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The Triggering Mechanism of the International Criminal Court

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ABSTRACT

Since the ICC is an independent court and is not a part of the United Nations. Its seat at the Hague in the Netherlands. Although the court's expenses are funded priority by states parties, it also received voluntary contributions from governments, international organizations, individuals, corporations and other entities. It is pertinent to know that how ICC shall be working independently when court's expenses are also received by voluntary contributions from our sources. The second important issue is to see whether ICC can work independently when the UN Security Council has referral and deferral powers. In this research paper, my endeavour has been to explain these problems, which are being faced by the ICC in order to trigger its jurisdiction independently.

In order to explain the working of the International Criminal Court, it was necessary to define the jurisdiction to which it is applicable. Although the model of the International Court of Justice was available, yet no one had ever tried to create a court with such a wider scope and application. Earlier examples of the Nuremberg Tribunals, Yugoslavia etc. were territorial in nature. For example, the International Criminal Tribunal for Rwanda has jurisdiction over crimes committed by the Rwandan nationals in the neighbouring countries in the same period. Accordingly, its jurisdiction is both territorial and as well as personal.

The basic difference with these precedents is that the International Criminal Court has been created with the consent of those who will themselves be subject to its jurisdiction. They have agreed that it is crimes committed on their territory or by their nationals, that may be prosecuted. These are the fundamentals of the court's jurisdiction that individual states are entitled to exercise with respect to the same crimes. Moreover, the drafters of the Rome Statute sought to limit the ability of the court to try cases over which it has, at least in theory, jurisdiction. Only when the domestic justice system is unwilling or is unable to prosecute, can the International Criminal Court take over. This is what the Statute refers to as admissibility. Not every case is admissible even if it has jurisdiction.

ICC is getting support from its member states. Unlike other global courts, ICC has less limitation for enforcement. In foreign courts, which rely on universal jurisdiction laws

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are limited by their lack of international support and political influence to enforce their decisions. Similarly, even global courts such as the International Court of Justice (ICJ) have little enforcement power. Domestic U.S. courts, on the other hand, possess the jurisdiction and power to a state party to the ICC is a challenge to think of universal jurisdiction of the court and to enforce the decision of the court. To make this court universal in nature, it is necessary to make the jurisdiction of the court fair and suspicion free in the provisions of the Rome Statute.

I. INTRODUCTION

In this paper, the practical aspect of the court has been discussed in detail. Since jurisdiction is the heart of this Statute, it is necessary to explain the jurisdiction and how it can be triggered as well. Since the ICC is an independent court and is not a part of the United Nations. Its seat at the Hague in the Netherlands. Although the court's expenses are funded priority by states parties, it also received voluntary contributions from governments, international organizations, individuals, corporations and other entities. It is pertinent to know that how ICC shall be working independently when court's expenses are also received by voluntary contributions from our sources. The second important issue is to see whether ICC can work independently when the UN Security Council has referral and deferral powers. In this chapter, my endeavour has been to explain these problems, which are being faced by the ICC in order to trigger its jurisdiction independently.

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The basic difference with these precedents is that the International Criminal Court has been created with the consent of those who will themselves be subject to its jurisdiction. They have agreed that it is crimes committed on their territory or by their nationals, that may be prosecuted. These are the fundamentals of the court's jurisdiction that individual states are entitled to exercise with respect to the same crimes. Moreover, the drafters of the Rome Statute sought to

[3]William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, First Edition, 2001, pp. 54-70, at p. 55.

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limit the ability of the court to try cases over which it has, at least in theory, jurisdiction. Only when the domestic justice system is unwilling or is unable to prosecute, can the International Criminal Court take over. This is what the Statute refers to as admissibility.[4] Not every case is admissible even if it has jurisdiction. I have discussed this issue in detail in the later part of this chapter.

The ICC no doubt is a progressive court as the Thomas Lubanga case has been recently decided on March 14, 2012[5]. Unlike self-contained, finite tribunals, the ICC has broad future jurisdiction in more than one hundred twelve countries that have ratified the Rome Treaty[6] (till May 2013) and yielded a portion of their sovereignty to the Court.

ICC is getting support from its member states. Unlike other global courts, ICC has less limitation for enforcement. In foreign courts, which rely on universal jurisdiction laws are limited by their lack of international support and political influence to enforce their decisions[7]. Similarly, even global courts such as the International Court of Justice (ICJ) have little enforcement power. Domestic U.S. courts, on the other hand, possess the jurisdiction and power to carry out their decisions.[8] Having an independent institution from the U.S when U.S is not even a state party to the ICC is a challenge to think of universal jurisdiction of the court and to enforce the decision of the court. To make this court universal in nature, it is necessary to make the jurisdiction of the court fair and suspicion free in the provisions of the Rome Statute.

II. TRIGGERING THE JURISDICTION

If we start with the discussions related to the jurisdiction of the Rome Statute, the inherent jurisdiction of all states parties and opt in or out mechanism and on the aspects of related to the trigger the jurisdiction and the role of Security Council with regard to the referral of complaints to the court as well as with regard to the deferral of proceedings.[9]

At the first stage the discussions on the jurisdiction were not satisfactory due to that

[4]William A. Schabas, 2001, at p. 55.
[5]W. Chadwick Austin and Antony Barone Kolenc, "Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare," *Vanderbilt Journal of Transnational Law*, Vol. 39, March 2006, pp. 291-343, at p. 313
[6]http:// www.iccnow.Org / countryinfo / worldsigsandratifications. html. (listing States that have ratified or signed the Rome Treaty).
[7]*http:// www.cato.org/pubs/pas/pa-311.pdf.*
[8]W. Chadwick Austin and Antony Barone Kolenc, 2006, at p. 314.
[9]Antonio Cassesse, Paola Gaeta, John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Volume I, Oxford University Press, Oxford, 2002, p. 58.

consolidated text prepared on these issues was badly organized, which contributed to confusion. The discussion continued till 1998 during the last session. During the session, two new proposals were submitted - one by the United Kingdom and another by Germany. The UK proposal presented a more coherent and better organized set of rules regarding the acceptance of jurisdiction and the conditions for the exercise of jurisdiction by the Court. The proposal indicated in clear terms that in case of non-states parties, the court would not have jurisdiction unless both the custodial state and the territorial state had given their consent. When the German proposal started with the universal jurisdiction, it was doubted that as the international law would be at the same position with the national law as core crimes already have the universal jurisdiction. Both the proposals were promising but to merge them and compile them was a difficult task and could not bring the solution of the problem.[10]

The discussions on the general principles of criminal law, international judicial cooperation and rules of procedure and evidence moved slowly but steadily forward. The efforts to achieve results were remarkable. It was the result of Siracusa meeting held in June 1997 as a new basis for discussion, helped to make progress. With regard to the role of the prosecutor, the option of the power to initiate proceedings *proprio motu* was included in the consolidated text.

If we further compare the practicability of triggering a jurisdiction of the predecessor of the ICC, we will find a difference in the jurisdictional aspect of all these courts. The then tribunal (ICTY, ICTR etc.) was used to be established and the prosecutor was assigned to identify the cases. There was no need to trigger the jurisdiction, because the target of prosecution was already defined by the enabling legislation. For example, the International Military Tribunal at Nuremberg was assigned to prosecute the major war criminals of the European Axis. Similarly, the prosecutor of the United Nations was given essentially free reign to identify their targets in the case of courts situated in international criminal tribunals for the former Yugoslavia, Rwanda, and Sierra Leone.

The Court's focus of prosecution is not pre-determined as has been the case with the earlier *ad hoc* institutions. The initial proposal submitted by the International Law Commission to the UN General Assembly in 1994 contemplated two basic means of unleashing prosecution: 'referral of a matter' by the Security Council or a 'complaint'

[10]Gurdip Singh, "International Criminal Court: Trigger Mechanisms," *National Capital Law Journal*, Vol. 3, 1998, pp. 51-59, at p. 52.

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by a State Party genocide or another crime within the jurisdiction of the court has been committed.

