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**PROSECUTORIAL DISCRETION AT THE INTERNATIONAL
CRIMINAL COURT**

BY

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Laws Degree(LL.M)**

Under the Supervision of
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DECLARATION

I, ALLAN WANJOHI NGENGI, G62/79664/2012 do hereby declare that this Research Paper is my original work, and that to the best of my knowledge, it has not been presented for any academic award in any other University or institution of learning.

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DEDICATION

This research is dedicated to my dear parents Mr. and Mrs. James Ngengi without whose encouragement, I would not have become an advocate.

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LIST OF ABBREVIATIONS

AI:	Amnesty International.
AG:	Attorney General.
CNDP:	<i>Congrès National pour la Défense du Peuple</i>
CPS:	Crown Prosecution Services
DPP:	Director of Public Prosecutions.
DRC:	Democratic Republic of Congo.
FDLR:	<i>Forces Démocratiques de Libération du Rwanda</i>
HRW	Human Rights Watch.
IDP:	Internally Displaced People
ICC:	International Criminal Court
ICL:	International Criminal Law
ICTR:	International Criminal Tribunal for Rwanda.
ICTY:	International Criminal Tribunal for the former Yugoslavia.
IMT:	International Military Tribunal.
IMTFTE:	International Military Tribunal for the East
JPs:	Justices of Peace
KLR:	Kenya Law Reports
LRA:	Lords Resistant Army.
MONUC:	United Nations Organization Mission in the Democratic Republic of Congo
NGOs:	Non-Governmental Organizations.
OTP:	Office of the Prosecutor

ODM:	Orange Democratic Movement
PNU:	Party of National Unity
PTC:	Pre- Trial Chamber.
RLP :	Refugee Law Project
RPE:	Rules of Procedure and Evidence.
RPF:	Rwanda Patriotic Front.
SCSL:	Special Court for Sierra Leone.
SC:	Security Council
UPDF:	Uganda People Defence Force.
UPC:	<i>Union des Patriotes Congolais</i>
UN:	United Nations
USA:	United States of America

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CHAPTER ONE

INTRODUCTION AND STATEMENT OF THE RESEARCH PROBLEM

1.1 Introduction and Background

International criminal law protects peace, security, and the well being of the world as the fundamental values of the international community.¹ World peace and international security, the two values of the international community that lie at the heart of the international criminal law are at the same time the main goals of the United Nations.² International criminal law is thus based on a broad concept of peace, which means not only the absence of military conflict between states but also conditions within a state.³

In according precedence to world peace and security, the United Nations held an international conference dubbed as the ‘conference of Plenipotentiaries’ in Rome from 16th June to 17th July 1998 whose upshot was the adoption of the Rome Statute of the International Criminal Court (ICC Statute).⁴ The ICC Statute is the core document of international criminal law today and sets out the legal basis of the International Criminal Court (ICC).⁵ The statute was also a major step forward for substantive international criminal law making provisions on the substance, mode and procedure of prosecuting and dealing with war crimes, crimes against humanity, genocide and the crime of aggression.⁶

¹Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009) 31.

²Simon Chesterman, Thomas M. Franck and David M. Malone, *Law and Practice of The United Nations: Documents And Documentary* (Oxford University Press 2008) 22.

³Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009) 31.

⁴Ibid 22.

⁵Ibid.

⁶Ibid 29.

At the ICC, situations are identified through one of the three models of “trigger mechanisms”.⁷ These are the Security Council referral, State Party referral and Prosecutor’s own initiative.⁸ In the first two models, neither the Prosecutor nor the judges have any discretion in identifying a situation. Article 15 of the Statute however presents an inimitable way whereby the Prosecutor may exercise his discretion to commence (in his own motion-*proprio motu*) investigations in a given situation and also select cases which he intends to prosecute.⁹ This is however subject to the trial chamber’s authorization.¹⁰ Whatever the mode used to trigger the jurisdiction of the court, the Prosecutor also has immense discretion under this article in the selection of the cases.¹¹ He can decide that there is simply no case and choose to proceed no further.¹²

The conferment of the said powers under Article 15 of the Statute to the Prosecutor to act *proprio motu* has been controversial. During deliberations leading to the adoption of the Statute, there was considerable unease that inclusion of such independent powers could lead to partiality, manipulation and politicization by a possibly rogue Prosecutor.¹³

There have also been post adoption controversies that have persisted in the premises that the exercise of the discretionary powers has been used discriminatorily and selectively by the office of the Prosecutor (OTP).¹⁴ For example, questions have been raised as to why after the Democratic Republic of Congo situation referral, the Prosecutor did not exercise his discretion to investigate the atrocities committed in the North and South Kivu and also Katanga provinces where

⁷William A. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 Journal of International Justice 731,735.

⁸Ibid. See also The Rome Statute of the International Criminal Court, articles 13, 14 and 15.

⁹Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009) 91.

¹⁰Ibid.

¹¹William A. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 Journal of International Justice 731,735.

¹²Ibid.

¹³Rod Rastan, ‘The Power of the Prosecutor in Initiating Investigations’ (International Criminal Court Symposium paper, February 4, 2007) <<http://www.icclr.law.ubc.ca/site%20map/icc/poweroftheProsecutor.pdf>> accessed 30 November 2012.

¹⁴Phil Clark, ‘Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.’ in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 39.

government forces and the Mai Mai militia believed to be backed by president Kabila were directly implicated in serious crimes.¹⁵ The Prosecutor only chose to investigate atrocities in Ituri region leading to indictment of Lubanga, Katanga and Ngudjolo.¹⁶

Similar questions have been raised on the exercise of the discretion regarding situation in Uganda whereby after the referral, the Prosecutor only chose to pursue the Lord's Resistance Army (LRA) leadership and glaringly failed to investigate grave atrocities committed in the Northern Uganda by the government's backed Uganda People Defence Force (UPDF) which had led to displacement of more than 1.5 million civilians in the Internally Displaced People (IDP) camps.¹⁷

In Kenya, the former International Criminal Court's Prosecutor, Luis Moreno Ocampo exercised his discretion under Article 15 of the Rome Statute by seeking permission to bring charges against six suspects for the violence that erupted after the announcement of the disputed 2007 presidential election results.¹⁸ It is still not clear on what the Prosecutor may have relied upon in his decision to choose six individuals only out of the Waki's list suspected to be containing about two hundred names of persons suspected to have played major roles in the 2007 post election violence.¹⁹ Suspicion is prevalent that the move by the Prosecutor may have been politically driven.²⁰

¹⁵Ibid.

¹⁶Ibid.

¹⁷Ibid 42.

¹⁸ The Commission of Inquiry into Post Election Violence Report (2008), <<http://ebookbrowse.com/gdoc.php?id=366582490&url=5fed066afa78c9a13c42525357b4d730>> accessed 28 November 2012.

¹⁹Ruben Eberlin, 'Perpetrators of Violence in Kenya at Waki's List: Guess Who's on it' 15 July 2009 Available at <<http://rubeneberlein.wordpress.com/2009/07/15/waki-violence-kenya-elections-200/>> accessed 28 November 2012.

²⁰ See generally John Lunn 'Kenya since 2007/08 crisis' 14 December 2012 Available at <http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=19&ved=0CGoQFjAIOAo&url=http%3A%2F%2Fwww.parliament.uk%2Fbriefingpapers%2F%2FSN05733.pdf&ei=y2NWU_KZLoLatAbMmYGQDw&usg=AFQjCNE4nITyBQU607k2smX6_nG8j9bR3g&sig=7CTzqtZTanrCibNdbRnsW> Accessed 16 December 2012.

This research therefore pores over this discretion as exercised and the issues emerging given that uncertainty is rife regarding the guidance of the Prosecutor on which situation to prosecute, when, who to prosecute and what charges to bring against suspects.

It also questions whether the existing safeguards (as enshrined in the Rome Statute and also the policy guidelines developed by the OTP) on the ICC Prosecutor's exercise of discretion are adequate and whether there is need for additional guidelines aimed at buttressing the existing checks against abuse, misuse and misapplication of the Prosecutorial discretion.

In addition, it will also propose ways through which the exercise of discretion may be subjected to proper checks for the purposes of justice and proper functioning of the Office of the Prosecutor.

Generally, the International Criminal Court began operations on 11 March 2003 in The Hague, Netherlands.²¹ This was after the Assembly of State Parties had from 4 to 7 February 2003 elected 18 judges.²² On 21 April 2003, Luis Moreno Ocampo of Argentina was elected Prosecutor by the Assembly.²³

Since commencement of the operations, the Prosecutor of the International Criminal Court has exercised his Prosecutorial discretion and decided to open investigations in different situations including the Democratic Republic of Congo, Uganda²⁴ and most recently in Kenya.²⁵

²¹Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009) 22.

²² Ibid.

²³ Ibid.

²⁴ Ibid 93.

²⁵ Jalloh and Charles and Chernor, 'Situation in the Republic of Kenya' (2011) 105 American Journal of International Law 540.

After the Rome Statute had come into force and the ICC had been established in 2002, Uganda in 2005 was the first State using the instrument of the self-referral pursuant to Articles 13 and 14 Rome Statute.²⁶ Accordingly, the Presidency of the ICC assigned the "situation in Uganda" to Pre-Trial Chamber II. On 8 July 2005, five warrants of arrest against Joseph Kony and four other leading rebels were unsealed.²⁷

While it had been anticipated that the exercise of discretion by the Prosecutor to commence investigations on the LRA's leadership regarding the atrocities purportedly committed against the civilian population in Northern Uganda would have an extensive support, the anticipation was largely utopian. For example, this move was resisted by civil society organizations such as Human Rights Watch (HRW) and the Refugee Law Project (RLP) of Makerere University as well communities living in northern Uganda.²⁸ According to the RLP, by issuing the warrants, the ICC had shown bias by ignoring evidence of similar crimes committed by the government army, the UPDF. RLP noted that the timing in the long run will show that the court was biased and the issuing of the warrants only to the LRA confirmed the same.²⁹ Communities felt that while the action was only one sided, it would exacerbate the already delicate state of affairs.³⁰

Similar widespread dissatisfaction and resistance was palpable upon the Prosecutor's exercise of discretion to investigate the alleged atrocities committed in the Ituri region of the Democratic Republic of Congo while strategically ignoring the situation in other regions such as North and South Kivu as well as Katanga Province whereby the government forces and the Mai Mai militia believed to be backed by the DRC government were unswervingly caught up in serious and alike

²⁶Sabine Klein, 'Uganda and the International Criminal Court Review Conference- Some Observations of the Conference's Impact in the 'Situation Country' Uganda' (2010) 2 Gottingen Journal of International Law 688, 673.

²⁷ *ibid*

²⁸Kasaija Phillip Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda' (2006) 4 Journal of International Criminal Justice 179, 185.

²⁹ *ibid*.

³⁰ *Ibid*.

crimes.³¹ The Prosecutor was accused of bias and condoning political influence in discharge of his duties.³²

On the 26th of November 2009, the office of the Prosecutor filed an application seeking authorization to start investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008.³³ The request was approved with one out of the three judges dissenting.³⁴ In a solid dissent, Judge Hans-Peter Kaul would have denied the Prosecutor's request for a *proprio motu* investigation because he believed the evidence presented fell far short of the constitutive contextual requirements of crimes against humanity to trigger ICC jurisdiction.³⁵

Apart from the issues raised by the dissenting Judge, it has been argued by various people that the decision to investigate the Kenyan case was politically motivated and so was the choice of the individuals to charge.³⁶ The Prosecutor has been under scathing criticism³⁷ that his exercise of discretion *proprio motu* was nothing more than a political scheme meant to water down the political ambitions of the indicted individuals amongst them Uhuru Kenyatta and William Ruto.

Apparently, the Prosecutor has had to contend with unrelenting criticism that his exercise of discretionary powers has been selective, discriminatory and more often than not, enshrouded in political and other extraneous considerations.³⁸

1.2 Statement of the Problem

³¹Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 39.

³² Ibid.

³³Charles C Jalloh, 'Situation in the Republic of Kenya' (2011) 105 American Journal of International Law 540.

³⁴ibid.

³⁵ Ibid.

³⁶KithureKindiki, 'ICC Cases Politically Motivated' Star News Paper (Nairobi, 4 April 2011).

³⁷ See David Nyekorach – Matsanga, 'Africa Union is Right: Kenyan ICC Cases Must Be Halted in Interest of ICC in Africa' <Available at http://www.panafricanforumltd.com/au_is_right_on_kenyan_icc_cases.html> 14 April 2014. See also Gabrielle Lynch and Miša Zgonec-Rozej, 'The ICC Intervention in Kenya' Africa/International Law AFP/ILP 2013/01, February 2013, 9. Available at <http://www.chathamhouse.org/sites/default/files/public/Research/Africa/0213pp_icc_kenya.pdf>.

³⁸Charles C Jalloh, 'Situation in the Republic of Kenya' (2012) 106 American Journal of International Law 118, 123.

In the preamble of the ICC statute, the contracting states are enjoined to ensure that most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.³⁹ Therefore, the critical role played by the prosecution can not be overlooked. The prosecution plays a key role in ensuring that the competence and the integrity of the trial process are not trampled upon. As such the Prosecutor should be independent, must have and show integrity and honesty.⁴⁰ He should be impartial and able to keep professional confidentiality.⁴¹ Noting that the ICC Prosecutor deals with weighty crimes where states are involved, he should therefore act genuinely, in non selective, non partisan and in a manner free of any form of political persuasion or consideration. This standard should apply even at the time he decides to exercise his discretion under Article 15 of the ICC Statute to determine which situations to investigate, the individuals to investigate and the specific charges to be brought against the suspects. Upon interrogating the Uganda, DRC and Kenya situations, one would axiomatically be impelled to ask certain questions such as: why would the Prosecutor investigate the LRA and not the UPDF?, why would the Prosecutor investigate the situation in Ituri and not in Northern and Southern Kivu or Katanga province where similar crimes had been committed? Why would the Prosecutor choose not to investigate the former President Kibaki and Honorable Raila Odinga and yet it is their supporters who participated in the 2007 / 2008 post election violence? Is the Office of the Prosecutor free of political influence and considerations or not?

This research therefore raises questions on and seeks to interrogate whether the current guidelines and considerations meant to guide the ICC Prosecutor's exercise of discretion to investigate, to charge and who to charge are adequate so as to diffuse the ubiquitous outcry that the said exercise has been wallowing in the miasma of favouritism, selectivity and extraneous considerations.

