has been made, and that in the case of Sudan, no data has been made available to show that the Court had collected sufficient evidence for trial or that there is adequate access to witnesses to appear in Court.

### **The Prosecutor proprio motu initiated cases – Cote d'Ivoire and Kenya**

In the Cote d'Ivoire case, the Court has partially reached the threshold for effectiveness. Former President Laurent Gbagbo is in custody in The Hague awaiting trial. While the thesis has not established whether the Court has managed to have adequate access to witnesses to appear in Court, what has established is that the Ivorian



authorities filed a declaration under Article 12 of the ICC Statute which might mean that needed evidence for trial may be available. On the Kenyan case, President Uhuru Kenyata's arrest is pending. Even though the Prosecutor followed proper procedures that led to the indictment of Kenyata, the effectiveness of the Court has not been established yet. Even though the Kenyan Waki Commission named alleged perpetrators of the Kenyan 2007 post-election violence, the majorities of witnesses have either died or have withdrawn from the case, and the perpetrators have not been arrested or brought to the Court.

### **State party referral – The Democratic Republic of Congo and Uganda**

The DRC and Ugandan situations were both state referrals. The Ugandan case involves Joseph Kony who is still at large. Even though the case is still pending, there are many issues that are raised inside and outside the country concerning Uganda's referral to the ICC. The issues range from the question of admissibility, impartiality, amnesty, accountability and reconciliation. Until Kony is found, nothing will happen. The DRC situation is the classic example of the effectiveness of the ICC. After the DRC government referred the situation in the Ituri region to the ICC, the Prosecutor requested an ICC arrest warrant which was granted by the Chamber. The warrant was issued and the DRC arrested and handed Lubanga to the ICC. Thomas Lubanga Dyilo was convicted in The Hague on 14 March, 2012 for the enlistment and conscription of children under 15 years in his army, the FPLC and the judges ultimately sentenced him to 14 years.

This thesis had set out to explore the effectiveness of the International Criminal Court. And, what the thesis has proven is that the effectiveness of the Court is dependent on the initiating entity. The DRC situation is a classic example of a conviction resulting from a state referral that has proven that effectiveness of the Court is possible when cooperation is high among parties to the Rome Statute.

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