In the case of the Security Council referral, the mechanism was essentially analogous to the one already established for the International Criminal Tribunal for the Former Yugoslavia. Indeed, the International Law Commission seemed to view the proposed court as little more than a standing or permanent version of the *adhoc* institution that already existed for the former Yugoslavia. The International Law Commission Draft also enabled a State Party to refer a situation. This was seen as an inter-state complaint mechanism similar to what exist at the International Court of Justice and various international human rights bodies, like the European Court of Human Rights. Here the consent of both the referring State and the referred State is required. A sole exception concerned a complained of genocide, if the two states concerned were parties to the 1948 Convention for the Prevention and Punishment of the Crime of Genocide, because it was assumed that ratification of the instrument was in some sense equivalent to consent to the jurisdiction.

Like other parts of the Rome Statute, there are significant differences between the 1994 International Law Commission draft and the final version. The Rome Statute proposes three ways of 'triggering' the jurisdiction.

Firstly, the State Party may refer a 'situation' to the court, although no special consent is required from the State against whom the situation is referred, except that it must be a State Party itself or have accepted the jurisdiction of the Court pursuant to the Article 12(3). Secondly, referral of a 'situation' by the UN Security Council remains without change from the International Law Commission Draft Statute of 1994. Thirdly, the Prosecutor may initiate charges acting *proprio motu*, that is, own his own initiative. Here, he may select any case as long as it is within the jurisdiction of the court. In other words, he may choose from crimes committed on the territory of any of the more than 122 States Parties anywhere else in the world. Accordingly, Article 13, which is entitled 'Exercise of Jurisdiction,' states:

The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if:

- A situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by a State party in accordance with Article 14.

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- A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the United Nations; or
- The Prosecutor has initiated investigations in the respect of such a crime in accordance with Article 15.

Each of these 'trigger' mechanisms merits detailed observations. While the ICC may exercise jurisdiction over war crimes, its jurisdiction is limited to events taking place after July 1, 2002.[11] The ICC has jurisdiction over war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". It has jurisdiction over the state party referral cases.

III. THE STATE PARTY REFERRAL

When the Rome Statute was drafted, referral of a situation by a State Party was thought to have the least potential for making the Court operational, although it curiously appears first in the enumeration of Article 13. It was doubted that the States might be notoriously reluctant to complain against other States on a bilateral basis, unless they had vital interest at stake. They would not, however, be likely to act as international altruists, submitting petitions alleging that others states were committing international crimes.

The handful of major cases have involved Cyprus against Turkey and Ireland against the United Kingdom and tend to confirm the observation that the two states concerned, generally about treatment accorded to the nationals or the property of the complaining State. States that desire the Court to take up a matter are more likely to lobby the Prosecutor than to launch the proceedings formally themselves. The result will be at the same, but they will save the diplomatic discomforts that accompany public denunciation.

It was astonishing and completely unexpected, when the State Party referral mechanism became the source of the first two situations to be 'triggered' before the court. The mechanism did not, however, operate as was intended. These were not inter-state complaints at all. Rather the State in question referred as 'self- referrals', although in reality the states concerned did not intend that prosecution be directed

[11]Noelle M. Shanahan Cutts, "Enemies Through the Gates: Russian Violations of International Law in the Georgia/Abkhazia," *Case Western Reserve Journal of International Law*, Vol. 40, 2008, pp. 281-311, at p. 309.

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against themselves. Rather, they sought to induce the Court to prosecute the rebel groups operating within their own borders, nor were they spontaneous initiatives taken by the States. The Prosecutor had, in effect, solicited the 'self-referrals'[12] pursuant to a policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the country.[13] The UN Security Council also has the power to refer the case.

IV. THE SECURITY COUNCIL REFERRAL

The Security Council Referral means that a situation may be referred by the UN General Assembly Resolution through Security Council Referral. The second means of triggering the exercise of jurisdiction by the ICC is through the Security Council Referral. Unlike the case of a State Party Referral, there is no detailed provision in the Rome Statute concerning the Security Council referral. The Security Council referral is governed by Article 13(b) which authorises the ICC to exercise its jurisdiction over crimes within its jurisdiction accordance with Article 5 if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. The provision governing Security Council referral part of the 1994 which was mentioned in the International Law Commission draft and could not undergo significant change during the negotiation process.[14]

The UN Security Council is one of the principal organs of the United Nations, and it has 'primary responsibility for the maintenance of international peace and security'.[15] Article 23 of the UN Charter declares that the Security Council consists of five permanent members, China, France, Russia, the United Kingdom and the United States, and ten non-permanent members who are elected by the General Assembly from among the membership of organisation to two year terms. Nine votes are required to adopt a resolution, but any permanent member may exercise a veto. In future, veto power may be used or misused. As India is not a permanent member of the Security Council, India is reluctant to sign the Rome Statute. Whether veto power is necessary for the proper and fair functioning of the ICC is another important question which we

[12]Paola Gaeta, "Is the Practice of Self Referrals a Sound Start for the ICC?" *Journal of International Criminal Justice*, Vol. 2, December, 2004, pp. 949-952, at p. 950.
[13] http:// www.icc-cpi.int / newspoint / pressreleases / 26html. Visited on May 1, 2020 at 10:30 a.m.
[14]Wiliam A. Schabas, 2007, p. 151.
[15]Article 24 of the United Nations.

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have to figure out.

Chapter VII of the charter declares that the Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 respectively to maintain or restore international peace and security'. Acting in accordance with Chapter VII, the Security Council established the *adhoc* tribunals for the former Yugoslavia and Rwanda. Its authority under the Charter to act in this way was upheld in early rulings of the international tribunals, and would now appear to be beyond dispute.[16]

The Relationship Agreement between the United Nations and the Court makes specific provision for cooperation in the event of a Security Council Referral. The Security Council has two possible functions, one is to refer situations to the court, and the other is to defer the exercise of jurisdiction of the court for the limited period of time. The reason why the possibility was given to the Security Council to refer a situation to the ICC was specifically because the court does not have universal jurisdiction. The Court depends upon the consent of one or two states nationality of the accused or territory of the crime. When neither of the two states has given consent, there still may be extremely serious situations with massive commission of crimes where the ICC should intervene. This is the reason why the UN Security Council was given that opportunity to fill that gap and that is what it did in the context of Darfur, Sudan. The Security Council may refer a situation but the Court has to decide ultimately whether there would be a case or not in that situation. This is the judicial part. The Prosecutor may well react to the Security Council referred case by stating that he does not see a reasonable basis to entertain the situation and that's the end of it. The Security Council cannot force the Court to carry on the cases.[17] Yet the power to defer the case is another weapon in the hand of the Security Council.

The Security Council also has the ability to request the Court to defer the exercise of the jurisdiction of 12 months when it has been seized of a situation under Chapter VII of the UN Charter. The rationale for this is that there may be situations that are in the middle of delicate peace negotiations for example and where the timings of the intervention of the ICC could cause problems for that process. Therefore, the role of

[16]Wiliam A. Schabas, 2007, p. 152.
[17]Philippe Kirsch, "The International Criminal Court," *The International Criminal Court Proceedings of a Dialogue in India*, KAF Publication Series No. 8, New Delhi, 2006, pp. 20-70, at p. 52.

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the ICC is not eliminated; it is just deferred by that limited period of time.[18]

When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to Article 13, paragraph (b) of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Security Council to the Prosecutor together with document and other documents that may be pertinent to the decision of the council. The court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the rules of the Procedure and Evidence. Such information shall be transmitted through the Secretary General.[19] The procedure of referral is mentioned under Article 87. Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to the Article 87 , paragraph 5 (b) or paragraph 7 of the Statute of a failure by a State to cooperate with the Court shall inform the Security Council or refer the matter to it, as the case may, and the Registrar shall convey to the Security Council through the Secretary General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances.

If it triggers the Court, the Council should be prepared to live within the parameters of the Statute with respect to such matters as jurisdiction. For example, it could not request that the Court consider the atrocities committed by the Khmer Rouge in Cambodia during the later 1970s because Article 11 of the Statute clearly declares that the Court cannot judge crimes committed prior to the entry into force of the statute. In such cases, the Council would be required to set up additional *ad hoc* tribunals to the new court. It remains uncertain whether the Security Council must also meet the other admissibility criteria and respect the principle of complementarity, a matter that seems to have been intentionally left unresolved at Rome Conference in the review conference.[20] Although the Review Conference was held in Uganda, still many issues were left unresolved. Admissibility shall be made only on the basis of the situation to the situation and it will depend upon the circumstance to circumstance. Not every case is admissible just like not every case is a case of genocide of that much gravity as it is a Rwanda case. Now the challenge is left for the ICC to decide which case is fit

[18]Philip Kirsch, 2006, at p. 53.
[19]*ibid*.
[20]William A Schabas, 2003, p. 153.