³⁹The Rome Statute of the International Criminal Court, Preamble (4).

⁴⁰ United States Agency for International Development, 'Practical Skills for Prosecutors in Rwanda: Course Manual' (2011) 2-6.

⁴¹ Ibid.

1.3 Theoretical framework

The paper is premised on what may be referred to as a cocktail of theories; profoundly the Kantian legal theory, retributive justice theory as well as natural justice theory.

According to the Kantian legal theory, crimes under international law are found in any substantial violation of freedom in interpersonal relations by which the validity of general world law is negated.⁴² International criminal law (and especially as encapsulated under the ICC Statute) is legitimate because, and to the extent that, punishment offsets both the violation of freedom in interpersonal relations and negation of general world law.⁴³

Retributive theory dictates that the criminal justice system functions on behalf of society as a whole, to restrict a criminal's freedom in response to an over-indulgence in a liberty not legally available to the rest of society.⁴⁴ Punishment provides for the common good by restricting a criminal's freedom in proportion to the freedoms that the criminal unfairly exercised in violation of the law. Retributive punishment restores the relative balance of advantages and disadvantages between those who elect to abide by the law and those who do not. Therefore, punishment upholds the proportionate equality of a just distribution of advantages and disadvantages, benefits and burdens, among the members of and sojourners within a political community.⁴⁵

Natural justice dictates that relevant factors must, and irrelevant factors must not, be taken into account by authorities in exercising powers vested in them by law. Actions or decisions of

⁴²Gerhard Werle, *Principles of International Criminal Law* (2nd Edition, T.M.C.Asser Press 2009) 33.

⁴³Ibid. See also Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An introduction to International Criminal Law and Procedure* (2nd Edition Cambridge University Press 2013)24.

⁴⁴Brian D.Skaret, 'A Victim's Right to View: A Distortion of the Retributivist Theory of Punishment' (2002) 28 Journal of Legislation 349,352.

⁴⁵Ibid.

authorities are amenable to being quashed if they are shown to have been based on irrelevant or extraneous considerations, or where it can be proved that relevant considerations were ignored.⁴⁶

The relevance of these theories to this paper is noticeable. The research revolves around and interrogates certain principles of International Criminal Law which member states have legitimately recognized as binding upon them. It also notes that one of the key objectives of International Criminal Law is to facilitate retributive justice. However, in as much as states desire to uphold retributive justice as against the perpetrators of what has been termed as most heinous crimes, basic principles of natural justice that guard against aspects such as irrelevant or extraneous considerations in a judicial process must not be sunk into oblivion.

1.4 Conceptual Framework

Generally, a Prosecutor must act genuinely, in non selective, non partisan and in a manner free of any form of political persuasion or consideration. He should be objective, impartial and must consider all relevant factors and circumstances before exercising discretion to investigate and prosecute. Discretion should be exercised within the tenets of clearly stipulated guidelines for the purposes of fairness and consistency in decisions made. Looking into the situations in Kenya, DRC and Uganda, it is doubtful whether the Prosecutor was influenced by these vital concepts in exercising discretion.

In a nutshell, this paper shall revolve upon basic concepts such as impartiality, relevant circumstances and factors, objectivity and superfluous considerations with view to examine the extent of departure by the Prosecutor from the existing guidelines in his exercise of discretion regarding the cited situations and also propose ways on how best the Prosecutor can exercise discretion for purposes of justice.

⁴⁶For an exposition see Lumumba and Kaluma, *Judicial Review in Kenya: Law and Procedure*(JomoKenyatta Foundation 2007) 84.

For the purpose of this research paper, the core concepts and terms used herein may be defined as follows;

‘Arbitrary’ means capricious, despotic or unjustifiable.

‘Authenticity’ means genuineness.

‘Bias’ means a spectrum of disqualification ranging from partiality on one hand to the extreme of corruption on another.

‘Discretion’ means the range within which any person or body may act or decide without violating any legal obligation to act or refrain from acting

‘Discrimination’ means the making of improper distinctions between persons or classes.

‘Extraneous considerations’ means irrelevant considerations.

‘Impartiality’ means lack of prejudice.

‘Objectivity’ means neutrality.

‘Partisan’ means show of bias.

‘Prosecutorial discretion’ is the authority of an agency or officer to decide what charges to bring and how to pursue each case.

‘Selectivity’ means choosing something or somebody as the best compared to the others.

‘Superfluous considerations’ means unnecessary considerations.

1.5 Literature Review

Scholars have propounded different opinions regarding the exercise of the Prosecutorial discretionary powers *as* provided for under the ICC Statute.

Allison Marston Danner⁴⁷ posits that the Rome Statute is almost totally silent with respect to the larger policy questions about which potential accused should be pursued by the Prosecutor. He further states that the Prosecutor will have an important policy making role in determining what kinds of situations should be adjudicated in the ICC and which accused, among the many potential targets, should face prosecution in an international forum.⁴⁸ However, the author does not offer conclusive solutions to cover the noted deficiencies. The research therefore shall make proposals intended to supplement the existing policies with view to bridging the gaps.

William A. Schabbas⁴⁹ argues that discretion wielded by the Prosecutor pursuant to Article 15 of the ICC Statute is considerably large but the criteria upon which such discretion is to be exercised is ill defined. Nevertheless, Schabbas does not also come up with a definitive criteria aimed at resolving the quandary. It is therefore anticipated that the research will explore the possibility whether a definitive criteria is sufficient to check on Prosecutor's discretionary powers.

The Human Rights Watch (HRW)⁵⁰ notes that while Article 53 of the ICC Statute allows the Prosecutor to initiate an investigation and upon investigation, to decide in the 'interests of justice' whether or not that there is a sufficient basis for a prosecution, there has never been any definitional agreement reached on the scope and meaning of 'interests of justice'. Arguably, this exacerbates the Prosecutor's dilemma in choosing where or where not to exercise discretion.

Similarly, Susana Sá Couto and Katherine Cleary⁵¹ opine that the gravity threshold plays a critical role in guiding the Prosecutor's selection of both situations and cases and yet 'gravity' is

⁴⁷ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 American Journal of International Law 510,521.

⁴⁸ Ibid.

⁴⁹ William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 Journal of International Justice 731,735.

⁵⁰ Human Rights Watch, 'Policy Paper: The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute' (2005) <<http://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>> Accessed on 13 December 2012 at 10.07 Am.

⁵¹ Susana Sá Couto, and Katherine A. Cleary, 'The Gravity Threshold of the International Criminal Court' (2008) 23 American Journal of International Law 807.

not defined in the Statute and further, the appropriate scope of term remains a matter of debate. Although this author makes proposals on how the gravity threshold ought to be handled,⁵² this research takes the view that the proposals are not sufficient. It is therefore anticipated that the research will recommend additional proposals with a view to adding knowledge on the concept of Prosecutorial discretion as exercised by the ICC Prosecutor.

Dapo Akande⁵³ argues that the existing OTP regulations do not provide much guidance on how the Prosecutor will make decisions in those areas where the Prosecutorial discretion is most important: decisions relating to what situations to investigate and who to prosecute. While this research agrees with Akande's argument, it will on the other hand propose principles that should guide the OTP in selection of situations and in deciding who to prosecute.

Avril McDonald and Roelof Haveman⁵⁴ conclude their work by noting that neither the Statute nor the Rules made there under provide much guidance for the Prosecutor in deciding whether or not to initiate an investigation and to proceed with a prosecution. They also agitate for proper guidelines, 'as the danger looms large that the court may be accused of starting investigations on entirely arbitrary grounds, and even based on political considerations'.⁵⁵

Generally while most of the above noted scholars have affirmed that there indeed exists a lacuna (in terms of lack of proper guidelines) on what the ICC Prosecutor should consider before exercise of Prosecutorial discretion, they do not however move forth to suggest or put forward what they consider should be included in the guidelines or come up with a criteria upon which the Prosecutor may rely upon.

⁵²Ibid, 839-854.

⁵³ Dapo Akande, 'Is There Still a Need for Guidelines for the Exercise of ICC Prosecutorial Discretion?' (2009) <<http://www.ejiltalk.org/is-there-still-a-need-for-guidelines-for-the-exercise-of-icc-prosecutorial-discretion/>> Accessed 13 December 2012.

⁵⁴ Avril McDonald and Roelof Haveman, 'Prosecutorial Discretion – Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion By the Prosecutor of the ICC' (2003) <http://www.issafrica.org/anicy/uploads/McDonald-Haveman_issues_relevant.pdf> Accessed 13 December 2012.

⁵⁵Ibid.

It is therefore anticipated that this research will suggest factors that the Prosecutor may need to consider before exercise of his discretion.

1.6 Justification of the Study

Critically, Prosecutors bear an enormous responsibility for determining what crimes will be prosecuted and as such, they have traditionally been accorded wide discretion in the enforcement process.⁵⁶ The discretionary powers are even wider under the Rome Statute. The ICC Prosecutor has power to decide the situations to investigate, suspects to investigate and whom to prosecute.⁵⁷ These enormous powers however remain largely unchecked and therefore susceptible to abuse. This is more because the existing hurdles (namely the gravity threshold, interest of justice and reasonable basis test) that the Prosecutor is obliged to get through before exercise of his discretionary powers to prosecute are ill defined and their exact contours are unknown.⁵⁸ Indeed, this quandary is attributable to the lack of a definitive criterion that the Prosecutor needs to put into consideration before exercising these powers.

In reality, this study comes at a time even when nations particularly the African countries' confidence in the OTP is at the lowest ebb, accusing it of bias, imperialism and neo colonialism.⁵⁹ This stems from the obvious fact that majority of situations under the OTP's scrutiny are within Africa.⁶⁰ On the other hand, divergent views depicting the OTP's bias in

⁵⁶Kirk J Nahra, 'The Role of Victims in Criminal Investigations and Prosecutions' (1999) 33 The Prosecutor 28, 30.

⁵⁷Margaret M.de Guzman, 'Choosing To Prosecute: Expressive Selection at The International Criminal Court' (2012) 33 Michigan Journal of International Law 265, 275. See also, William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 Journal of International Justice 731, 734.

⁵⁸Ray Murphy, 'Gravity issues and the International Criminal Court' (2006) 17 Criminal Law Forum 281, 282. The author argues that despite its focus on the concept of gravity, the Rome Statute provides little guidance regarding how the ICC should apply its gravity standards. See generally also Avril McDonald and Roelof Haveman, 'Prosecutorial Discretion – Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion By the Prosecutor of the ICC' (2003). Available <http://www.issafrica.org/anij/uploads/McDonald-Haveman_issues_relevant.pdf> Accessed 14 September 2014.

⁵⁹For details see, Josephine Uwineza, 'The African Union (AU) demands that International Criminal Court (ICC) proceedings against Sudan's Omar al-Bashir—as well as the court's Kenya case—be deferred to the East African Court of Justice. Available at <<http://www.rnw.nl/international-justice/article/au-no-trials-hague>> Accessed 14 September 2014.

⁶⁰Details on the situations can be found on the ICC website, <<http://www.icc-cpi.int/cases.html>> Accessed 14th September 2014. See also David Armstrong, Theo Farrell and Helene Lambert, *International Law and International Relations* (2nd Edition Cambridge University Press 2012) 215. The authors corroborate the assertions herein by

handling the situations under study have been fronted.⁶¹ As a consequence, this study is defensible for a number of reasons. First, it gives an exposition on the meaning, origin and utility of the discretionary powers to prosecute. Secondly, it explains the intricacies surrounding the exercise of these powers by ICC Prosecutor, factors that the OTP should mull over before exercise thereof and also considers whether or not the Prosecutor has been exercising the discretionary powers in a judicious manner especially in the situations under study namely, Kenya, DRC and Uganda. Finally it proposes measures that the OTP may adopt so as exercise its discretionary powers impeccably.

1.7 Objectives of the Research

The main objective of the research is to discuss the concept of Prosecutorial discretion as exercised by the ICC Prosecutor and explain the intricacies surrounding the exercise of Prosecutorial discretion and challenges faced by the Prosecutor in exercise thereof.

Specific objectives are:

- i. To closely examine the manner in which Prosecutorial discretion under the ICC Statute may be abused.
- ii. To scrutinize the situations in Kenya, DRC and Uganda and propose ways in which discretion regarding investigations and prosecutions ought to have been exercised.
- iii. To propose general ways in which discretionary powers accorded to the OTP under the aforesaid Article may be regulated to avoid abuse.

stating thus, 'African states might be forgiven for wondering whether more powerful states enjoyed greater immunity from the ICC.'

⁶¹For example see generally, Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008).

1.8 Hypotheses

- i. Despite existence of some controls, the discretionary powers to prosecute wielded by the ICC Prosecutor under the ICC Statute are still enormous and are susceptible to abuse.
- ii. The exercise of the Prosecutorial powers to investigate and prosecute selected individuals in situations in Uganda, the DRC and Kenya epitomizes the abuse of Prosecutorial discretion and demonstrates political interference in the otherwise judicial process which has had the effect of denting the authenticity of the whole process.
- iii. The existing policy guidelines on the exercise of Prosecutorial discretion are inadequate and there is dire need to buttress the same through the formulation of better guidelines for proper checks of the Prosecutor's powers.

1.9 Research Questions

This research seeks to respond to the following questions:-

- i. Are the ICC Prosecutor's discretionary powers under the ICC Statute enormous and susceptible to misuse by the Prosecutor?
- ii. Did the ICC Prosecutor abuse his discretion regarding the Uganda, DRC and Kenya situations?
- iii. What considerations should the ICC Prosecutor mull over before exercise of his discretion?
- iv. Is there need for further guidelines for the exercise of ICC Prosecutorial discretion?

1.10 Research Methodology

This research aims at discussing the concept of Prosecutorial discretion as exercised by the ICC Prosecutor and explains the intricacies surrounding the exercise of Prosecutorial discretion and challenges faced by the Prosecutor in exercise thereof. As such, it will be qualitative and explanatory and will mostly be informed by secondary materials drawn from the ongoing discussions on International Criminal Law touching on the subject matter. Information shall be

drawn from books⁶² and relevant statutes⁶³ as well as from other secondary sources such as articles from journals,⁶⁴ newspapers and the internet.⁶⁵ The research shall also draw information from decided cases.⁶⁶

⁶²For example Chesterman S, Franck T M, Malone D M, *Law and Practice of the United Nations: Documents and Documentary* (Oxford University Press 2008), Clark P, Waddell N, (eds) *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) Lumumba P, Kaluma P, *Judicial Review in Kenya: Law and Procedure* (Jomo Kenyatta Foundation 2007), Werle G, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009) F X Njenga, *International Law and World Order Problems* (Moi University Press, 2001), William A.Schabas, *An Introduction to the International Criminal Court* (2nd edition Cambridge University Press 2004) Roy S.Lee (ed), *Introduction to the International Criminal Court: The Making of the Rome Statute – Issues, Negotiations and Results* (The Hague, Kluwer Law International 1999) Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) and Henry J Steiner and Philip Alston and Ryan Goodman *International Human Rights in Context: Law Politics Morals* (3rd edition, Oxford University Press 2007).

⁶³ For example, Rome Statute of The International Criminal Court, America's Judiciary Act of 1789, The German Code of Criminal Procedure, Criminal Procedure Law of China, Constitution of Kenya, The Treaty of Versailles, Charter of the International Military Tribunal, ICTY Statute, ICTR Statute, and Statute of the Special Court for Sierra Leone.

⁶⁴For Example Apuuli K P, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda' (2006) 4 *Journal of International Criminal Justice*, Brubacher M R, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 *Journal of International Criminal Justice*, Couto S S and Cleary K A, 'The Gravity Threshold of the International Criminal Court' (2008) 23 *American Journal of International Law*, Danner A M, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law*, Charles C Jalloh, 'Situation in the Republic of Kenya' (2011) 105 *American Journal of International Law*, Klein S, 'Uganda and the International Criminal Court Review Conference- Some Observations of the Conference's Impact in the 'Situation Country' Uganda' (2010) 2 *Göttingen Journal of International Law*, Schabas W A, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Justice* and Skaret B D, 'A Victim's Right to View: A Distortion of the Retributivist Theory of Punishment' (2002) 28 *Journal of Legislation*.

⁶⁵For example

<http://dpp.gov.mu/English/Documents/publication/hopac.pdf>,
<https://cliniclegal.org/sites/default/files/Shoba%20Wadhia%20Prosecutorial%20Discretion%20in%20Immig.pdf>,
<http://scc.lexum.org/decisia-scc-csc/scc-csc/scccsc/en/item/7949/index.do>,
<http://supreme.justia.com/cases/federal/us/470/598/case.html>
<https://casetext.com/case/us-v-redondo-lemos>
<http://www.1215.org/lawnotes/work-in-progress/judiciary-act-of-1789.pdf>
[https://www.courtlistener.com/nysd/deoz/united-states-v-greater-blouse-skirt-neckwear-con-/](https://www.courtlistener.com/nysd/deoz/united-states-v-greater-blouse-skirt-neckwear-con/)
<http://cil.nus.edu.sg/rp/il/pdf/1998%20Rome%20Statute%20of%20the%20International%20Criminal%20Court-pdf.pdf>
http://legal.un.org/ilc/documentation/english/A_49_10.pdf
<http://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>

⁶⁶For Example, *R V Nixon* 2011 SCC 34, *United States V. Redondo –Lemos* 27 F. 3d 439, 444, *Crispus Karanja Njogu V. Attorney General, George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another, Prosecutor v. Kordic* Case No. IT-95- 14-4, *Prosecutor V. Mladic*, Case No. IT-95-5/18-1, *The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd* (1989) KLR, *Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang* ICC- 01/09-01/11, *The Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang*, ICC-01/09-01/11-307, *Prosecutor V. Lubanga Dyilo*, Case No. ICC-01/04-01/06-08, and *Prosecutor V. Lubanga Dyilo*, Case No. ICC-01/04-169-

1.11 Chapter Breakdown

1.11.1 Chapter One: Introduction and Statement of Problem

This chapter lays out the background of the study, identifies the research problem and identifies the theoretical and conceptual framework upon which the paper is premised. It goes on to identify the objectives of the research and also sets out the broad argument layout. The chapter also identifies research questions sought to be answered and also states the methodology to be used. To further put the study in its proper context, this chapter also undertakes a literature review.

1.11.2 Chapter Two: General Analysis of Prosecutorial Discretion

This chapter shall attempt to define Prosecutorial discretion, explain its historical and philosophical origins and foundations and also outline its applicability in trials especially the Nuremberg, Tokyo, Rwanda and Yugoslavia criminal trials under various charters and UN resolutions.

1.11.3 Chapter Three: Prosecutorial Discretion under the Rome Statute of the International Criminal Court

The chapter shall delve into the relevant provisions of the Rome Statute and look at the legal threshold set by the Statute and which the Prosecutor must withstand before exercise of powers. In a nutshell, it will look at jurisdiction (Articles 12, 17) admissibility (Article 17) and also interests of justice (Article 53). The chapter shall also look into other factors that inform the Prosecutor's exercise of discretion. These are gravity of the offence and interest of peace. The chapter shall also evaluate the guidelines formulated by the OTP in 2009 with view to expose the insufficiencies.

1.11.4 Chapter Four: The ICC Process and the Exercise of Prosecutorial Discretion in Kenya, Uganda and the Democratic Republic of Congo

The chapter shall look at the manner and circumstances surrounding the exercise of Prosecutorial discretion in Kenya, Uganda and the DRC. It will interrogate whether the said process was

conducted in a fair and impartial manner within the tenets of the Statute and the 2009 OTP guidelines and also whether the Prosecutor was influenced by extraneous considerations in making his decision. The chapter will make general comments on the exercise of discretion in the said situations.

1.11.5 Chapter Five: Best Practices on the Exercise of Prosecutorial Discretion

This chapter shall look at how best discretion may be exercised. A study of best practices drawn from the Code for Crown Prosecutors in England and Wales shall be accorded priority given that the code has been termed as one of the best in regulating discretion. The research shall also look at how discretion is regulated in other jurisdictions such as the USA, France and Germany.

1.11.6 Chapter Six: Conclusion and Recommendations

The Chapter will contain the conclusions and recommendations of the study.

CHAPTER TWO

GENERAL ANALYSIS OF PROSECUTORIAL DISCRETION

2.0 Introduction

Generally, this chapter attempts to define the concept of prosecutorial discretion and at the same time explaining its utility and downsides in the dispensation of criminal justice. It also explains the historical and the philosophical origins of the concept. Furthermore, the chapter concisely outlines the concept's applicability in trials especially the Nuremberg, Tokyo, Rwanda and Yugoslavia criminal trials under various charters and UN resolutions.

2.1 Meaning, Utility and the Downsides of Prosecutorial Discretion

The term 'discretion' has a variety of meanings and is used in numerous ways.¹ Simply put, it is the ability or freedom to make decisions on one's own.² It has been remarked that discretion is 'an authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience.'³ Black's Law Dictionary holds that "when applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others".⁴ Nsereko⁵ posits that discretion is 'the freedom or authority to make judgment and to

¹Charles H. Koch Jr, 'Judicial Review of Administrative Discretion' (1986) 624 *George Washington Law Review* 469,470. Indeed the author argues that the term has at least five different uses in administrative law. The authority to make individualizing decisions in the application of general rules can be characterized as individualizing discretion. Freedom to fill in the gaps in delegated authority in order to execute assigned administrative functions may be called executing discretion. The power to take action to further societal goal is policy making discretion. If no review is permitted the agency is exercising unbridled discretion and if the decision can not by its very nature be reviewed, the agency is exercising numinous discretion.

²*The New International Webster's Pocket Dictionary* (Trident Press International 2002) 168.

³Roscoe Pound, 'Discretion and Mitigation: The Problem of the Individual Special Case' (1960) 4 *New York University Law Journal* 925,926.

⁴Henry Campbell Black, *Black's Law Dictionary: Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (6th Edition, West Publishing company 1990) 466.

⁵Daniel D. Ntanda Nsereko 'Prosecutorial Discretion Before National Courts and International Tribunals' (University of Botswana) 1. Available at https://www.google.co.ke/search?q=Daniel+D.+Ntanda+Nsereko+%E2%80%98Prosecutorial+Discretion+Before+National+Courts+and+International+Tribunals%E2%80%99&ie=utf-8&oe=utf-8&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gws_rd=cr&ei=xRNUUpfeDcjS4QSi5oCADA > Accessed 8 October 2013.

act as one sees fit. He argues that discretion allows for flexibility and enables the decision maker to adapt his or her decision to existing circumstances.

Satyajit Boollell⁶ therefore defines prosecutorial discretion as the prosecutor's power to 'choose whether or not to bring criminal charges, and what charges to bring, in cases where the evidence would justify the charges. Prosecutorial discretion is also the authority of an agency to enforce the law against a particular individual.⁷ It is the 'wide latitude' that the prosecutors have in determining when, whom, how and even whether to prosecute apparent violations of the law.⁸ Elsewhere⁹ prosecutorial discretion has been delineated as 'the power to decline to prosecute in cases of provable criminal liability'. Correspondingly, it is the prosecutor's power to select among cases, indeed among like cases, those he shall press and those not. As a public officer responsible for law enforcement, he is permitted to pick and choose which laws he will enforce and against which violators.¹⁰

A more cogent definition of prosecutorial discretion is however propounded by Linds¹¹ and Dong.¹² Linds avers that it is a term of art which refers to interconnected decisions of whether to initiate, continue or cease prosecution, which includes the discretion to plea bargain while Dong insists that it refers to the prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, plea bargaining and recommending a sentence to the court. The Supreme Court of Canada has asserted thus:¹³

⁶ Satyajit Boollell, 'Challenges in Crime in the 21st Century' (11th Heads of Prosecuting Agencies Conference Grand Copthorne Waterfront, Singapore, 20-22 March 2012)5. Available at <<http://dpp.gov.mu/English/Documents/publication/hopac.pdf>> accessed 8 October 2013.

⁷ Shoba Sivaprasad Wadhia, 'Prosecutorial Discretion in Immigration Agencies: A Year in Review' (2012) 1. Available at

<<https://cliniclegal.org/sites/default/files/Shoba%20Wadhia%20Prosecutorial%20Discretion%20in%20Immig.pdf>> accessed 8 January 2014.

⁸ Kate M. Manuel and Todd Garvey 'Prosecutorial Discretion in Immigration Enforcement: Legal Issues' (Congressional Research Service 2013) 1.

⁹ John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 University of Chicago Law Review 439, 440.

¹⁰ Ibid.

¹¹ Ari Linds, 'A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after *R V Nixon*' (2012) 38 Queens Law Journal 295,301.

¹² Jingbo Dong, 'Prosecutorial Discretion at the International Criminal Court: A Comparative Study' (2009) 2 Journal of Politics 109.

¹³ *R V Nixon* 2011 SCC 34 Available at <<http://scc.lexum.org/decisia-scc-csc/scc-csc/sccsc/en/item/7949/index.do>> Accessed 8 October 2013.

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by the police; (b) the discretion to enter a stay of proceedings in either public or private prosecution; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether and (e) the discretion to take control of a private prosecution. While there are other discretionary decisions, these are the core of delegated sovereign authority peculiar to the office of the Attorney General

Humorously, it has been said that prosecutors are most instrumental in “determining the number of new prisoners who must be housed in state prisons”.¹⁴ Clearly however, the role played by prosecutors and by extension, their discretion in the dispensation of criminal justice goes beyond sending criminals into prisons and apparently, may not be gainsaid. Danner¹⁵ argues that in both international and municipal criminal law systems, prosecutors play a critical role in the administration of Justice. Antonio Casese, the first President of the International Criminal Tribunal for the Former Yugoslavia told the UN General Assembly that the prosecutor provided the “key to the Tribunal’s action”.¹⁶

Prosecutors bear responsibility for determining what crimes will be prosecuted and as such, legal systems have traditionally accorded wide discretion to criminal prosecutors in the enforcement process.¹⁷ So long as the prosecutor has probable cause to believe that the accused committed an offence defined by statute, the decision whether or not to prosecute and what charge to file or bring before a grand jury, generally rests entirely in his discretion.¹⁸ The basis of this discretion rests on the nature of the prosecutorial function.¹⁹ Consequently and barring any sound

¹⁴Robert L. Minser, ‘Recasting prosecutorial Discretion’ (1996) 86 Journal of Criminal Law and Criminology 717,720.

¹⁵Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 American Journal of International Law 510,512.

¹⁶*Ibid.*

¹⁷Kirk J Nahra, ‘The Role of Victims in Criminal Investigations and Prosecutions’ (1999) 33 The prosecutor 28, 30.

¹⁸*Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) available at <<http://www.emptywheel.net/wp-content/uploads/2013/06/Bordenkircher-Decision.pdf>> accessed 14 January 2014.

¹⁹See the decision by the U.S Supreme Court in *Wayte V. United States*, 470 U.S. 598, 607-08 whereby it was stated thus “This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily

justification there is an extreme deference the courts must give to prosecutorial charging decisions and a trial judge must accord a presumption of constitutionality to prosecutorial decisions, and approach the inquiry with appropriate respect for judgments exercised by officers of a coordinate branch of government.²⁰ Justifications for this kind of deference are bountiful but emphasis is laid on assessing the strength and importance of a case and other tangible and intangible factors²¹ such as government enforcement priorities and also the necessity to consider how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge. Moreover, because these decisions are “not readily susceptible to the kind of analysis the courts are competent to undertake, the [supreme] court has been properly hesitant to examine the decision whether or not to prosecute.”²² Further, since crime in virtually every country exceeds the ability of the criminal justice system to adjudicate it, prosecutors must be able to exercise their discretion to pursue or decline particular cases in order to maintain a functioning criminal justice system.²³

Minser²⁴ propounds three closely related trends that have been at work to promote the authority of the prosecutor. First, current criminal codes contain so many overlapping provisions that the choice of how to characterize conduct as criminal has passed to the prosecutor. In many cases, the legislatures have effectively delegated the prerogative to define the nature and severity of criminal conduct to the prosecutor. Legislative mandates regarding sentencing maxima, sentencing minima, and sentencing guidelines are dependent upon the substantive charge chosen by the prosecutor. In addition, prosecutors have the untrammelled authority to select the number

susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute”. Available at <<http://supreme.justia.com/cases/federal/us/470/598/case.html>> Accessed 14 January 2014.

²⁰United States V.Redondo –Lemos 27 F. 3d 439, 444 (9th Circuit. 1994) Available at <<https://casetext.com/case/us-v-redondo-lemons>> Accessed 14 January 2014.

²¹Wayte V. United States, 470 U.S 598, 607-08.

²²Ibid.