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for the admissibility and which case has jurisdiction and which case can exactly be taken under the purview of the ICC.

For example, in March 2005, after several weeks of backroom discussions during which the United States proposed several other options in order to address impunity in Darfur, before ultimately conceding the referral, the Security Council sent the 'Situation in Darfur' to the Court.[21]

On March 31, 2005, the UN Security Council, acting under Chapter VII of the UN Charter, referred the situation in Darfur to the ICC Prosecutor by resolution 1593 (2005)[22]. This was a major breakthrough on at least three grounds:

First, certain members of the Security Council who had previously displayed strong antagonism to the ICC judiciously toned down their opposition and abstained from voting, thus enabling the Security Council to refer a situation to the Court for the first time. Secondly, the Council drew a wise link between justice and peace by demonstrating that peace may also be achieved by imposing international accountability upon the alleged perpetrators of horrific crimes that threaten stability and peaceful relations. Thirdly, the Court's action can now be backed up by Chapter VII enforcement mechanisms, in case the relevant states fail to live up to their obligation to cooperate with the Court. While the Court is normally equipped against such failures with the enforcement measures provided for in Article 87 (7) of the ICC Statute (finding of non-cooperation by the Court and reporting to the Assembly of States Parties), once the Security Council has referred a situation, any refusal or lack of cooperation can trigger entire enforcement machinery (including adoption of sanctions).

In addition, in the case at issue any enforcement action taken by the Council is greatly facilitated by its invitation to the Prosecutor, contained in the resolution concerning Darfur, to report regularly to the Council on his action on the matter.

On April 7, 2005, the Prosecutor opened the sealed document prepared by the UN Commission of Inquiry for Darfur and handed over to him by the Secretary- General. This document contained the names of the 51 suspects against whom the Commission believed sufficient probative material had been collected pointing to their possible

[21] *id.*

[22] Matthew Happold, "Darfur, the Security Council, and the International Criminal Court," *International and Comparative Law Quarterly*, Vol. 55, No. 1, 2006, pp. 226-236, at p. 230.

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criminal responsibility. On 1 June 2005, the Prosecutor decided to open investigations into the situation in Darfur.[23] The case has recently been decided on March 14, 2012. The Trial Chamber I of the ICC decided unanimously that Thomas Lubanga Dyilo is guilty, as a co-perpetrator, of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities from 1 September 2002 to 13 August 2003. It is the first verdict issued by an ICC Trial Chamber. At present, 14 other cases are lying pending before the Court for adjudication, three of which are at the stage of trial[24]. The detail of the cases has been discussed in the later part of this chapter.

- **The Security Council Referral to the International Criminal Court**

The Security Council finally referred the situation in Darfur to the ICC[25]. Acting under Chapter VII of the UN Charter, the Security Council decided to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC and ordered the Government of Sudan and all other parties to the conflict in Darfur to 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor' pursuant to the resolution. All this was in accordance with the power given to the Security Council under Article 13 of the Rome Statute of the International Criminal Court to trigger the Court's jurisdiction by acting under Chapter VII of the UN Charter to refer a situation in which one or more crimes appear to have been committed to the Prosecutor. However, the Resolution also contained some rather more problematic provisions as a result of the compromises necessary to ensure its adoption.[26]

- **The Dafur Case**

The Darfur case has been taken up by the ICC under the General Assembly Security Council Resolution 1593. Its genesis was long and complicated, and it has been seen by some as a substitute for effective action by the United Nations to end the

[23]Antonio Cassese, "Is the ICC Still Having Teething Problems," *Journal of International Criminal Justice*, Vol. 4, July 2006, pp. 434-440, at p. 436.
[24]Over the course of 204 days of hearings, the Trial Chamber has delivered 275 written decisions and orders and 347 oral decisions. The Chamber heard 36 witnesses, including 3 experts, called by the Office of the Prosecutor, 24 witnesses called by the defence and 3 witnesses called by the legal representatives of the victims participating in the proceedings. The Chamber also called 4 experts. A total of 129 victims, represented by two teams of legal representatives and the Office of Public Counsel for Victims, were granted the right to participate in the trial. They have been authorised to present submissions and to examine witnesses on specific issues. The Prosecution submitted 368 items of evidence, the Defence 992, and the legal representatives of victims 13.
[25]Matthew Happold, 2006, p. 231.
[26]Resolution 1593 was adopted by 11 votes to none, with four abstentions (Algeria, Brazil, China, and the USA).

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humanitarian crisis and systematic atrocities being committed in Darfur.[27] This is an example to remove the concept of immunity and Security Council has understood the responsibility to refer a situation and it has been appreciated throughout the world.

If we elaborate the case, Sudan has known little peace since gaining independence in 1956. The recent years, however, saw some hopeful developments. In 2000, negotiations began in Nairobi between the Government of Sudan and the rebel Sudan People's Liberation Movement / Army, culminating, in May 2004, in the signing of a framework peace agreement. In early 2003, however, violence erupted in the vast and remote western region of Darfur. The population of Darfur is Muslim but recent political developments have stressed ethnic divisions between 'Arabs' and 'Africans'.[28] Such atrocities soon resulted in widespread displacement and humanitarian crisis. As of June 2004, it was estimated that out of a pre-conflict population of 4-7 million, an estimated 1.3 million were displaced within Sudan, some 150 ,000 had fled into Chad and 10 -30,000 had died in the conflict.[29]

Given its remoteness and the media's concentration on the North/South peace negotiations, the crisis in Darfur at first went almost unreported. From July 2003 NGOs, notably Amnesty International and the International Crisis Group, were reported on the situation. However, it was not until the spring of 2004 that international attention began to focus and it was not until May 2004 that the Security Council focused its attention on Darfur. This is a progressive step at the part of the Security Council to trust the International Criminal Court and to refer a situation which was unreported earlier without the establishment of the ICC.

The first referral was formulated by the government of Uganda on December 16, 2003. The letter of referral made reference to the situation concerning the Lord Resistance Army in the Northern and the Western Uganda. The Prosecutor responded to Uganda indicating his interpretation that the scope of the referral encompasses all crimes committed in the Northern Uganda in the context of the ongoing conflict involving the Lord Resistance Army.

On January 29, 2004, Luis Moreno-Ocampo, Prosecutor of the International Criminal

[27]Matthew Happold, 2006, p. 226.

[28]Two groups, the Sudan Liberation Movement / Army and the Justice and Equality Movement, drawing their support from a number of 'African' tribes, launched an insurrection against the Sudanese Government. The Government's response was brutal. Utilizing tactics perfected in the North/South civil war, the Government recruited militias-the janjaweed-from amongst the local 'Arab' tribes and unleashed them on the civilian population. Government forces and militias waged a campaign against communities suspected of supporting the rebels.

[29]http:// news.bbc.co.uk/ 1/ hi/ world/ Africa/ 4268733.stm

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Court, announced his decision to launch the Court's first investigation. The prosecutor made a public announcement of the "referral". A first and obvious explanation is that when the investigative powers of the Prosecutor were exercised in response to a referral by a State Party, the ICC Statute does not require authorization by the Pre-Trial Chamber to start an investigation. Thus, the Court has made its first steps in the guise of an institution that can assist states to obtain justice in the face of mass atrocities committed within their boundaries, rather than as an interfering international watchdog against which states have to defend themselves.[30]

Self-referrals appear to be a better option, not only compared with the *proprio motu* powers of the Prosecutor, but also compared to the other two ways of triggering the Court's jurisdiction, namely a referral of a situation by the Security Council, or at the initiative of a State Party unconnected with the crimes [31].