²³Kai Ambos, ‘Comparative Summary of the National Reports’ in Louise Arbour, Albin Eser, Kai Ambos and Andrew Sanders (eds.), *The Prosecutor of a Permanent International Court* (Freiburg: Max Planck Institute, 2000) 495, 525.

²⁴Robert L. Minser, ‘Recasting prosecutorial Discretion’ (1996) *86 Journal of Criminal Law and Criminology* 717,742.

of separate criminal acts for which the defendant will be charged. The prosecutors also determine whether to seek sentencing enhancements.²⁵ Second, the increase in reported crime without a concomitant increase in resources dedicated to the prosecution and defense of criminal conduct has resulted in a criminal process highly dependent upon plea bargaining. There are very few restraints placed upon the prosecutor in the bargaining process. Third, the development of sentencing guidelines and a growth of statutes with mandatory minimum sentences have increased the importance of the [discretionary] charging decision since the charging decision determines the range of sentences available to the court.²⁶

From the foregoing, it is palpable that it is the public prosecutors not judges, who are primarily responsible for the overall effectiveness of the criminal justice system²⁷ and although Musila²⁸ argues that the core and functional objective of the international criminal justice system is to achieve the complete cocktail of the retributive, utilitarian and restorative justice, the same may however be achieved only through proper prosecution and impeccable exercise of prosecutorial powers.²⁹

Specifically, prosecutors are public authorities who, on behalf of society and in the public interest and by exercising their discretion ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.³⁰ They bear the responsibility for all decision making in the areas where they have discretion - whether to charge, what charges to bring and how the cases should be prosecuted.³¹ In all criminal justice systems, prosecutors

²⁵Kay A. Knapp, 'Allocation of Discretion and Accountability within Sentencing Structures' (1993) 64 University of Colorado Law Review 679, 688.

²⁶Robert L. Minser, 'Recasting prosecutorial Discretion' (1996) 86 Journal of Criminal Law and Criminology 717,720.

²⁷ Council of Europe, 'The Role of Public Prosecution in the Criminal Justice System' Recommendation Rec(2000)19. See also Peter Burns, 'Private Prosecutions in Canada: The law and a proposal For Change' (1975) 21 McGill Law Journal 269. The author opines that the role of prosecutor whether in private or public is a very special one in any system of criminal justice.

²⁸See Generally, Godfrey M Musila, *Rethinking International Criminal Law : Restorative Justice and the Rights of Victims in the International Criminal Court* (Berlin, Lambert Academic Publishing, 2010).

²⁹Thoughts mine.

³⁰Council of Europe, 'The Role of Public Prosecution in the Criminal Justice System' Recommendation Rec(2000) 4.

³¹Kirk J Nahra, 'The Role of Victims in Criminal Investigations and Prosecutions' (1999) 33 The prosecutor 28, 32.

decide whether to initiate or continue prosecutions, conduct prosecutions before the courts and may appeal or conduct appeals concerning all or some court decisions.³²In some systems, they may also implement national crime policy while adapting it, where appropriate, to regional and local circumstances; conduct, direct or supervise investigations ensure that victims are effectively assisted, decide on alternatives to prosecution and supervise the execution of court decisions.³³

Although authors³⁴ have lauded prosecutorial discretion as an essential tool in dispensation of criminal justice, they have not been hesitant in pinpointing its darker side. For example, it has been said that it poses an increasing threat to justice.³⁵The author makes a further observation thus:

If the prosecutor is obliged to choose his cases, it follows he can choose his defendants. This method results in “[t]he most dangerous power of the prosecutor: that he will pick people he thinks he should get, rather than pick cases that need to be prosecuted. Prosecutors could easily fall prey to the temptation of “picking the man, and then searching the law books . . . to pin some offense on him”. In short, prosecutors’ discretion to charge—or not to charge—individuals with crimes are a tremendous power, amplified by the large number of laws on the books.³⁶

Discretion therefore entails both risks and benefits. By promoting case-sensitive decision making, it can protect liberty, but it can also lead to unjustified discrimination.³⁷Besides securing the

³²Ibid.

³³Ibid.

³⁴For Example Professor Davis who opines thus: “Discretion is a tool indispensable for individualization of justice.....Rules alone untempered by discretion, can not cope with the complexities of modern government and in law. Discretion is our principal source of our creativeness in government and in law....where law ends individualized justice begins....” For an exposition, see Ernst K. Pakuscher, ‘The use of Discretion in Germany’ (1976) 44 University of Chicago Law review 94.

³⁵Glen Harlan Reynolds, ‘Ham Sandwich Nation: Due Process when everything is a Crime’ (2013) 113 Columbia Law Review Sidebar 102.

³⁶Ibid 103.

³⁷Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003)97 American Journal of International Law 510,518. See also Angela J Davis, ‘Prosecution and Race: The power and privilege of Discretion’ (1998) 67 Fordham Law Review 13, 18. The Author posits: “Through the exercise of prosecutorial discretion, prosecutors make decisions that not only often predetermine the outcome of criminal cases, but also contribute to the discriminatory treatment of African Americans as both criminal defendants and victims of crime. I suggest that this discretion, which is almost always exercised in private, gives prosecutors more power than any other criminal justice officials, with practically no corresponding accountability to the public they serve. Thus, I maintain that prosecutors, through their overall duty to

prosecutor's independence, prosecutorial discretion as to issues of investigation and prosecution may give rise to misgivings of various kinds.³⁸ It sits uneasily between the twin demands of the individualization of prosecutorial decisions and protection from arbitrary state action.³⁹ Others have charged that the concentration of discretionary power in the prosecutor is unnecessary, resulting from default rather than a conscious legislative judgment and that charging decisions- particularly decisions not to prosecute- are sometimes made for political, personal or other capricious reasons.⁴⁰ The criteria on which discretionary decisions are based are "numerous, ill sorted and sometimes hazy and that despite prosecutors' repudiation of the existence of a political dimension to the exercise of discretionary powers it is hard to imagine that such considerations are always discarded in matters closely linked to vast political interests.⁴¹ Equally, it has also been averred that deficiency of prosecutorial discretion lies not in its existence, but in the randomness and arbitrariness of its application and that its use greatly exacerbates racial disparities in criminal process.⁴²

Given the foregoing rival positions regarding the utility and drawbacks associated with prosecutorial discretion, it would be inimitable to interrogate in the forthcoming chapters whether the same has a place in the contemporary international criminal justice system, part of which is encapsulated under the Rome Statute.

pursue justice, have the responsibility to use their discretion to help eradicate the discriminatory treatment of African Americans in the criminal justice system".

³⁸Drazan Dukic, 'Transitional Justice and the International Criminal Court- in "the interests of justice"?' (2007) 89 International Review of the Red Cross 691, 713.

³⁹Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 American Journal of International Law 510,518.

⁴⁰ Kenneth J Melilli, 'Prosecutorial Discretion in an Adversary System' (1992) Brigham Young University Review 669,673.

⁴¹Luc cote, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 Journal of Criminal Justice 169,171.

⁴²Angela J Davis, 'Prosecution and Race: The power and privilege of Discretion' (1998) 67 Forodham Law Review 13, 21.

2.2 Historical Foundations of Prosecutorial Discretion

The origins of prosecutorial discretion in the criminal justice system are poorly understood.⁴³ The concept is however believed to be more entrenched in the American system⁴⁴ although even the historical scholarship has not explained how the American public prosecutor emerged from the common law tradition of private prosecution to obtain the powers he has today.⁴⁵ There is however common consensus that the modern concept of prosecutorial discretion traces its origin from the English Common law.⁴⁶ For a very long time, really into the 19th century the English relied upon a predominant, although not exclusive, component of private prosecution. The aggrieved citizen could inform the juries in court as in medieval times he had informed them out of court.⁴⁷ The assize judge who was conducting trial exercised a general superintendence over those who responded to the call but witness and prosecutor were one. This citizen prosecutor was neither a lawyer nor an officer of the state.⁴⁸ The noticeable hitch to such system of citizen prosecution is that it is unreliable. There will be cases where there are no aggrieved citizens who survive to prosecute, and others where the aggrieved citizens will decline to prosecute, or be inept at it. Because the public interest in law enforcement cannot allow such gaps, the English had to admit an official element into their system of citizen prosecution.⁴⁹ The major steps in this direction were taken under Mary in 1554-1555 in two statutes which, almost imperceptibly, raised up the justices of the peace (JPs) as the public prosecutors for felony in England.⁵⁰ Prior to the Marian statutes, JPs had the power to bind over various trouble makers

⁴³Rebecca Krauss, 'The Theory of prosecutorial in Federal Law: Origins and Developments' (2009) 6 Seton Hall Circuit Review 1, 3.

⁴⁴John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 University of Chicago Law Review 439, 443.

⁴⁵Rebecca Krauss, 'The Theory of prosecutorial in Federal Law: Origins and Developments' (2009) 6 Seton Hall Circuit Review 1, 3.

⁴⁶See generally, Rebecca Krauss (ibid), John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 University of Chicago Law Review 439, 440. and also John H Langbein, 'The Origins of Public Prosecution at Common Law' (1973) 17 American Journal of Legal History 313.

⁴⁷Ibid 318.

⁴⁸R. M. Jackson, *The Machinery of Justice in England* (6th Edition Cambridge University Press 1972)155. The author insists thus: "In England where official prosecution is in form limited to the handful of cases brought by the Director of Public Prosecutions, private prosecution continues in theory to be the norm: When 'the police' prosecute, the correct analysis is that some individual has instituted proceedings, and the fact that this individual is a police officer does not alter the nature of the prosecution".

⁴⁹John H Langbein, 'The Origins of Public Prosecution at Common Law' (1973) 17 American Journal of Legal History 313, 318.

⁵⁰Ibid

to keep the peace, to order the arrest of offenders, to commit accused persons to gaol until trial and to release gaoled suspects on bail pending trial.⁵¹ They could also arrest on suspicion and had power to order an accused committed to stand trial. Indeed, the JPs were the officers to whom the aggrieved citizens would make complaints of serious crimes.⁵² Unscrupulous JPs however abused their powers leading to the enactment of the Marian Statutes which sought *inter alia* to control the manner in which the JPs imposed fines and granted bails.⁵³ Although the Common law upheld the notion of prosecution initiated by private parties [through JPs] rather than a central authority, the Crown being impelled by shortcomings manifest in the JP system sought representation by a 'professional attorney' who sometimes prosecuted cases of special concern to the sovereign.⁵⁴ This function evolved in 1472 into the role of the Attorney General of England, who was granted the power to create deputies to act for him in any court of record.⁵⁵ However, prosecutions remained largely in the hands of private individuals.

The existence of the AG brought a conspicuous shift in the manner in which prosecutions were conducted. Since most prosecutions were nominally in the name of the sovereign, the Crown heaped upon itself the right through its representative, to terminate the proceedings prior to completion.⁵⁶ This is what later on came to be known as *nolle prosequi* although the state lacked a public prosecutor who controlled criminal prosecutions as a matter of routine.⁵⁷ The Attorney General could also take over and conduct private prosecutions with the consent of private prosecutor, though whether the ability existed to do so without the consent is unclear.⁵⁸

⁵¹Ibid 319.

⁵²Ibid.

⁵³See generally, John H Langbein, 'The Origins of Public Prosecution at Common Law' (1973) 17 American Journal of Legal History 320-324.

⁵⁴Peter Burns, 'Private Prosecutions in Canada: The law and a proposal For Change' (1975) 21 McGill Law Journal 272.

⁵⁵Ibid

⁵⁶Law Reform of Canada, 'Controlling Criminal prosecutions: the Attorney General and the Crown prosecutor' (1990) Working paper 62(Ottawa Canada) 3.

⁵⁷Rebecca Krauss, 'The Theory of prosecutorial in Federal Law: Origins and Developments' (2009) 6 Seton Hall Circuit Review 1, 2.

⁵⁸Philip Stenning, *Appearing for the Crown* (Cowansville, Quebec 1986) 32.

In the English colonies, this British system was largely adopted but with modifications.⁵⁹ In other jurisdictions, there was a departure from the English system. In the United States, the First Judiciary Act established the federal public prosecutor as early as 1789 with exclusive powers to bring federal criminal prosecutions, in a departure from the English tradition.⁶⁰ The upshot was that the American prosecutor wielded broad discretionary power and at the extreme, became the most influential person in America in terms of the powers he or she has over the lives of citizens.⁶¹ An American prosecutor decides whether to prosecute or not to prosecute, who to prosecute and with what offence. He also has power to withdraw or discontinue any prosecution whether initiated by him or by a private prosecutor or authority and in doing so, he does not have to give any reasons, for to require him to do so would be to encroach on his discretion.⁶² Indeed, even a citizen lacks standing to contest the policies of prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.⁶³

The extensive prosecutorial powers enjoyed by these prosecutors has been said to be premised first on the separation of prosecutorial powers doctrine and secondly, on the *nolle prosequi*.⁶⁴ Regarding the former, it has been asserted thus:

.....the decision of a prosecutor in the executive branch not to indict...has long been regarded as the special province of the executive branch.....the exercise of prosecutorial discretion is at the very core of the executive function, limiting that

⁵⁹Law Reform of Canada, 'Controlling Criminal prosecutions: the Attorney General and the Crown prosecutor' (1990) Working paper 62(Ottawa Canada) 4.

⁶⁰ Judiciary Act of 1789, 1 Stat. 73 at Section 35. Available at <<http://www.1215.org/lawnotes/work-in-progress/judiciary-act-of-1789.pdf>> Accessed 27 January 2014. ("And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district . . . whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States").

⁶¹Reichel L Philip, *Comparative Criminals Justice Systems, A Topical Approach*(2nd Edition Prentice Hall 1999) 211.

⁶²Jingbo Dong, 'Prosecutorial Discretion at the International Criminal Court: A Comparative Study' (2009) 2 *Journal of Politics* 110.

⁶³ See Linda R.S. V. Richard D (1973) 410 U.S. 614, 619. Available at <<http://webcache.googleusercontent.com/search?q=cache:YhNLGg5Ci0YJ:supreme.justia.com/cases/federal/us/410/614/+&cd=4&hl=en&ct=clnk&client=firefox-a>> Accessed 27 January 2014.

⁶⁴Rebecca Krauss, 'The Theory of prosecutorial in Federal Law: Origins and Developments' (2009) 6 *Seton Hall Circuit Review* 5-25.

discretion by imposing judicial review would invade the traditional separation of powers doctrine....⁶⁵

On the latter, Krauss posits:

Like *Dulany*, *Wheeler* affirmed the line prosecutor's power to enter a *nolle prosequi*. *Wheeler* also emphasized that the *nolle* was not subject to judicial review, even when a public prosecutor—rather than the President or monarch—entered it. In this respect, the *nolle prosequi* appears to have provided the first American manifestation of the notion that prosecutorial discretion was not reviewable. American courts recognized the line prosecutor's right to enter a *nolle*, applied the same form of judicial review to the *nolle* that had been practiced in England, and thereby adopted a hands-off approach to at least one prosecutorial decision.⁶⁶

Consequently, extensive unreviewable prosecutorial discretion became entrenched in the American system with the only rare limitations being where it is tremendously demonstrated that exercise of discretion was done in abuse of process and that it would produce an unfair trial or affects the integrity of the justice system itself.⁶⁷ It is however worth noting that the omnipotence of the public prosecutor in the American procedure is a sharp divergence from the common law model. In England, private prosecution continues in theory to be the norm. Official prosecution is formally limited to the handful of cases brought by the Director of Public Prosecutions.⁶⁸ Even when the police prosecute, the correct analysis is that some individual has instituted proceedings and the fact that this individual is a police officer does not alter the nature of the prosecution.⁶⁹

Unlike the American system, the French avoided creating a prosecutorial monopoly.⁷⁰ Instead, the prosecution process was made to include three actors:⁷¹ the judicial police, the prosecutor,

⁶⁵United States V. Greater Blouse Skirt & Neckwear Contractors 228 F. Supp. 483, 489 (S.D.N.Y. 1964). Available at <<https://www.courtlistener.com/nysd/deoz/united-states-v-greater-blouse-skirt-neckwear-con-/>> Accessed 27 January 2014

⁶⁶Rebecca Krauss, 'The Theory of prosecutorial in Federal Law: Origins and Developments' (2009) 6 *Seton Hall Circuit Review* 1, 20.

⁶⁷*R v Nixon* 2011 SCC 34 paras. 16 and 33.

⁶⁸John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 *University of Chicago Law Review* 439, 440.

⁶⁹See generally, Philip B Kurland and DWM Waters, 'Public prosecutions in England, 1854-79: An essay in English Legislative History' 1959 *Duke Law Journal* 493.

⁷⁰John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 *University of Chicago Law Review* 439, 441.

⁷¹See generally, Richard S. Frase, 'Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do it, How Can We Find Out and Why Should We Care?' (1990) 78 *California Law Review* 540.

and the examining magistrate. Examining Magistrates function as an investigation director who assigns and supervises activities of the judicial police and the prosecutor, but he cannot open an investigation unless requested to do so by the prosecutor or the victim.⁷² The prosecutors determine appropriate charges against the accused, prosecute less serious felonies and most misdemeanors, and direct the work of the judicial police. For the serious offenses, the prosecutor must send them to the Examining Magistrate for a judicial investigation. At the completion of the magistrate's investigation, prosecutors must follow the magistrate's recommendation for disposition.⁷³ Furthermore, private prosecution under the rubric of *l'action civile* has acquired a significant sphere. The *raison d'être* of *l'action civile* is to permit the victim of the crime to constitute himself *partie civile* and to join a claim for civil damages to the public prosecutor's action for criminal sanctions.⁷⁴ If the public prosecutor does not initiate *l'action publique* the *partie civile* may do it himself ostensibly in order to provide the necessary basis for his parasitic damages claim.⁷⁵ Consequently, when the French prosecutor decides not to prosecute, he decides for himself and his office alone. Someone else may still invoke the criminal process against the culprit.⁷⁶

Although the Germans derived a good deal of their criminal procedure code in the 19th century from the French, they did not introduce a variant of *l'action civile* (known as the Adhäsionsverfahren) until the 1940s.⁷⁷ The procedure is seldom used for civil damage claims proper and can not be used as in France to enable the victim to institute a criminal case. If the German prosecutor has decided not to prosecute, the victim can bring his civil action only in tort. He is not entitled to launch a private prosecution.⁷⁸ Like the American prosecutor however, the

⁷²Ibid.

⁷³Jingbo Dong, 'Prosecutorial Discretion at the International Criminal Court: A Comparative Study' (2009) 2 Journal of Politics 109.

⁷⁴Loïc Cadiet, 'Introduction to French Civil Justice System and Civil Procedural Law' (2011) 28 Ritsumeikan Law Review 331.

⁷⁵Ibid.

⁷⁶John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 University of Chicago Law Review 439, 442.

⁷⁷Ibid.

⁷⁸Ibid.

German prosecutor is a monopolist whose monopoly was created, entrenched and protected by Statute. The German's Code of Criminal procedure⁷⁹ sets the same as hereunder:

Section 151. The opening of a court investigation shall be conditional upon preferment of charges.....Section 152 (1) The public prosecution office shall have the authority to prefer public charges.

The preferring of the formal charge is the responsibility of the public prosecutor. The German law takes the position that only the state through a specially constituted officer should have power to institute the process leading to sanctions.⁸⁰ The German prosecutor's monopoly is, unlike the American, regulated. Under section 152 (2) the public prosecutor is required to take action against all judicially punishable acts to the extent there is a sufficient factual basis.⁸¹ Arguably, the Germans undertook to forbid their monopolist prosecutor the discretion to refuse to prosecute in cases where adequate incriminating evidence is at hand.

The Chinese also adopted a monopolistic prosecutorial system whereby the criminal actions can only be initiated by the prosecutor. For the minor crimes, the prosecutor can choose not to bring a case before the court.⁸² However, all the solutions of not sending before court pronounced by the prosecutor, as well as the measures taken or the actions performed by him during the investigation, can be contested, the complaints being under the hierarchically superior prosecutor's competence.⁸³

A number of countries in Africa have endorsed the notion that a prosecutor is *dominus litis*⁸⁴ with powers to institute, take over and terminate criminal proceedings before courts and is not obliged to furnish any reasons to a private prosecutor or the court. This position appears to have been sponged from their former colonial masters especially the British and who for long approved a

⁷⁹ The German Code of Criminal Procedure, Sections 151 and 152(1) Available at <http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html> Accessed 29 January 2014.

⁸⁰ John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 *University of Chicago Law Review* 439, 443.

⁸¹ The German Code of Criminal Procedure (n 129) Section 152(2).

⁸² Criminal Procedure Law of China, Section 142 Available at <<http://www.refworld.org/pdfid/3ddbcd4e7.pdf>> Accessed 29 January 2014.

⁸³ Ibid Section 145.

⁸⁴ De Villiers J in *R V. Sikumba* [1955] 3 S. A. 125, 127. The judge avers: "The prosecutor, as the representative of the Solicitor-General, is the *dominus litis*. It is within his powers to withdraw the charge at any stage of the proceedings and no court can prevent him, just as no court can force him to prosecute".

powerful public prosecutor.⁸⁵ However, courts generally have been progressive and have as consequence not dithered in declaring that prosecutorial discretion is not absolute and that the same is subject to judicial scrutiny.⁸⁶

In Kenya, prosecutorial functions are discharged by the office of the Director of Public Prosecution established under the Constitution.⁸⁷ The DPP is enjoined to exercise prosecutorial powers by instituting and undertaking criminal proceedings against any person. These proceedings may be instituted before any court other than a court martial. The office may also take over and continue any criminal proceedings instituted or undertaken by another person or authority. Moreover, the office may also discontinue at any stage before judgment is delivered any criminal proceedings. The DPP also has powers to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conducts but while discharging these functions, the office must ensure due regard to the public interest, the interest of the administration of justice and the prevention and avoidance of abuse of legal process.⁸⁸ Earlier on, the High Court in *Crispus Karanja Njogu V. Attorney General*⁸⁹ had underscored the need to put the prosecutorial powers of the Kenyan prosecutors under judicial watch and declared that a *nolle prosequi* entered capriciously and in abusive manner was null and void. This position was recently buttressed by the High Court in *George Joshua Okungu &*

⁸⁵See for example the English case of *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 at p. 487 where Viscount Dilhorne said, “The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.”

⁸⁶For example in *Musoke V. Uganda* [1972] E.A 139, Kiwanuka Ag. C.J opined thus: “....I do not deny that the Director of Public Prosecutions has every right to alter charges as he sees fit. But as a judge of this court I am bound to come to the rescue of our citizens where I can detect an attempt on the part of those who have power to prosecute others to abuse the powers in their hands. This in my view is one of those areas”. In *Director of Public Prosecutions V. Mehboob Akbar Haji & Anor* Criminal Appeal No. 28 of 1992 [unreported] the Tanzania Court of Appeal posited: “We are surprised because we did not think anyone in our country could be vested with such absolute and total powers. It would be terrible to think that any individual or group of individuals could be empowered by law to act even *mala fide*. As it turned out to our great relief the exercise of the powers by the DPP under the Criminal Procedure Act is limited by the Act. Although the powers of the DPP appear to be wide, the exercise is limited by three considerations. That wherever he exercises the wide powers he must do so only in the public interest, in the interest of justice and in the need to prevent abuse of the legal process”.

⁸⁷The Government of Kenya, *Constitution of Kenya* (Government printers Nairobi 2010) article 157.

⁸⁸*Ibid.*

⁸⁹HCCR App. No 39 of 2000 (unreported).

*another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another*⁹⁰ whereby the learned Justices W. Korir and G.V Odunga affirmed that a discriminatory and selective prosecution was not only an abuse of process but also vividly unconstitutional.

2.3 Prosecutorial Discretion Before the International Tribunals

2.3.1 International Criminal Tribunals in Context

The initial move towards the establishment of individual criminal responsibility under international law can be found in the Versailles Peace Treaty of 28 June 1919⁹¹ which states:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for supreme offence against international morality and the sanctity of treaties.⁹²

An international tribunal was to be set up to try Kaiser and in addition, the allies' had power to try persons before their military courts for violations of the laws and customs of war.⁹³ To make this possible, the peace treaty required the German government to hand over war criminals and assist in their prosecution.⁹⁴ However, the new and ambitious model of establishing individual criminal responsibility formulated in the Versailles Peace Treaty was never implemented. No international tribunal was ever created and Kaiser was granted asylum in the Netherlands, never to stand a trial in a criminal court.⁹⁵ Therefore, the prosecution of war criminals by allied military courts failed due to German's stubborn refusal to surrender persons named by the allies.⁹⁶ Ultimately, there was no criminal prosecution of international crimes committed by Germans in World War 1. Nevertheless, the significance of the model provided for in the

⁹⁰ HCK at Nairobi Petition Nos. 227 & 230 of 2009 [2014] eKLR Available at <<http://kenyalaw.org/caselaw/cases/view/94347/>> Accessed 17 February 2014

⁹¹ M.C. Bassiouni, *International Criminal Law* (2nd Edition Brill Academic Publishers 1999) 33.

⁹² *The Treaty of Versailles*, (1919) Article 227 Available at <<http://www.firstworldwar.com/source/versailles227-230.htm>> Accessed 30 January 2014

⁹³ Ibid articles 227(2), 228(1) and 229(1) and (2).

⁹⁴ Ibid articles 228(2) and 230.

⁹⁵ Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C. Asser Press 2009) 5.

⁹⁶ M.C. Bassiouni, *International Criminal Law* (2nd Edition Brill Academic Publishers 1999) 31.

Versailles Treaty should not be underestimated.⁹⁷ The idea of individual criminal responsibility under international law and through international tribunals was explicitly recognized in that particular international treaty thus laying the ground work upon which to build following the horrors of the Second World War.⁹⁸

2.3.2 Prosecutorial Discretion at the Nuremberg Tribunal

The Nuremberg Tribunal has been said to be instrumental in rousing human conscience from its wartime slumber and further that it has been the project of international criminal law ever since to keep that conscience attentive, responsive and engaged.⁹⁹ Established in 1945 ‘for trial of war criminals whose offences had no geographical location’,¹⁰⁰ the tribunal was an outgrowth of the London Agreement concluded on 8 August 1945 by four victorious powers namely the USA, France, Britain and the Soviet Union.¹⁰¹ Annexed to this agreement was the Charter of the International Military Tribunal which made provisions for *inter alia* jurisdiction “to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations” committed any crimes defined in the charter.¹⁰²

The Tribunal consisted of Lord Justice Geoffrey Lawrence of the British Court of Appeals as President; Francis Biddle, former Attorney General of the United States; Major General I. T. Nikitchenko, Vice-Chairman of the Soviet Supreme Court; and Donnedieu de Vabres, Professor of Law at the University of Paris. The alternates were Sir Norman Birkett, Judge of the High Court of England; John J. Parker, Judge of the United States Circuit Court of Appeals; Lt.-Col. A. F. Volchkov, Judge of the Moscow District Court; and Robert Falco, Judge of the Court of Cassation of France.¹⁰³ The Tribunal held its first public meeting in Berlin on October 18, 1945, and received the indictment from the Committee of the Chief Prosecutors consisting of Justice Robert H. Jackson for the United States, Sir Hartley Shawcross for Great Britain, Francois de

⁹⁷Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009) 6.

⁹⁸Ibid.

⁹⁹Tara Helfman, ‘Francis Biddle and the Nuremberg Legacy: Waking The Human Conscience’ (2012) Journal of Jurisprudence 353,372.

¹⁰⁰Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009)7.

¹⁰¹Quincy Wright, ‘The Law of the Nuremberg Trial’ (1947) 41 American Journal of International Law 38, 39.

¹⁰²Ibid 40.

¹⁰³Ibid.

Menthon for France, and General R. A. Rudenko for the Soviet Union. Twenty four Nazi leaders were indicted each on two or more counts.¹⁰⁴

Specifically, the Charter prescribed crimes against peace, war crimes and crimes against humanity as crimes within the jurisdiction of the tribunal.¹⁰⁵ The charter further ruled out immunity from prosecution of heads of states or responsible officials in government departments.¹⁰⁶ It further stipulated that “the fact that the Defendant acted pursuant to orders of his government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the tribunal determines that justice so requires.”¹⁰⁷

Although authors have argued that the IMT was important in many respects,¹⁰⁸ it is also worth noting that dissonance emerged regarding the manner in which trials were conducted. Criticisms are focused on three points: *ex post facto* character of the trial because of accepting the aggressive war as a crime, trials involved punishment in violation of the rule of *nullum crimen, nulla poena sine lege* and lastly, the criticisms labelled the tribunal as victor’s justice.¹⁰⁹ It seems indisputable that the London Agreement of 1945 provided for two categories of crimes that were new: crimes against peace and crimes against humanity. The IMT did act upon the charter provisions dealing with both categories. In so doing, it applied *ex post facto law*; in other words, it applied international law retroactively, as the defense counsel at Nuremberg rightly

¹⁰⁴Ibid

¹⁰⁵ Article 6 Charter of the International Military Tribunal (1945) Available at <<http://www.unimburg.de/icwc/dateien/imtcenglish.pdf>> Accessed 3 February 2014.