In Resolution 1593 of March 31 , 2005, the Security Council finally referred the situation in Darfur to the International Criminal Court.[32] Acting under Chapter VII of the United Nations Charter, the Council decided to 'refer the situation' in Darfur since July 1, 2002 to the Prosecutor of the International Criminal Court[33] and ordered the Government of Sudan and all other parties to the conflict in Darfur to 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor' pursuant to the resolution.

All this was in accordance with the power given to the Security Council under Article 13 of the Rome Statute of the ICC to trigger the Court's jurisdiction by acting under Chapter VII of the UN Charter to refer a situation in which one or more crimes appear to have been committed to the Prosecutor. However, the Resolution also contained some rather more problematic provisions as a result of the compromises necessary to ensure its adoption.

On 26th May 2004, in a presidential statement, the Security Council expressed 'its grave concern over the deteriorating humanitarian and human rights situation in the Darfur region'. The Council demanded that those responsible be held accountable for

[30]Paola Gaeta, p. 951.
[31]*Ibid*., p. 952.
[32]The resolution was one of three Security Council resolutions concerning Darfur adopted in March 2005: Resolution 1590 of 24 March 2005, Resolution 1591 of 29 March 2005 and Resolution 1593 of 31 March 2005. Originally it had been hoped that one portmanteau resolution could be adopted but divisions in the Security Council made that impossible.
[33]Resolution 1593 was adopted by 11 votes to none, with four abstentions (Algeria, Brazil, China, and the USA).

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the large-scale violations of human rights and international humanitarian law reported, and called on the Government of Sudan to neutralise and disarm the janjaweed militias. Similar language appeared in Security Council Resolution 1566 of 30 July 2004 .[34] The Resolution stated that the situation in Sudan constituted a threat to international peace and security and, acting under Chapter VII of the UN Charter, the Council demanded that:

The Government of Sudan fulfil its commitments to disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leaders and their associates who have incited and carried out human rights and international humanitarian law violations and other atrocities. In the event of non-compliance, the Council expressed a willingness to consider further action, including resort to its powers under Article 41 of the Charter ('measures not involving the use of armed force'). However, although in its next resolution on the situation in Darfur, the Council found that the Government of Sudan had not met its obligations, it did not impose any sanctions. Instead, Resolution 1564 of 18 September 2004 requested that:

The Secretary-General rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur b y all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable. All parties to the conflict were called upon to cooperate fully with the commission.

The second referral from the Democratic Public of Congo came on 3 March 2004. Finally on 7 January 2005, the Prosecutor announced publicly that the Central African Republic had made a similar referral to the court on 22 December 2004. It covered crimes within the jurisdiction of the court committed anywhere on the territory of the Central African Republic since 1 July 2002 .[35]

Article 14[36] of the Rome Statute states the terms for referral of a situation by a State Party. The referral must be in writing. The provision of the 1994 Draft Statute submitted

[34]Matthew Happold, "Dafur", 2006, p. 228.
[35]Willian A. Schabas, 2003, p. 145.
[36]A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

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to the General Assembly by the International Law Commission described the State Party could making a referral as a 'complaint state'. It said that a State Party could lodge a complaint. The court was authorised to exercise its jurisdiction with respect to genocide if the state party to the statute that was also a contracting party to the 1948 Genocide Convention took the initiative to 'lodge a complaint' that the genocide has been committed. In the case of aggression, war crimes and crimes against humanity, the court could proceed if a complaint was lodged by a custodial state and by the state on the territory of which the act or omission in question occurred. The language makes it clear enough that what was contemplated was a complainant state lodging a complaint against another state.

The reference to complaint continued through the early drafts, and in the final draft adopted by the Preparatory Committee that formed the basis of negotiations at the Rome Conference.

- **The Obligation of the Non-Party States to Co-operate Under International Law**

Treaties are binding in principle only in state parties. For non-party states, there is neither harm nor benefit in them. Therefore, according to the general principle of the law of treaties as embodied in the Vienna Convention on the Law of Treaties, 1969, the obligation of non-party state to cooperate differs from that of state parties.

In the Rome Statute, the provisions on the obligation to co -operate differ for the state parties and the non-party states. Article 86 of the Statute is a general provision concerning state cooperation and judicial assistance. In accordance with this provision, "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the court[37]."

Article 87(5) is a provision on cooperation by non-party states with the ICC. It stipulates that he court "may invite any state not party to this Statute to provide assistance under this part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis."

Only the state parties are obligated to cooperate. This corresponds to the general principles of treaty law. Article 35 of the Vienna Convention on the Law of Treaties,

[37]Zhu Wenqi, "On Cooperation by States not Party to the International Criminal Court," *International Review of the Red Cross,* Vol. 88, No. 861, March 2006, pp. 87-110, at p. 88.

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adopted on 23 May 1969, clearly provides that "An obligation arises for a provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing." Article 34 of the said Convention also provides that a treaty does not create either obligation or rights for a third state without its consent. This is also one of the general principles of treaty law.

That is precisely why the Rome Statute makes different provisions for the state parties and for the non party states on the issue of the state cooperation. To the state parties, the ICC 'is entitled' to present 'cooperation requests' they are obliged to 'cooperate fully' with it in the ICC investigations and prosecutions of assistance on the basis of an ad hoc arrangement.[38] The word "invite" shows that cooperation by the non party states with the ICC is in the legal category of cooperation of "voluntary nature" alone.

The above are general principles and provisions of international treaty law. However, cooperation with the ICC in particular by non-party states may, if analyzed in terms of the authority of the UN Security Council, the jurisdiction the ICC or the general principles of international law be an obligation of a mandatory nature in certain specific cases.

V. THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT

A non party state may in certain cases have a mandatory obligation to cooperate with the ICC due primarily to the relation between the UN Security Council and the authority and the Security Council is closely linked to the Rome Statute's provision laying down the ICC's jurisdiction.[39]

Article 1 of the Rome Statute stipulates that the role of the ICC shall be complementary to the national jurisdiction. Article 2 of the Statute gives a further description of the Court's specific system of the jurisdiction. Its main points include the following provisions:

- The jurisdiction of the court shall be limited to the most serious international crimes of concern to the international crimes of the concerns to the international community as a whole, that is, the crime of genocide, crime against humanity, war crimes and the crime of aggression.[40]

[38] Article 87(5) of the Rome Statute.
[39] www.icc-cpi.int/about/Official_Journal.html.
[40] Article 13 of the Rome Statute.

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- A State which becomes party to this Statute thereby accepts the jurisdiction of the court with respect to the said crimes, a state not party may accept by declaration the exercise of jurisdiction by the court with respect to the crime concerned.[41]
- The court may exercise jurisdiction as long as the state on the territory of which the crime occurred, or the state of which the person accused of the crime is a national, is party to the Rome Statute or is a State not party thereto that has accepted the Court's jurisdiction. The court has jurisdiction, however, all cases referred to it by the Security Council.
- There are three trigger mechanisms for the court's jurisdiction, namely (i) a state party refers a case to the Prosecutor; (ii) The UN Security Council refers the case to the Prosecutor under Chapter VII of the UN Charter; or (iii) the Prosecutor himself or herself initiates an investigation o n the basis of relevant material.
- The ICC shall determine that a case is in admissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, or where the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the ICC is not permitted under its statute.

Thus for the ICC to exercise its jurisdiction, not only can the Court Prosecutor trigger the investigation and prosecution mechanism, but state parties and the UN Security Council can also do so by referring situations to the ICC in which one or more crimes have occurred. Since the states, whether party to the Rome Statute or not, are all essentially members of UN agencies, when the UN Security Council refers a case to the Court for investigation and prosecution, it involves the UN member states.[42] In other words, it involves the obligation to cooperate of both state parties and states not party to the ICC.

The authority of the UN Security Council is derived from the UN Charter. By virtue of Article 25 of the UN Charter, all decisions made by the UN Security Council are binding upon all the UN member states. Consequently the UN Security Council can, when it refers to the ICC a criminal case related to the maintenance of world peace; ask all the UN member states to co-operate in the Court's process of investigating that case. Owing to the nature of the UN Security Council, such requests are binding upon all the UN member states. There are already cases to show the influential role of the UN Security

[41]Article 12(3) of the Rome Statute.
[42]L. Condorelli and A. Ciampi, "Comments on the Security Council Referral of the Situation in Darfur to the ICC," *Journal of International Criminal Justice*, Vol. 3, 2005, pp. 590-599, at p. 596.