¹⁰⁶ Ibid Article 7. See also Henry J Steiner and Philip Alston and Ryan Goodman *International Human Rights in Context: Law Politics Morals* (3rd edition, Oxford University Press 2007) 117.

¹⁰⁷Ibid Article 8.

¹⁰⁸ For example see Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 323. First it broke the monopoly over criminal jurisdiction concerning such crimes as war crimes, until that moment firmly held by states. For the first time non-national, or multinational, institutions were established for the purpose of prosecuting and punishing crimes having an international dimension and scope. Secondly, new offences were envisaged in the London Agreement and made punishable crimes against humanity and crimes against peace. Thirdly, while until that time only servicemen and minor officers had been prosecuted, now for the first time military leaders as well as high ranking politicians and other civilians were brought to trial. Fourthly, the statutes and case law of IMT and the various tribunals set up by the Allies in the aftermath of the Second World War contributed to the development of new legal norms and standards of responsibility, by providing for example, for the elimination of defence of obedience of superior orders. Finally, a symbolic significance emerged from these experiences in terms of their moral legacy. See also generally, Henry T. King, JR, ‘Without Nuremberg- What?’ (2007) 6 *Washington University Global Studies Law Review* 653.

¹⁰⁹ Burcu Baytemir, ‘The International Military Tribunal at Nuremberg: The Ongoing Reflections in International Criminal Law’ in *USAK Yearbook of International Politics and Law* (Volume 3 International Strategic Research Organization 2010) 81.

stressed.¹¹⁰ Moreover the IMT in justifying punishment of aggressive war crimes and crimes against humanity trashed the cardinal rule of *nullum crimen, nulla poena sine lege* thus relegating it to a general principle of justice.¹¹¹ In this respect, Cassese avers:¹¹²

Indeed, the Tribunal not only stated that in international law ‘the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice’ (a proposition true at the time, no longer valid today); but, more importantly, also said, ‘To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished’.

The other major setback was that the trials imposed ‘victors’ justice’ over the defeated.¹¹³ The tribunal was composed of four judges appointed by each of the victor powers; prosecutors too were appointed by each of those powers and acted under the instructions of each appointing state.¹¹⁴ Thus, the view must be shared that the tribunal was not an independent international court proper, but a judicial body acting as an organ common to the appointing states.¹¹⁵ Additionally, the prosecutions were selective, focus being on the major war criminals of the European Axis. While articulating this point, Sellars pronounces:¹¹⁶

Shortly after the judgment was handed down, the British alternate judge, Norman Birkett, while noting that the Charter did not apply to Soviet Union, the United States or Britain, declared that, ‘if it continues to apply only to the enemy, then I think the verdict of the history may be made against Nuremberg.’ While Germans were being tried, the Charter formalized the Allies’ refusal to relinquish immunity for themselves for similar crimes. This was a sensitive point, and others associated with the bench and the prosecution-

¹¹⁰See the motion adopted by all defense counsel on 19 November 1945, in Trial of the Major War Criminals Before International Military Tribunal, Nuremberg 14 November 1945-1 October 1946 (Volume 1 Nuremberg 1947) 168-9. Available <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf> accessed 3 February 2014.

¹¹¹Guido Acquaviva, ‘A Conversation with Antonio Cassese’ (2012) 25 *Leiden Journal of International Law* 815, 818.

¹¹²*Ibid.*

¹¹³Jeremy Peterson, ‘Unpacking Show Trials: Situating the Trial of Saddam Hussein’ (2007) 48 *Harvard International Law Journal* 257, 275.

¹¹⁴Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 322.

¹¹⁵*Ibid.*

¹¹⁶Kirsten Sellars, ‘Imperfect Justice at Nuremberg and Tokyo’ (2011) 21 *European Journal of International Law* 1085, 1090.

Herbert Wechsler, Telford Taylor and Bernard Meltzer – also raised concern about the problem of selectivity.

From the foregoing, it is noticeable that these criticisms bordered more on the legality of the trials processes as opposed to abuse of prosecutorial discretionary powers. However, there was also a general lack of judicial or any other formal mechanisms in the Tribunal's constitutive documents to restrain the manner in which the prosecutors conducted their duties.¹¹⁷ This position arguably made a way through which both the judges and the prosecutors manipulated the indictments. First, the Tribunal regularly sided with the prosecutors to reject challenges to indictments and thereby finding that the indictments were satisfactory but provided no justification for such a verdict.¹¹⁸ Additionally, the Tribunal habitually entertained motions to amend indictments as regularly fronted by the prosecutors perhaps to ensure conviction.¹¹⁹ Debatably, the prosecutors therefore struck foul blows¹²⁰ which normally, may not be permissible in the present day practice. Nevertheless, issues regarding prosecutorial discretion were to a large extent absent considering that the London Agreement had prescribed those to be targeted while the Nuremberg Charter had already defined the scope of the charges. Nonetheless, misgivings touching on selectivity and victors' justice were prevalent.

2.3.3 Prosecutorial Discretion at the Tokyo Tribunal

On 26 July 1945, two weeks before the conclusion of the London Conference, the Allies issued the Potsdam declaration¹²¹ announcing their intention to prosecute leading Japanese officials for the offences similar to those tried at Nuremberg. Subsequently, on 19 January 1946, General

¹¹⁷ Neier A, *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice* (United States: Random House 1998) 15.

¹¹⁸ Ibid.

¹¹⁹ May R, 'Challenges to Indictments in International Criminal Trials in International Criminal Trials' in Li H, Yee S and Wang, *International Law in the Post- Cold War period: Essays in Memory of Li Haopei* (Psychology Press 2001) 443,444.

¹²⁰ While explaining on the role of a prosecutor, Lord Justice Sutherland in *Berger V. United States*, 295 U.S 88 (1935) stated thus "The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice will be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilty shall not escape or innocent suffer. He may prosecute with earnestness and vigor- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use legitimate means to bring about a just one."

¹²¹ The Potsdam Declaration (J u l y 2 6, 1 9 4 5) available at <<http://afe.easia.columbia.edu/ps/japan/potsdam.pdf>> Accessed 4 February 2014.

Douglas Mac Arthur, supreme Commander for the Allied powers in Japan, approved in the form of an executive order, the Tokyo Charter, setting forth the constitution, jurisdiction and the functions of the International Military Tribunal for the Far East (IMTFE).¹²² Like the Nuremberg Charter, the Tokyo Charter which was issued on 26 April 1946, included the newly articulated crimes against peace and humanity.¹²³ The Charter was modelled on the Nuremberg Charter. There were, however, differences between the two texts and the way they regulated the structures of the tribunal and the charges that could be brought against defendants.¹²⁴ Just like the Nuremberg tribunal, the Tokyo trials had their own prosecutorial misgivings.¹²⁵ The Eleven judges were appointed by the victors¹²⁶ the same as prosecutors. Political considerations in prosecutions could not be ruled out as it was alleged that the trial was either a vehicle for America's revenge for the treacherous attack on Pearl Harbor, or a way of assuaging America national guilt over the use of atomic weapons in Japan.¹²⁷ Moreover, politics permeated the indictment process and release policies for those imprisoned.¹²⁸ Emperor Hirohito was not indicted, on the ground that his immunity was necessary for Japan's post war stability, and he was deliberately neither mentioned by the prosecution nor the defence¹²⁹ while cold war considerations led to the US acquiescing in the release of all those imprisoned by the year 1955.¹³⁰ Further, it has also been posited that failure to indict the Emperor who was aware of the Imperial Army's atrocities in the war was a calculated political decision by the Americans in an attempt to aid the post war occupation of Japan.¹³¹ Additionally, the trials depicted selectivity in view of failure to prosecute rape crimes committed against 'comfort women' and by the U.S prosecutors granting immunity to criminals operating with unit 731 and who had allegedly used

¹²² Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009) 12.

¹²³ Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 322.

¹²⁴ For a summary of differences, see generally Zachary D. Kaufman, 'The Nuremberg V. The Tokyo Tribunal: Designs, Staffs and Operations' (2010) 43 *The John Marshall Law Review* 754. See also B.V.A Roling and A Cassese, *The Tokyo Tribunal and beyond: Reflections of a Peace Monger* (Cambridge: Polity press 1993) 2.

¹²⁵ Criticisms of *ex post facto* law, mutilation of the *nullum crimen, nulla poena sine lege* and also claims of 'victors' justice' were prevalent just like in the Nuremberg.

¹²⁶ Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 322.

¹²⁷ *Ibid.*

¹²⁸ Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2nd edition Cambridge University Press 2013) 119.

¹²⁹ Herbert P. Bix, *Hirohito and the Making of Modern Japan* (Harper Collins Publishers 2000) 591-618.

¹³⁰ R. John Pritchard, 'The International Military Tribunal for the Far East and the Allied National war Crimes Trials in Asia' in M.C Bassiouni, *International Criminal Law* (3rd edition Martinus Nijhoff Publishers 2008) 142.

¹³¹ Zhang Wanhong, 'From Nuremberg to Tokyo: Some Reflections on Tokyo Trial (on the Sixtieth Anniversary of The Nuremberg Trials)' (2006) 27 *Cardozo Law Review* 1673, 1677.

biological and chemical weapons experiments on humans. Exclusion was also applied to heads of feared *kempeitai* (Japan's Gestapo), leaders of ultra nationalistic secret societies, and industrialists who had profited from the aggression.¹³² Arguably, extraneous considerations prevailed at the cost of justice.

2.3.4 Prosecutorial Discretion at the *Ad Hoc* Tribunals: ICTR, ICTY and Sierra Leone

The Statutes of the three *ad hoc* Tribunals of the former Yugoslavia, Rwanda and Sierra Leone set up an office of the prosecutor for each tribunal. Prosecutors were assigned duty to investigate and prosecute persons responsible for committing the crimes within the tribunal's jurisdiction.¹³³ The prosecutors are enjoined to act independently as separate organs of the tribunals and are forbidden to seek or receive instructions from any government or from any other source.¹³⁴ Prosecutors of the *ad hoc* tribunals have limited discretion regarding decision to prosecute.¹³⁵ They have power to determine whether there are grounds to warrant an investigation. If there are grounds, they initiate investigation and if investigations yield credible evidence of violations the prosecutor must again determine whether the violations are serious.¹³⁶ If they are then the prosecutors must identify what persons bear the greatest responsibility for such violations.¹³⁷ They must also satisfy themselves that the persons they have identified have *prima facie* case against them.¹³⁸ Once they have made these preliminary determinations, they are obliged to prepare an indictment.¹³⁹ This peremptory language suggests

¹³²Ibid.

¹³³Article 20 of the ICTY Statute, Article 15 of the ICTR Statute and Article 15 of the Statute of the Special Court for Sierra Leone.

¹³⁴Ibid.

¹³⁵Daniel D. Ntanda Nsereko 'Prosecutorial Discretion Before National Courts and International Tribunals' (University of Botswana)11.Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008)398.The author states that the huge discretionary power by the prosecutor has been gradually limited by suggesting that he should prosecute those who appear to bear the greatest responsibility for international crimes. This need to concentrate on the major suspects is justified by both practical reasons (international tribunals are costly and may not afford to bring to trial all the perpetrators of international crimes, including the so called 'small fry') and by the very rationale for the establishment of such tribunals, which is to dispense justice with regard to the most serious crimes affecting the whole international community on account of their gravity.

¹³⁶Ibid.

¹³⁷Article 16 of the ICTY Statute, Article 15 of the ICTR Statute and Article 15 of the Statute of the Special Court for Sierra Leone.

¹³⁸In *Prosecutor v. Kordic* Case No. IT-95- 14-4 Decision on The Review of the Indictment, the ICTY through Judge McDonald defined '*prima facie* case' as a credible case, which would (if not contradicted by defence) be a sufficient basis to convict the accused on the charge.

¹³⁹Article 18(4) of the ICTY Statute, Article 17 of the ICTR Statute

duty and not discretion on part of prosecutors, to indict.¹⁴⁰ While the prosecutors have power to amend indictments to add new charges, drop others or in other way deal with charges these powers are however limited given that such amendments may be effected any time before the confirmation of the indictment but thereafter, amendments may only be done subject to the leave of the judge who confirmed the indictment or during trial, by the trial judge.¹⁴¹ Similarly, the prosecutors have power to withdraw the charges. This however may only be done before and not after its confirmation. Thereafter, they may only do so with leave of the confirming judge or during trial, the trial judge.¹⁴² Moreover, the statutes of the three tribunals bid the prosecutors not to seek or receive instructions from any government or from any other sources.¹⁴³ However, this does not forbid them from seeking or receiving assistance or advice.¹⁴⁴ Furthermore, while the prosecutors may initiate investigations on the basis of information obtained from governments, UN organs, intergovernmental organs and NGOs, they alone assess that information and decide whether there is a sufficient basis to proceed.¹⁴⁵

Generally, the prosecutorial functions are subject to the tribunals' scrutiny. A judge may decline to confirm an indictment on the ground that it does not disclose a *prima facie* case or even dismiss it and discharge the accused. These review proceedings help to check the prosecutors' exercise of their discretionary powers, protect members of the public from frivolous, mischievous and oppressive prosecutions,¹⁴⁶ and save tribunals' time and resources.¹⁴⁷ Conversely however, tribunals can not review or change prosecutors' decision not to prosecute as doing so would arguably amount to a repudiation of the prosecutors' independence.¹⁴⁸ Therefore, it may rightly be said that the scope of prosecutorial discretion under the *ad hoc* tribunals is narrower compared to the IMT and IMFTE whereby there generally lacked judicial or any other formal mechanism to

¹⁴⁰ Daniel D. Ntanda Nsereko 'Prosecutorial Discretion Before National Courts and International Tribunals' (University of Botswana) 11.

¹⁴¹ Rule 50 of the ICTY RPE and Rule 50 of the ICTR RPE.

¹⁴² Rule 51 of the ICTY RPE and Rule 51 of the ICTR RPE.

¹⁴³ Article 16(2) of the ICTY Statute, Article 15(2) of the ICTR Statute and Article 15(1) of the Statute of the Special Court for Sierra Leone.

¹⁴⁴ Daniel D. Ntanda Nsereko 'Prosecutorial Discretion Before National Courts and International Tribunals' (University of Botswana) 12.

¹⁴⁵ Article 18 of the ICTY Statute, Article 17 of the ICTR Statute

¹⁴⁶ *Prosecutor V. Mladic*, Case No. IT-95-5/18-1 par. 22. Justice Orie of the ICTY opined thus: 'standing trial is a difficult experience and an accused should not be put on trial if, from the onset, a conviction is unlikely'.

¹⁴⁷ Daniel D. Ntanda Nsereko 'Prosecutorial Discretion Before National Courts and International Tribunals' (University of Botswana) 12.

¹⁴⁸ *Ibid.*

check on the exercise of prosecutorial powers. However, although the exercise of discretion before the *ad hoc* tribunals may appear to have been infallible, questions regarding selectivity were ubiquitous.¹⁴⁹ Moreover, some authors have authoritatively argued that ICTR represents a reincarnation of the Nuremberg legacy of Victor's justice as manifested through a discriminative failure to prosecute the RPF side of the conflict.¹⁵⁰

2.4 Conclusion

In conclusion, the concept of prosecutorial discretion which traces its origins from the English common law has been described in different ways by different authors. Nevertheless, there is a general consensus that it is generally ingrained in most of the criminal legal systems in the world. Further, its applicability in the dispensation of criminal justice has been characterized by divergent views on whether it has any usefulness or it should be discarded.

However, despite the competing opinions, the concept has and continues to occupy a central position in international criminal law. As already discussed in this chapter, although the concept did not exquisitely manifest itself in the course of prosecutions before the IMT and IMTFE, it however found its way during trials at the *Ad hoc* tribunals namely the ICTR, ICTY and Sierra Leone. The concept has also found itself at the centre of litigation at the ICC through the provisions of the Rome Statute. The following chapter therefore delineates the scope and applicability of the concept at the ICC.

¹⁴⁹For example see, Frederiek de Vlamming, 'The Yugoslavia Tribunal and the Selection of Defendants' (2012) 4 Amsterdam Law forum 89,102. The author observes: "Prosecutorial policies at the ICTY lacked transparency. Grounds for selecting defendants were often opaque. Understandably, during the early years, the prosecutor shied away from publishing information on how he selected particular targets because he was unsure whether he could get enough assistance and resources. Over the years, especially after the completion strategy was issued, the prosecutor became more open about considerations and choices, although no official policy document was ever published. Complete openness may not always be feasible in the highly politicized context of international tribunals. To avoid perceived bias or politicization of the selection process, however, prosecutors should be as clear as possible about the grounds for prosecution".

¹⁵⁰See generally, Luc Reydam's 'The ICTR Ten Years On: Back to the Nuremberg paradigm?' (2005) 3 Journal of International Criminal Justice 977-988.

CHAPTER THREE

PROSECUTORIAL DISCRETION UNDER THE ROME STATUTE

3.0 Introduction

In a nutshell, this chapter briefly explains the genesis of prosecutorial discretion at the ICC. It also captures the prerequisites that must be met by the Office of the Prosecutor (OTP) before it exercises its prosecutorial discretionary powers. These are jurisdiction, triggering authority and admissibility. The chapter also covers areas in which the OTP has the greatest discretion which include carrying out investigations, screening cases and choosing charges and defendants as well as determining admissibility of the selected cases. Lastly, the chapter discusses the existing checks for controlling prosecutorial discretion as provided for under the Statute but concludes that the same are inadequate and therefore, there is a need for a remedy.

3.1 The International Criminal Court in Context

The International Criminal Court has (ICC) been said to represent a quantum leap in the enforcement of international criminal law, a monumental response to the most serious crimes of concern to the international community as a whole and that it stands as a determination that *de facto* impunity should no longer be enjoyed by those perpetrating genocide, war crimes and crimes against humanity by ensuring that cases are tried even when states are unwilling or unable to do so themselves.¹ It represents the latest chapter in the evolution of an international legal order once concerned primarily with the mutual relations of states² but now increasingly focused on the rights and obligations of individuals.³

¹Thomas Hethe Clark, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance' (2005) 4 Washington University Global Studies Law Review 389.

²Indeed, international law has traditionally been defined as the body of rules which nations recognize as binding upon one another in their mutual relations. This approach was adopted by the Permanent Court of International Justice in *The SS Lotus (France V. Turkey) Case 10, 1927 P.C.I.J. Serial A No 18* which stated: 'International law governs relations between independent states. The rules of law binding states therefore emanate from their own free will as expressed in conventions (treaties) or by usage (customary state practice) generally accepted as

Although the court began operations in The Hague, Netherlands on 11 March 2003,⁴ the Statute establishing the court was a culmination of efforts organized by the UN General Assembly ultimately leading to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference), held in Rome from 15 June to 17 July 1998, at which the delegates from over 160 states negotiated and approved the final text of the Rome statute.⁵ Challenges at the conference were bountiful but the main areas of contention involved defining court's jurisdiction, especially the question whether the court would have automatic jurisdiction, the role and status of the prosecutor, and the court's relationship with the UN, especially the Security Council.⁶ Ultimately, these challenges were somehow surmounted the upshot being that provisions regarding crimes within the jurisdiction of the court, trigger mechanisms and admissibility are now fully implanted in the Rome Statute.⁷

expressing principles of law and established in order to regulate relations between these coexisting independent communities or with view to achieving common aims'.

³Alexander K. A Greenwalt, 'Justice Without Politics? Prosecutorial Discretion and The International Criminal Court' (2007) 583, 584.

⁴Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009) 22.

⁵William A. Schabas, *An Introduction to the International Criminal Court* (2nd edition Cambridge University Press 2004) 21. See also Richard John Galvin, 'The ICC Prosecutor, Collateral Damage, and NGOs:Evaluating the Risk of a Politicized Prosecution' (2005) 13 *University of Miami International and Comparative Law Review* 1, 5.

⁶Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009) 21. The author explains, "regarding the scope of courts jurisdiction, it was not possible for the pro-court states to achieve their goal of extending the court's jurisdiction, under the principle of universal jurisdiction, to all crimes under international law, regardless of where, by whom, or against whom they had been committed. The orientation toward the territoriality and personality principle that was ultimately enshrined as a compromise in the ICC Statute creates sensitive gaps in the court's jurisdiction. Also controversial to the end was the question on who should be empowered to initiate trials before the court (trigger mechanisms); here the pro-court coalition was at least partially successful. Under the provisions finally adopted in the ICC statute, the prosecutor, like the Security Council and the parties to the treaty, has the right to initiate investigations. On the one hand, as far as the Security Council is concerned, dominated as it is by five powers, there were fears that giving it too strong a position would polarize the court's work and call its overall credibility into question; on the other hand, negotiators wished to make it possible for the veto powers to agree to the Statute. The prosecutor's right, corresponding to the powers of the prosecutor of the ICTY and ICTR; to initiate investigations of his or her own accord was viewed as an indispensable guarantor of the court's independence".

⁷ See generally, Rome Statute of The International Criminal Court, Articles 5 – 20 Available at <<http://cil.nus.edu.sg/rp/il/pdf/1998%20Rome%20Statute%20of%20the%20International%20Criminal%20Court-pdf.pdf>> Accessed 26 February 2014.

Interestingly, it is some of these provisions as embedded in the statute that put the ICC prosecutor in a discomfited position whereby exercising prosecutorial discretion is not much of a choice.

Notably, the Office of The prosecutor (OTP) is an organ of the ICC created under the statute and under a peremptory duty to act independently and be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.⁸ In doing so a member of the Office shall not seek (theoretically) or act on instructions from any external source.⁹

3.2 The Contours of Prosecutorial Discretion under the ICC Statute: Historical Genesis

As already put¹⁰ prosecutorial discretion is the authority to or not to assert power, or not to assert it to the full extent authorized by the law¹¹ and whose origin under the Rome Statute is traceable to the first draft of treaty that would eventually become the Rome statute produced by the International Law Commission (ILC) in 1994.¹² Although the draft itself did not allow the prosecutor to initiate a case in absence of either state or Security Council (SC) referral, it however formed a formidable basis upon which the Preparatory Committee delegates would explore a possibility of entrenching powers of the prosecutor to act *proprio motu* in the final statute.¹³ The ILC in its astuteness had held that *proprio motu* powers were not advisable ‘at the present stage of development of the international legal system’.¹⁴

⁸Article 42(1) ICC Statute.

⁹Ibid.

¹⁰See chapter 2 generally

¹¹K.Stith, ‘The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion’ (2008) 117 Yale Law Journal 1420, 1422.

¹²See generally, Draft Statute For the International Criminal Court in Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10. Available at <http://legal.un.org/ilc/documentation/english/A_49_10.pdf> Accessed 21 March 2014. For a brief history see also Christopher Keith Hall, ‘The Powers and the Role of the Prosecutor of International Criminal Court in Global Fight Against Impunity’ (2004) 17 Leiden Journal of International Law 12, 124.

¹³Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 American Journal of International Law 510,513.

¹⁴Ibid.

Once negotiations turned on to the Preparatory Committee, delegates suggested that the prosecutor should have the ability to initiate investigations based on information received from non state sources such as individuals and nongovernmental organizations (NGOs).¹⁵ The question whether or not to authorize the prosecutor to initiate investigations without a state or SC referral became one of the most litigious issues in the negotiations over the statute.¹⁶ Both the cohorts and the challengers of a prosecutor with *proprio motu* powers pivoted their cases on trepidations of politicizing the court. Challengers opined that the prosecutor could become either a ‘lone ranger running wild’¹⁷ around the world targeting highly sensitive political situations or a weak figure who would be subject to manipulation by states, NGOs, and other groups who would seek to use the power of the ICC as a bargaining chip in political negotiations.¹⁸ Proponents of *proprio motu* powers posited that limiting the prosecutor’s investigatory ability to situations identified by

¹⁵Silvia A.Fernandez de Gurmendi, ‘The Role of the International Prosecutor’ in Roy S.Lee (ed), *Introduction to the International Criminal Court: The Making of the Rome Statute – Issues, Negotiations and Results* (The Hague, Kluwer Law International 1999) 3.

¹⁶Indeed Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 328-329 has explained that three major groupings of states emerged. The first was the group of so called like minded states, which included countries from all regions of the world and was to a large extent led by Canada and Australia. This group favoured a fairly strong court with broad and automatic jurisdiction, the establishment of an independent prosecutor empowered to initiate proceedings, and a sweeping definition of war crimes embracing crimes committed in internal armed conflicts. A second group comprised of the permanent members of the Security Council however minus France and UK which had joined the like minded states. The three remaining permanent members, and in particular the USA, were opposed to automatic jurisdiction and to granting to the prosecutor the power to initiate proceedings. By the same token they were eager to assign extensive tasks to the Council. This body was to be empowered both to refer matters and to prevent cases from being brought to the court. In addition, these states were opposed both to envisaging aggression among the crimes subject to the court’s jurisdiction, and to including any reference to the use of nuclear weapons among violations of humanitarian law over which court was to exercise jurisdiction. The third grouping embraced members of the non- aligned- movement (NAM). They insisted on envisaging aggression among the crimes provided for in the statute; some of them including Barbados, Dominica, Jamaica, and Trinidad and Tobago pressed for inclusion of drug trafficking while India, Sri Lanka, Algeria and Turkey supported providing for terrorism. They strongly opposed the assignment of any role to the SC and opposed any jurisdiction over war crimes committed in internal armed conflicts. In contrast, they insisted on inclusion of death penalty among possible penalties. A group of distinguished diplomats, and in particular the Canadian Phillipe Kirsch, who chaired the Committee of the Whole (where major points of the draft statute were substantially negotiated) must be credited with having been able skilfully to devise and suggest a number of compromise formulae that in the event permitted the conference to adopt the statute by 120 votes to 7(USA, Israel, Libya, Iraq, China, Syria, Sudan) with 20 abstentions.

¹⁷Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) *97American Journal of International Law* 510,513.

¹⁸Silvia A .Fernandez de Gurmendi, ‘The Role of the International Prosecutor’ in Roy S. Lee (ed), *Introduction to the International Criminal Court: The Making of the Rome Statute – Issues, Negotiations and Results* (The Hague, Kluwer Law International 1999) 181.

overtly political institutions like the states and SC would lead to colossal decimation of the independence and credibility of the court as a whole.¹⁹

NGOs in particular were adamant that limiting the triggering of the ICC's jurisdiction to states and the SC would amount to politicization of the court and further argued that states' historical reluctance to use the existing state complaint procedures in human rights mechanisms indicated that they would be equally disinclined to incur the political costs of referring cases to the ICC.²⁰ The United States (US) on the other hand argued that allowing the prosecutor to initiate investigations based on information from non state entities would submerge the prosecutor with frivolous complaints and for this reason the ICC regime needed a screen which could only be provided by the SC and the states, to distinguish between cases that deserved to be heard by the court and those which did not.²¹ In addition, the United States demanded the power to divest the Prosecutor of the ability to investigate a case if it were being considered by the SC under the Council's Chapter VII authority. Since any member of the Council can put measures on the SC's agenda, under this proposal the United States could have removed any case from the ICC's purview.²² The U.S. position was rejected. The delegates at Rome found making the Court formally subordinate to political institutions, and especially to the SC, incompatible with the purpose of the ICC. In the final version of the Statute, the SC has only limited ability to restrict the prosecutor's discretion.²³ Despite the delegates' rejection of the Security Council as the ultimate regulator of the ICC's jurisdiction, many states recognized the danger posed by arming the prosecutor with unfettered discretion. In March 1998, a few months before the convening of the Rome Conference, Germany and Argentina introduced a proposal that granted the Prosecutor *proprio motu* powers but also provided a check on his discretion at an early stage of the

¹⁹ Ibid 178.

²⁰ Lawyers Committee for Human Rights, 'The International Criminal Court: Trigger Mechanism and The Need for an Independent Prosecutor' (ICC Briefing No. 4 July 1997) 9-11. Available at <<http://www.iccnw.org/documents/AnalysisICCbyIPB.pdf>> Accessed 22 March 2014.

²¹ See generally, 'Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before Sub Committee on International Operations of the Committee on Foreign Relations United States Senate (One Hundred Fifth Congress Second Session July 23, 1998)'. Available <<http://www.gpo.gov/fdsys/pkg/CHRG-105shrg50976/html/CHRG-105shrg50976.htm>> Accessed 22 March 2014.