Council in the ICC and of its requests for co-operation with the Court. In view of the war crimes and crimes against humanity that had occurred in the Darfur region of Sudan, the International Commission of Inquiry submitted a report to the UN Secretary General on January 25, 2005. In it the Commission recommended that the Security Council refer the situation in Darfur to the ICC, because ''the Sudanese judicial system is incapable and the Sudanese government is unwilling to try the crimes that occurred in the Darfur region and to require the perpetrators to assume the accountability for their crimes.[43]

After receiving the report, the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1593 on March 31, 2005, in which it decided to ''refer the situation in Darfur since July 1, 2002 to the ICC Prosecutor.[44]' The Security Council further decided "that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to co-operate fully".[45]

The adoption of the Resolution 1593 concerning the situation in Darfur was the first case in which the Security Council triggered the ICC's investigation mechanism in accordance with Article 13(b) [46] of the Statute. While Sudan is the state concerned by the enforcement of that resolution, it is not party to the ICC. Although it expressed opposition to the Security Council resolution, it must as a UN member state nevertheless abide by the provisions of the UN Charter and obey the Security Council resolution by co-operating with the Court[47]. The statement in Resolution 1593 ''that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'' clearly shows that all non-party states, including Sudan,

[43]http:// www.un.org/ News/ dh/ sudan/ com_inq_darfur.pdf visited on March 15, 2013 at 7 p.m.
[44]Acting under Chapter VII of the Charter of the United Nations, Decides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully. Security Council Resolution 1593.
[45]*ibid.*
[46]A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.
[47]For further details see: http:// www.un.org / News / Press / docs / 2005 / sc8351.doc. htm. Visited on May 7, 2020.

must co-operate with and assist the ICC accordingly. The rights and obligations of non-party states are related to the UN Security Council and to its treaty mechanisms. In accordance with the principle of ‘‘complementary jurisdiction’’ in the Rome Statute, any state concerned may challenge the jurisdiction of the ICC. If Sudan opposes the investigation and prosecution by the ICC and can prove that it is actually willing and is able to exercise jurisdiction in accordance with that principle, the ICC will not have jurisdiction. However, discussion of the principle of ”complementar y jurisdiction” *per se* has implied that as it requires non-contracting states to submit to the procedures provided for in the Rome Statute and to act accordingly, those states are also required to comply with the obligations in the Statute. This could be said to be a new development of the traditional legal principle that “a treaty does not create obligations and rights for a third state”.

However, the UN Security Council Resolution 1593 has a number of problematic features. Its genesis was long and complicated, and it has been seen by some as a substitute for effective action by the United Nations to end the humanitarian crisis and systematic atrocities being committed in Darfur.[48]

- **The UN Security Council Jurisdiction**

Through the establishment of the ICTY and the ICTR, the UN Security Council gave a new dimension to the exercise of its powers for the maintenance of international peace and security, by becoming active in the field of the prosecution of international crimes. In this perspective, the Rome Statute takes over from the Security Council’s disposal for the fulfilment of its primary responsibility under the UN Charter. By establishing a permanent international criminal court, providing for the basic rules that go vern its functioning and defining its jurisdiction, and then by allowing the Security Council to ‘trigger’ the proceedings before the court, the Rome Statute encourages and considerably simplifies the UN organ’s action.[49] In the future, the prosecution of international crimes could be initiated immediately, without the need to establish new tribunals and to define their constitutive elements. In other words, in 1998 , the States participating in the Rome Conference seemed to make a ‘gift’ to the Security Council for the accomplishment of its duties under the charter.[50]

[48]Matthew Happold, 2006, pp. 226-236, at p. 227.
[49]Antonio Cassese, *The Rome Statute of the International Criminal Court: A Commentary*, Volume I, Oxford University Press, Oxford, 2002, pp. 571-582, at p. 572.
[50]William A. Schabas, Third Edition, 2007, p. 146.

Chapter VII measures taken by the Security Council must be in response to a threat to international peace and security, once the Council has made a determination to this effect under Article 39. The Council has in the past determined what constitutes a threat to international peace fairly broadly. [51] An example of the wide interpretation made by the Council is the determination that the failure by the Libyan Government to demonstrate its renunciation of terrorism and to respond to Council requests in the SC Security Council Resolution 731 (1991) constituted a threat to international peace and security. Further, it is widely acknowledged that as decisions of the Security Council are political, it would be unwise to second-guess the validity of their determination.

Despite this wide measure of discretion accorded to the Security Council, in the case of Resolutions 1422 and 1487, it is debatable whether there was in effect any threat to international peace that justified the granting of exclusive jurisdiction. There was no immediate provocation for the passage of these resolutions excluding the jurisdiction of the ICC, except the threat that the UN Mission in Bosnia and in Herzegovina would not be renewed. The suggestion that this threat in itself would constitute a threat to international peace and security is of doubtful validity. [52]

The situation in the Resolution 1497 which was passed in response to the conflict in Liberia is somewhat different as the threat to international peace and security clearly existed. Operative Paragraph 7 which forms part of this resolution provides for exclusive jurisdiction of contributing states that are non-parties to the Rome Statute over acts of their officials related to the forces. The only circumstance in which the validity of Operative Paragraph 7 could be challenged is if it were permissible to look at each clause of the resolution to determine whether or not it is linked to the ultimate objective of achieving peace. No precedent for such an exercise can be found in international law.

Moreover, the argument that the grant of exclusive jurisdiction is entirely unconnected to the successful functioning of peacekeeping missions is hard to sustain. Providing for exclusive jurisdiction of contributing states over the acts of their personnel in the case of peacekeeping forces is not unknown in international law. Exclusive

[51]Neha Jain, "A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court," *European Journal of International Law*, Vol. 16, April, 2005, pp. 239-255, at p. 244.

[52]Stahn, C., "The Ambiguities of Security Council Resolution 1422," *European Journal of International Law*, Vol. 14, 2002, pp. 86-88, at p. 85.

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jurisdiction of states over the acts of their nationals has been provided in the case of several UN forces in the past. Exclusive jurisdiction of contributing states over offences committed by their personnel in the course of duty has been recognized by the UN Model Status of Forces Agreement for Peacekeeping Operations. Further, primary jurisdiction of the contributing state in such cases has been provided in two of the most widely ratified Status-of- Forces Agreements (SOFA) signed between states - the NATO SOFA, and the Brussels Treaty Powers SOFA. A survey of decisions of courts of various jurisdictions during the Second World War indicates that the provision of such exclusive jurisdiction in Agreements signed between states during the war period was fairly common.

The grant of such exclusive or primary jurisdiction to the state of nationality is considered important for the successful functioning of the force stationed in another country. In most cases of peace keeping missions, the justice delivery system in the host state would have broken down. Under such circumstances, states contributing peacekeeping personnel would be doing an injustice to their citizens if they subjected them to the uncertain laws and non-working justice delivery system of the host state. Since the contributing state may be deterred by the prospect of a potentially unstable alien judicial system exercising jurisdiction over its nationals, exclusive jurisdiction would facilitate contributions to the force, especially in an emergency.

Hence, it is extremely difficult to assail the validity of the Resolution 1497 on the ground that there is no link between the resolution and the Security Council's mandate of maintaining international peace and security.

From a legal point of view, however, one cannot exclude that the Security Council may exercise its 'positive' and 'negative' powers in relation to one and the same situation. By way of a systematic interpretation of Articles 13 and 16 respectively of the Statute, it seems problematic to deny that the Security Council has the power to suspend the Court's investigations or prosecutions for a period of 12 months (renewable under the same conditions), with respect to a situation which it referred to the ICC Prosecutor. Nor is it easy to envisage limits to the discretion of the Security Council in relation to the reasons of the deferral. The discretion that the Security Council enjoys, qua a political organ, is obviously very wide under the UN Charter.[53]

[53]Annalisa Ciampi, "The Proceedings Against President Al Bashir and the Prospects of their Suspension under Article 16 of the ICC Statute," *Journal of International Criminal Justice*, Vol. 6, November 2008, pp. 885-900, at p. 887.

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Although the ICC can and is functioning without the support of the United States, the United States admittedly is a very powerful member of the Security Council. As a result thereof, it can certainly impede any real efforts by the Security Council to give effective assistance to the ICC.[54] The U.S. influence over the Security Council in the matters relating to the ICC is evident in examining the Darfur situation. The only reason the United States abstained instead of vetoing the referral was that the grave situation in Darfur and the political ramifications should the United States have worked against an effort to bring the perpetrators of such violent crimes to justice.[55] Still, the absence of any mention of the ICC in Security Council Resolution 1706, which deployed the United Nations personnel to Darfur, was undoubtedly at least in part due to the United States' reluctance to assist the ICC in any way. As evinced by the events leading up to the transfer of Slobodan Milosevic to the ICTY, U.S. military and financial resources can be a powerful force behind the Security Council resolutions designed to bring criminals to justice. Thus, the most effective way to increase the Security Council's exercise of Chapter VII authority to the benefit of the ICC would be to obtain U.S. support of the ICC.[56]

VI. PROPRIO MOTU AUTHORITY OF THE PROSECUTOR

One important feature of the ICC differentiates it from every other court the United States has faced outside its borders is the *proprio motu* power of its Chief Prosecutor. The construction of the ICC system makes it unlikely for the Chief Prosecutor to initiate a frivolous investigation,[57] especially in light of the many heinous violations that occur regularly throughout the world. However, when a future claimant comes through the ICC door with a grievance against a U.S. official or military member, the completely independent Chief Prosecutor will be compelled under a statutory duty to analyze the seriousness of the information received. There will be no free passes for the U.S. citizens, and there lies the opportunity for asymmetric exploitation.[58] The like-minded nations favored the ex officio or *proprio motu* prosecutor proposals. They argued, "Without a strong and independent Prosecutor there isn't going to be a strong

[54]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*, Vol. 61, March 2008, pp. 647-680, at p. 676.
[55]Jack Goldsmith, "The Self Defeating International Criminal Court," *University of Chicago Law Review*, Vol. 70, Winter 2003, pp. 89-102, at p. 93.
[56]Annalisa Ciampi, at p. 888.
[57]*www.icc-cpi.int/ library/ organs/ otp/ policy_annex_final_210404.pdf*
[58]W Chadwick Austin and Antony Barone Kolenc, *id*., 2006, pp. 291-343 at p. 316.

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and independent Court[59].” A decision on whether the Prosecutor ought to investigate is triggered in one of three situations. These are when the Security Council passes a situation to the ICC, where a State party to the Statute refers the situation to the Prosecutor, or finally where the Prosecutor decides, *proprio motu*, to initiate an investigation himself, on the basis of information he has received.[60]

The fact that anyone in the world can submit information to the Prosecutor, and ask that he investigate, could have led to considerable problems for the Prosecutor. The first of these might be termed the 'Belgium' problem. Belgium used to have universal jurisdiction legislation without a requirement of presence or any link to Belgium. This led to a plethora of politically sensitive claims being brought to the Belgian courts relating, for example, to Yasser Arafat, Ariel Sharon, and General Tommy Franks, which caused huge consternation internationally. Pressure from the United States, amongst others, caused Belgium to limit its Act, on the basis that it had been ‘abused’. It would be very likely that, had the ICC been granted universal jurisdiction, a similar commotion would have attended any action by the Prosecutor with respect to those communications. As much is implied not only by the Belgian situation, but also the experience of the ICTY, when the US reacted in an exceptionally hostile fashion to even the suggestion that the Prosecutor might investigate it’s bombing in relation to Kosovo.[61]

Although an ex officio prosecutor is needed to insure the court's effectiveness. Can we rely upon the states or the Security Council to bring complaints or make referrals. "If the Court does not prosecute a case unless all five permanent members of the Security Council give their consent, there will be no prosecution?”[62]

Louise Arbour, who was the then prosecutor of the International Criminal Tribunal for the former Yugoslavia, noted in a statement to the December 1997 session of the Preparatory Committee that there is a major distinction between domestic and international prosecution. It lies in the unfettered discretion of the prosecutor. In a domestic context, there is an assumption that all crimes that go beyond the trivial or *de minimis* range are to be prosecuted. However, before an international tribunal,

[59]Marcus R. Mumford, “Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference,” *Journal of International Law and Practice*, Vol. 1, Spring, 1999, pp. 151-312, at p. 175.
[60]Olympis Bekou, “International Criminal Court and Universal Jurisdiction: A Close Encounter,” *International and Quarterly*, Vol. 56, No. 1, 2007, pp. 49-68, at p. 53.
[61]Olympis Bekou, 2007, at p. 54.
[62]Marcus R. Mumford, 1999, at p. 176.

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particularly one based on complementarity 'the discretion to prosecute is considerably larger, and the criteria upon which such prosecutorial discretion is to be exercised are ill defined, and complex.[63] It is a challenge before the Prosecutor to choose from many meritorious complaints from the appropriate ones for international intervention, rather than to weed out weak or frivolous ones.

One of the main inadequacies in the Draft Statute prepared by the International Law Commission, according to most non-governmental organisations and many states, was the failure to endow the Prosecutor with the independent authority to undertake prosecutions, in the absence from the complaint from a State Party or referral by the Security Council. The principal argument was that the proposed court would be unlikely to have much work if it relied upon State Parties and the Security Council to trigger its jurisdiction. The caucus of 'like- minded' State made the independent or *proprio motu* Prosecutor was one of the issues it could never abide.[64]

Giving prosecutor the power to initiate prosecution is the mechanism most analogous to domestic justice systems, but it was also the most controversial. The International Law Commission states the Prosecutor's power. The Commission conceived of the court as a facility available to State Parties to its statute, and in certain cases to the Security Council who alone were empowered to initiate a case.[65] And it obviously would mean that nationals of the veto-wielding states on the Security Council would have virtually no risk of being prosecuted before the ICC. For these reasons, such proposals were vigorously resisted by human rights NGOs at Rome, who held firm for an 'independent' prosecutor.[66]

The U.S. delegation doubted that once again, that the Prosecutor would work within the state-based legal structure of modern international relations. US worried that an ex officio or *proprio motu* prosecutor would turn into "a 'master of the universe' . . . accountable to no-one."[67] Moreover, it would not be presumptuous to say that the model of an independent prosecutor acting before international courts, one who can conduct preliminary criminal investigations *proprio motu* without judicial scrutiny, is of

[63]William A. Schabas, Third Edition, 2007, at p. 159.
[64]Leila Nadya Sadat and S. Richard Carden, "The International Criminal Court: An Uneasy Revolution," *Georgetown Law Journal*, Vol. 88, pp. 381-401, at p. 390.
[65]Robert Rosenstock, "The Forty-Sixth Session of the International law Commission," *American Journal of International Law*, Vol. 89, April 1995, pp. 390-397, at p. 391.
[66]David A. Martin, "Haste, Gaps, and Some Possible Cures for the ICC: An Introduction to the Panel," *Virginia Journal of International Law*, Vol. 41, Fall 2000, pp. 152-160, at p. 160.
[67]Marcus R. Mumford, 1999, pp. 151-212, at p. 157.

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concern for those states who are engaged in politically sensitive (internal) conflicts and fear politically motivated prosecutorial decisions. This concern merits even more attention when this power of the prosecutor is combined with the lack of any consent requirement on the part of states as a condition for the existence of jurisdiction by the ICC.

The requested prosecution of both Pinochet[68] in the Netherlands and Sharon[69] in Belgium reveal that where no clarity is provided with respect to the decision to prosecute and no legal protection exists against politically influenced prosecutorial decision making, the legitimacy of the criminal justice system may be undermined. This observation would also have relevance with respect to the prosecution of high-ranking governmental officials before international courts. The reality is that in virtually all national prosecutions, the prosecutorial decision to investigate and to proceed to trial is inherently subject to a degree of discretion. Selective prosecution seems thus unavoidable and is only subjected to judicial scrutiny in cases of clear abuse. Prosecution before international criminal courts is even more selective partly due to the fact that prosecutorial resources will seldom be sufficient to undertake prosecution of all international crimes that fall within the jurisdictional ambit of the particular court. Accordingly, the prosecution of high-ranking officials seems to automatically give rise to feelings of a politically influenced prosecutorial decision. That is the main challenge that international criminal justice faces today.[70]

In this context, a question arises whether the Prosecutor has an obligation to notify

[68]*Prosecutor* v. *Pinochet*, in which While the former Chilean Head of State was residing in Amsterdam in 1995, several complaints alleging torture were filed against him, based on the 1984 Convention Against Torture which the Netherlands had acceded to in 1989. Upon the refusal of the Dutch Prosecutor to prosecute Pinochet, based on the argument that the Dutch criminal courts had no jurisdiction, the Court of Appeal was called upon to determine the validity of the Prosecution's discretionary power not to prosecute Pinochet before a Dutch court. The Court of Appeal ruled that it was "evident that prosecution of Pinochet by the Dutch Public Prosecutions Department would encounter so many legal and practical problems that the public prosecutor was perfectly within his rights to decide not to prosecute". [FN4] The phrase "practical problems" may turn out to have had a legal-political dimension, or its use indicate the susceptibility of the Court to such an influence.

[69]Ariel Sharon, Cour d'Appel de Bruxelles, Chambre des Mises en Accusation, Pen. 1632/01 judgment of 26 June 2002. In this case an indictment was issued when the defendant was not even within Belgium's jurisdiction, albeit by a Belgian law which enabled the prosecutor to initiate investigations following complaints by individual plaintiffs alleging crimes against humanity or violations of the Geneva Conventions. The authority of a prosecutor to start preliminary investigation without any restrictions as envisaged by the Belgian case against Ariel Sharon met serious criticism. The complaint was dismissed by way of diplomatic action.

[70]Greet-Jan Alexander Knoops, "Challenging The Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers From A Legal, Ethical and Political Perspective," *Criminal Law Forum*, 2004, Vol. 15, No. 4, pp. 365-390, at p. 370.

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States that are not party to the Statute.[71] The only realistic limitation on said prosecutorial discretion exists in the special position in this area of the ICC Pre-Trial Chamber. In the case of preliminary investigations or inquiries set in motion by the Prosecutor *proprio motu*, he is obliged to call upon the Pre-trial Chamber to authorize an official investigation. This judicial authorization is therefore mandatory in order to start an official investigation at the request of the Prosecutor or a State-party. This precondition of judicial authorization is aimed at limiting the power of the ICC Prosecutor and may qualify as a restriction on prosecutorial discretion.

These prosecutorial restraints are found in Article 53[72] of the ICC Statute. In the event of a request by a State request or by the Prosecutor *proprio motu*, the first requirement would be that these requests comply with Articles 18(1) and 53(1), is that "there would be a reasonable basis to commence an investigation". Yet no definition of "reasonable basis" is provided. It is the Prosecutor himself, therefore, who is empowered to determine whether this reasonable basis exists. At this stage, the Prosecutor may even decide not to proceed with a certain complaint. It can be seen that the framing of Article 53 leaves considerable prosecutorial leeway for initiating investigations, as it extends the power to set aside an investigation for political reasons.[73]

On the other hand those who oppose the U.S. hegemony will find an attractive tool in the processes of the ICC, especially if the United States ratifies the Rome Treaty. History has shown that complaints filed in foreign courts have had little impact on the U.S. policymaking; these courts have no teeth. But the ICC is unlike other global courts in both form and substance. Combined with the Chief Prosecutor's *proprio motu* power and the increasing influence of non- governmental organizations (NGOs), these differences make the ICC a more dangerous weapon of asymmetric "law-fare."[74] The U.S. description of the Prosecutor as an institution with no oversight is therefore overblown.

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[71]Mohamed M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law," *Michigan Journal of International Law,* Vol. 23, Summer 2002, pp. 869-975, at p. 950.

[72]Article 53 sets out three requirements which the ICC Prosecutor must comply with before commencing an investigation:

(a) the information available should provide a reasonable basis to believe that a crime within the ICC's jurisdiction has been or is being committed;

(b) the case is admissible under Article 17 of the Statute; and

(c) taking into account the gravity of the crime and the interest of the victims, there should also be substantial reasons to believe that an investigation serves the interests of justice.

[73]Geert-Jan Alaxender Knoops, 2004, pp. 365-390, at p. 367.

[74] W. Chadwick Austin and Antony Barone Kolenc, *id*., 2006, pp. 291- 343, at p. 300.

There is, however, a fundamental tension in the Rome Statute highlighted by the

U.S. objections. The decision to vests the Prosecutor with *proprio motu* powers places greater importance on the sensible discharge of his mandate and on the other checks and balances in the ICC regime than would a system with more direct state control. In the ICC, the Prosecutor functions as a counterweight to state power, a role not often played by Prosecutors in domestic systems. At the same time, the ICC depends heavily on state support to discharge its mandate effectively. Reconciling this inherent conflict constitutes one of the primary challenges for the Court's Prosecutor.[75]

VII. SCOPE OF THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

The International criminal court has jurisdiction only with respect to crimes committed after the entry into force of the Statute (Art. 11). Once a state has ratified this statute, then that state automatically submits to its jurisdiction. However, there is an exception to this under Article 124. This Article allows a State Party the option of declaring that it will not be bound by the jurisdiction of the court for a period of seven years for war crimes committed in its territory or by one of its nationals from the date of ratification by the State. This declaration is limited to war crimes and excludes all other offences in Articles 6 and 7 and whether or not it also applies to acts of aggression is still to be decided.

Articles 13 -15 refer to the special circumstances by which the court may exercise its jurisdiction for the prosecution of the international crimes set out in Article 5. They are, as follows, under Article 13:

- A State Party may refer a situation to the prosecutor in accordance with Article 14 .
- The Security Council may, under Chapter VII, refer a situation to the prosecutor for investigation.
- The Prosecutor may initiate an investigation *proprio motu* (on his own initiative) on the basis of information received of crimes within the jurisdiction of the court in accordance with Article 15.

It is of utmost importance that the ICC should be fair, effective, independent, impartial and above all free from encumbrances and pressures from outside influences. Likewise, the office of the investigating Prosecutor should expound those same attributes. Under

[75]Alison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court," A*merican Journal of International Law*, Vol. 97, July 2003, pp. 510-567, at p. 520.

Article 15(2), the Prosecutor is to be given a free hand in analysing the seriousness of the particular international crime, including receiving reports and information from various sources, e.g., states, the United Nations, Inter Governmental and NGOs or indeed any reliable sources where information from various sources where information can be gathered, including individuals.

Under Article 15(3), once the Prosecutor is convinced that an investigation is warranted, he then will be submitting a request to the Pre-Trial Chamber for authorisation to commence investigations. Once the Pre-Trial Chamber considers that "there is a reasonable basis to proceed with an investigation then it will authorise the commencement of full investigation.

As a part of this investigation, victims are permitted to make representations to the Pre Trial Chamber along with legally admissible supporting material. If the Pre Trial Chamber refuses the Prosecutor's request, the latter may at some future date resubmit his application with new facts or evidence come to his notice. It is immediately recognisable that the Pre Trial Chamber plays a vital role throughout the stages of any investigation and possesses the power to curtail the Prosecutor's so called independent authority. The functions of the Pre-Trial Chamber are set out in Article 57 and include being permitted to rule on a number of issues contained in Articles 15, 18, 19, 54(2), 61(7), and 72. In the aforementioned Articles, a majority ruling, at least, by the judges is required before any of their decisions may be implemented. Under Article 57(1)(b) "in all other cases, a single judge of Pre Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre Trial Chamber."[76]

The triggering dimension of the International Criminal Court's jurisdictional powers, unknown to the statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, is the result of the combination of the three following factors: (i) the permanent nature of the International Criminal Court; (ii) the fact that the jurisdictional powers of the Court are not just limited to a given crisis situation such as those occurred in the territory of the former Yugoslavia since 1991 and Rwanda in 1994 and (iii) the Rome Statute drafters fear of initiation of politically motivated investigations as a result of abuse of

[76]Claire De Than and Edwin, *International Criminal Law and Human Rights*, Thomson Sweet and Maxwell, London, 2003, pp. 324-335, at p. 324.

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prosecutorial discretion by the Office of the Prosecutor.[77]

VIII. CONCLUSION

The various triggering mechanisms envisaged in the Rome Statute, self-complaint is likely to be favoured in the future activity of the Court. In addition to establishing whether or not the ICC has jurisdiction over a case, the court must also establish that a case is admissible. Admissibility largely turns on the concept of complementarity: a case will not be admissible before the ICC if a national court system is willing and able to hear it.[78] However, self-referrals will not always guarantee that the Office of the Prosecutor enjoys the necessary conditions for effective investigations.[79] There are two possible dangers.

First, in states in which civil war is taking place, it may be that a state's request for an investigation is chiefly motivated by the wish to expose internationally the crimes allegedly being perpetrated by the other side. By requesting ICC intervention, that state could be using the Court as a political weapon in the hope that its intervention could assist it in achieving its domestic political and military aims. The ICC Prosecutor is clearly aware of this risk and he should emphasis in the case of the DRC, he should investigate all alleged crimes, whether committed by rebels or by state agents.

The second danger is that it is likely to be difficult to achieve the full cooperation of the referring state in cases where the state is torn apart by internecine war. In such circumstances, the government authorities may well be prepared to cooperate when the crimes investigated have been allegedly committed by the opposing side; in contrast, it is unlikely that they will be fully cooperative in the investigation of crimes perpetrated by state agents.

The Prosecutor should be keenly aware of these possible pitfalls despite initial

[77]H. Olasolo, "The Prosecutor of the International Criminal Court before the Initiation of Investigations: A Quasi-Judicial or a Political Body"?, *International Criminal Law Review*, Vol. 3, 2003, pp. 98-106, at p. 87.
[78]Article I of the Rome Statute states that the ICC shall be "complementary to national criminal jurisdictions," and Article 17 is the primary article pertaining to complementarity. Rome Statute, supra note 7, arts. 1 and 17. The Chief Prosecutor, Luis Moreno-Ocampo, interprets Article I as requiring that the ICC only intervene where a state is unwilling or unable to act. He considers that the ICC should be viewed as a success when it has no cases, due to the availability and ability of national courts to try persons responsible for the crimes articulated in the Rome Statute, International Criminal Court, Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor 4 (2003), available at http: // www. amicc. Org / docs/ OcampoPolicyPaper9_03.pdf, visited on May 10, 2011.
[79]Jennifer S. Easterday Arizona, "Deciding the Fate of Complementarity: A Colombian Case Study," *Journal of International and Comparative Law*, Vol. 26, Spring 2009, pp. 49-80, at p. 52.

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appearances, self-referral is not necessarily the most straight forward option.[80] Three 'situations' have been referred so far by the state concerned to the ICC prosecutor: Uganda (referred to the ICC on 29 January 2004), the Democratic Republic of Congo (DRC) (referred on 19 April 2004) and the Central African Republic (referred on 7 January 2005). The striking feature in all the three self- referrals lies in the fact that in each case the referring state asked the Prosecutor to investigate crimes allegedly committed by rebels fighting against the central authorities. The advantages of self-referrals have been duly underlined: the y primarily consist in a greater likelihood of cooperation from the national authorities. Besides, the Prosecutor has wisely stated, in so many words, that once he investigates into a 'situation', he will do so across the board, hence also looking into crimes possibly committed by officials of the referring state. Nevertheless, the practice of self-referrals by states beset with civil war is of concern. It might lead to states using the Court as a means of exposing dangerous rebels internationally, so as to dispose of them through the judicial process of the ICC.[81]

For over 40 years, one of the worst humanitarian crises in the world has ravaged Colombia, victimizing and displacing nearly a tenth of the population as armed paramilitary groups, guerillas, and the national military battle for territory and control. In an effort to end the conflict, the Colombian government claims it is implementing transitional justice by creating accountability and providing reparations for victims with the Justice and Peace Law. Yet, upon careful examination of the politics of justice in Colombia, it appears as though the passage of the Justice and Peace Law is merely an attempt to shield human rights abusers from criminal liability and evade ICC intervention. How the ICC interprets and evaluates the actions of Colombia will determine the application of complementarity and the future of international criminal law.[82]

To sum up, we can say that the event of a referral by a State Party or by the Security Council, the Prosecutor is obliged to initiate an investigation, unless he determines that there is no reasonable basis to proceed under the Statute,[83] therefore, his decision to start an investigation does not need an authorization of the Pre-Trial Chamber (in fact, the latter may only review the Prosecutor's determination not to start an

[80]Paola Gaeta, p. 952.
[81]Antonio Cassese, "Is the ICC Still Having Teething Problem," *Journal of International Criminal Justice*, Vol. 4, July, 2006, pp. 434-440, at p. 434.
[82]Jennifer S. Easterday, "Deciding The Fate of the Complementarity: A Colombian Case Study," *Arizona Journal of International and Comparative Law*, Vol. 26, Spring 2009, pp. 49-69, at p. 50.
[83]Article 53 of the Rome Statute.

investigation). On the contrary, the Prosecutor may not start an investigation on his own initiative without being authorized by the Pre-Trial Chamber. This of course means that he must convince the Pre-Trial Chamber that he is not abusing the *proprio motu* powers that the Rome Statute vested in him.

What are the prospects of co-operation by states not party to the ICC? The ICC naturally hopes that all states will co-operate fully and unconditionally with it and provide it with the necessary assistance so that it can perform the mission entrusted to it by the international community. However, from the point of view of states, it is evident that in providing any assistance to the ICC, they would first have to give full consideration to their own national sovereignty and security. Indeed, the states not party to the ICC have not yet ratified the Rome Statute just because of their concern that ratification would infringe on their national sovereignty. The experience of the two ad hoc UN Tribunals hitherto has shown that obtaining the co-operation of non-party states will be a challenge to the normal operation and development of the ICC[84]. Article 11, therefore, should be read to apply only to situations referred to the Court by a State Party to the ICC Statute or a situation investigated by the Prosecutor *proprio motu*.[85]

To those used to prosecutors with absolute or untrammelled discretion, the restrictions placed on the Prosecutor may appear intrusive and obstructive. Nevertheless, given the volatile political environment in which the Court operates, the interests of states that may be at stake and the profile of the individuals that are likely to appear before the Court, the restrictions are justified. They ensure transparency and accountability in the exercise of the Prosecutor's powers. They serve to shield the Prosecutor from accusations of initiating politically motivated prosecutions. [86]

Seven situations have until 2012 been investigated by the ICC Prosecutor [87]. During the same time the prosecutor has declined to investigate further referrals by the Central African Republic, Iraq and Venezuela. The Prosecutor has not had a chance to exercise his *Proprio Motu* powers, despite the fact that until mid 2006

[84]Zhu Wengi, 2006, p. 95.
[85]Kenneth S. Gallant, "Jurisdiction to Adjudication and Jurisdiction to Prescribe in International Criminal Court," *Villanova Law Review*, Vol. 48, 2003, pp. 765-840, at p. 805.
[86]Anne Sofhie Massa, "Nato's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia not to Investigate: An Abusive Exercise of Prosecutorial Discretion," *Berkley Law Journal of International Law*, Vol. 24, 2006, pp. 610-650, at p. 640.
[87] Hector Olasolo, *The Triggering Procedure of the International Criminal Court*, Brill Academic Publishers, Martinus Nijhoff and VSP, The Netherlands, 2005, pp. 65-116, at p. 70.

he had already received more than 1700 communications.[88]

In this chapter I have discussed the Security Council Referral and the *Proprio Motu* Jurisdiction of the ICC in detail. In the next chapter the arguments of various countries for not signing the Rome Statute shall be discussed in detail. Further in the sixth chapter the five situations of the ICC shall be discussed in detail and the present position of the situation in the court. The analysis of the cases shall also be discussed.

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[88]IIias Bantekas and Susan Nash, *International Criminal Law*, Third Edition, Routledge and Cavendish, London, New York, 2007, pp. 535-557, at p. 543.