²² Lionel Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16' in Roy S. Lee *Introduction to the International Criminal Court: The Making of the Rome Statute – Issues, Negotiations and Results* (The Hague, Kluwer Law International 1999) 150.

²³ Rome Statute of The International Criminal Court, Article 16.

investigation.²⁴ According to this proposal, the prosecutor's independent decision to initiate an investigation would be subject to judicial review by a pretrial chamber before the prosecutor could actually proceed with the investigation. This proposal was eventually incorporated into the Rome Statute, which allows for the Prosecutor to commence investigations on his own initiative.²⁵ This axiomatically created an avenue for exercising his discretion which forms the basis of this paper.

3.3 Prosecutorial Discretion under the ICC Statute: Preconditions to the ICC Trial Processes

It is worth noting that the exercise of prosecutorial discretion in the ICC processes is not that mechanical. Before the prosecutor can exercise his discretion, certain prerequisites must be met as hereunder delineated.

3.3.1 Jurisdiction

Jurisdiction has simply been defined as the practical authority granted to a formally constituted legal body or political leader to deal with and make pronouncements on and, by implication, to administer justice within a defined area of responsibility.²⁶ The quintessence of jurisdiction was demonstrated by the Kenya Court of Appeal²⁷ when it stated thus:

Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

In fact, the ICC itself has in the Decision on the Confirmation of Charges in the case of *The Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang*²⁸ underscored the importance of jurisdiction by stating thus:

²⁴ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 American Journal of International Law 510,515.

²⁵ Ibid.

²⁶ Steve Ouma, *A Commentary on the Civil Procedure Act CAP 21* (Nairobi, Law Africa Publishing (K) Ltd 2010) 11.

²⁷ *The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd* (1989) KLR.

²⁸ *Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang* Pre Trial II, Decision on the Confirmation of Charges, ICC- 01/09-01/11 para. 24.

This chamber has stated on different occasions that, regardless of language of article 19(1) of the statute, which requires an assessment of whether the court has the competence to adjudicate the case *sub judice*, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential component in the exercise of any judicial body of its functions and is derived from the well recognized principle of *la competence de la competence*.

Correspondingly, the prosecutor may involve himself only in cases where the court has jurisdiction to intervene. Under the Rome Statute, the ICC jurisdiction and - by extension the prosecutor's- is limited to cases alleging the commission of crimes against humanity, war crimes or genocide as defined under the statute.²⁹ The crimes must have occurred after July 1, 2002, the date of entry into force of the Statute.³⁰ Unless the Security Council has referred the relevant situation to the prosecutor, the ICC (and the prosecutor) will not have jurisdiction over the case unless either the state where the alleged crime has occurred or state whose national is accused of committing the crime has ratified the Statute.³¹ Generally however, the prosecutor must have familiarized himself with the provisions of Article 20 of the Statute on *ne bis in idem* which may loosely be translated to mean the rule against double jeopardy.³²

²⁹For an exposition, see the Rome Statute, Articles 5-8.

³⁰Ibid Article 11 basically on Jurisdiction *Ratione Temporis*. See also Thomas Hethe Clark, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance' (2005) 4 Washington University Global Studies Law Review 389,394-395. See also Joseph M. Isanga, 'International Criminal Court Ten Years Later' (2013) 21 Cardozo Journal of International and Comparative law 235, 264. The author states '...the chamber concludes that this expression means "that an examination of the necessary jurisdictional prerequisites under the statute must be undertaken. Citing to the jurisprudence of the ICC, the chamber noted that: For a crime to fall within the jurisdiction of the court it has to satisfy the following conditions: (1) it must fall within the category of crimes referred to in article 5 and defined in articles 6,7, and 8 of the statute (jurisdiction *ratione materiae*); (II) it must fulfill the temporal requirements specified under article 11 of the statute (jurisdiction *ratione temporis*); and (III) it must meet one of the two alternative requirements embodied in article 12 of the statute (jurisdiction *ratione loci* and jurisdiction *ratione personae*).

³¹Ibid Article 12 (3).

³²See generally Tijana Surlan, '*Nebis in idem* in Conjunction With the Principle of Complementarity' Available at <http://www.esil-sedi.eu/sites/default/files/Surlan_0.PDF> Accessed 25 March 2014. See also, Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An introduction to International Criminal Law and Procedure* (2nd Edition Cambridge University Press 2013) 80.

3.3.2 Triggering Authority

The Rome Statute envisages three trigger mechanisms whereby *notitia criminis* may be received by the prosecutor.³³ They include Security Council referral,³⁴ state party referral³⁵ and prosecutorial own initiative.³⁶ The first two mechanisms are a manifestation of state sovereignty through either the action of one state or that of the international community, acting collectively through the Security Council and further, they correspond closely to the conception presented in the draft statute prepared by the ILC and submitted to the UNGA in 1994³⁷ whereby the court was to be a facility available to states parties to its statute and in certain cases to the Security Council, who alone were empowered to initiate investigations.³⁸ The third mode was a post ILC drafting phase innovation and allows the prosecutor to identify crimes within the jurisdiction of the court that he proposes to investigate, although judicial authorization is required for him to proceed.³⁹ It is however worth noting that whatever trigger mechanism is employed, once this has taken place, the prosecutor has great discretion in the selection of cases.⁴⁰

3.3.3 Admissibility

The prosecutor will only exercise his mandate if the case is admissible. The admissibility provisions in the Rome Statute have several consequences to the prosecutor. First, they ensure that his prosecutions are complementary to national prosecutions⁴¹ and they restrict his *proprio*

³³Matthew R Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 Journal of International Criminal Justice 71, 77. See also Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 399- 400. See also Daniel D NtandaNsereko, 'Triggering The Jurisdiction of the International Criminal Court' (2004) 4 African Human Rights Law Journal 263- 273.

³⁴Rome Statute, Article 13

³⁵Ibid Article 14.

³⁶Ibid Article 15.

³⁷William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 Journal of International Justice 731, 734.

³⁸Silvia A. Fernandez de Gurmendi, 'The Role of the International Prosecutor' in Roy S. Lee (ed), *Introduction to the International Criminal Court: The Making of the Rome Statute – Issues, Negotiations and Results* (The Hague, Kluwer Law International 1999) 175- 188.

³⁹William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 Journal of International Justice 731, 734.

⁴⁰Luc Cote, 'International Criminal Justice: Tightening up The Rules of the Game' (2006) 88 International Review of the Red Cross 133, 135.

⁴¹Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the

motu powers thus creating a complex and potentially politically charged series of procedural hurdles that he must negotiate.⁴² The prosecutor must according to Article 15 ‘analyze the seriousness of the information from states, organs of the UN, NGO’s or intergovernmental organizations or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the court’⁴³ and if he decides that there is a reasonable basis to proceed with investigation, he must so notify all states that would normally exercise jurisdiction over the crime.⁴⁴ Where one of these states enlightens the prosecutor that it is or has investigated the architects within its jurisdiction and requests the prosecutor not to proceed, he is obliged to

International Criminal Court’ (2003) 97 *American Journal of International Law* 510,517. See also Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008)342 -344 whereby he states: ‘In contrast, the ICC is based on the principle of complementarity whereby the court is subsidiary or complementary to national courts..... complementarity is laid down in paragraph 10 of the preamble as well as in article 1 of the statute and is spelt out in articles 15, 17,18 and 19. In short the court is barred from exercising jurisdiction over a crime whenever a national court assert its jurisdiction over the same crime and (i) under its national law the state has jurisdiction; (ii) the case is being duly investigated or prosecuted by its authorities or these authorities have decided, in a proper manner, not to prosecute the person concerned; and (iii) the case is not of sufficient gravity to justify action by court (ex art 17). In addition, the court (iv) may not prosecute and try a person who has already been convicted of or acquitted for the same crimes, if the trial was fair and proper (articles 17 c and 20). The court is instead authorized to exercise its jurisdiction over a crime, even if a case concerning a crime is pending before national authorities, and thus to override national criminal jurisdiction, whenever; (i) the state is unable or unwilling genuinely to carry out investigations or prosecution or its decision not to prosecute the person concerned has resulted from its unwillingness or inability genuinely to prosecute that person; and (ii) the case is of sufficient gravity to justify the exercise of court’s jurisdiction. The question, of course, arises as to what is meant by ‘unwillingness’ or ‘inability’ of a state to prosecute or try a person accused or suspected of international crimes. These two notions are spelt out in article 17(2) and (3). A state may be considered as ‘unwilling’ when: (i) in fact the national authorities have undertaken proceedings for the purpose of shielding the person concerned from criminal responsibility; or (ii) there has been an unjustified delay in the proceedings showing that in fact the authorities do not intend to bring the person concerned to justice; or (iii) the proceedings are not being conducted independently or impartially or in any case in a manner showing the intent to bring the person to justice. A state is ‘unable’ when, chiefly on account of a total or partial collapse of its judicial system, it is not in a position: (i) to detain the accused or to have him surrendered by the authorities or bodies that hold him in custody; or (ii) to collect the necessary evidence; or (iii) to carry out criminal proceedings. One should also add cases where the national court is unable to try a person not because of a collapse of or malfunctioning of judicial system, but on account of legislative impediments, such as amnesty law, or a statute of limitation, making it impossible for the national judge to commence proceedings against the suspect or the accused. Complementarity applies not only with regard to state parties to the ICC statute but also with respect to states non parties (see article 18(1)). Thus for instance, if the national of a state non party (A) has committed an international crime on the territory of a state party (B) and then escapes to another state non party (C), and this state asserts its jurisdiction on the ground that the crime is provided for in an international treaty and the suspect is present on its territory (the *forum deprehensionis* principle) or on ground of universality, the ICC may not exercise jurisdiction if it is proved that C is willing and able to conduct proper and fair trial. Complementarity applies whatever the trigger mechanism of the Court’s proceedings.....”

⁴²Danner, Ibid.

⁴³Brian D Lepad, ‘How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles’ (2010) 43 *John Marshall Law Review* 553,554.

⁴⁴Rome Statute, Article 15(6)

defer to that state's investigation.⁴⁵ The prosecutor is however allowed to challenge the state's assertion that the case is inadmissible in the ICC because of an ongoing domestic investigation or prosecution and may urge the pre trial chamber to find a case admissible in the face of a domestic investigation or prosecution if the state is unwilling or unable to investigate or prosecute the case. In *The Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang* the prosecutor successfully challenged Kenya's application to defer the case on account of inadmissibility.⁴⁶

The Appeals Chamber in dismissing the application stated:

The Admissibility Challenge that gave rise to the present appeal was brought under article 19 (2) (b) of the Statute in relation to a case in which a summons to appear has been issued against specific suspects for specific conduct. Accordingly, as regards the present appeal, the 'case' in terms of article 17 (1)(a) is the case as defined in the summons. This case is only inadmissible before the Court if the same suspects are being investigated by Kenya for substantially the same conduct. The words 'is being investigated', in this context, signify the taking of steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. The mere preparedness to take such steps or the investigation of other suspects is not sufficient. This is because unless investigative steps are actually taken in relation to the suspects who are the subject of the proceedings before the Court, it cannot be said that the same case is (currently) under investigation by the Court and by a national jurisdiction, and there is therefore no conflict of jurisdictions. It should be underlined, however, that determining the existence of an investigation must be distinguished from assessing whether the State is "unwilling or unable genuinely to carry out the investigation or prosecution....."

The admissibility proceedings ought to be handled with caution and sobriety as they define the commencement or pursuance of an investigation by the prosecutor and also for the reason that

⁴⁵Ibid Article 18(2)

⁴⁶*The Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-307 para 41.

the admissibility regime essentially requires the prosecutor to put domestic system justice system to trial.⁴⁷

The Prosecutor will have to prove either that a state's criminal justice system is incompetent or that it is being manipulated by the state's government. These questions have far-ranging political overtones, and generally pose a significant challenge for the ICC's prosecutor.⁴⁸

3.4 Prosecutorial Discretion at the ICC: Understanding the Bedrock

As already stated⁴⁹ discretion impels prosecutors to reach decisions that collectively impinge on the criminal justice as a whole⁵⁰ thus obliging them to make judgments about the purpose and priorities of their particular systems.⁵¹ Thus, prosecutorial function assumes a special importance in criminal systems characterized by a large measure of prosecutorial discretion.⁵² Undeniably, the prosecutor exercises his discretionary roles most profoundly in investigations, screening and choosing charges and determining admissibility as rightly observed in *Prosecutor v Akayesu*⁵³ whereby the ICTR Appeals Chamber insisted thus:

Investigation and prosecution of persons responsible for serious violations within the jurisdiction of the Tribunal fall to the prosecutor and.....it is her responsibility to 'assess the information received or obtained and decide whether there is sufficient basis to proceed. 'In many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and can not realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdictions. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. The prosecutor has a broad discretion in relations to the initiation of investigations and preparation of indictments.....'.

The following therefore typifies the areas in which the ICC prosecutor has the greatest discretion.

⁴⁷Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97American Journal of International Law 510,517.

⁴⁸Ibid.

⁴⁹See Chapter 2 generally

⁵⁰Giuseppe Di Federico, 'Prosecutorial Independence and the Democratic Requirement of Accountability in Italy' (1998) 38 British Journal of Criminology 371, 378.

⁵¹Gerard E. Lynch, Phillip K. Howard, 'Special Prosecutors: What's the Point?' Washington Post (Washington DC, 28 May 1995) 7.

⁵²Danner (n 13) 519

⁵³*Prosecutor v Akayesu* Judgment, ICTR-96-4-A, Appeals Chamber, 1 June 2001, 94-96.

3.4.1 Investigations

Undeniably, the prosecutor under the ICC regime is vested with discretionary power to pursue an investigation and the related power to decline the same.⁵⁴ Specifically, the OTP is assigned the responsibility of receiving referrals and any substantiated information on crimes within the jurisdiction of the court and conducting investigations and prosecutions before the court.⁵⁵ Consequently, he faces an avalanche of complaints from NGO's, victims and other individuals alleging commission of crimes within the court's jurisdiction.⁵⁶ He may also be triggered into action by the Security Council or states.⁵⁷ Incontestably, the prosecutor is therefore left in a situation whereby he has to exercise discretion in deciding what to investigate and what to ignore. Furthermore, the ICC Rules of Procedure and Evidence, as well as certain articles in the Statute, establish that the prosecutor may exercise his discretion to decline to investigate cases, even where he believes that a crime within the jurisdiction of the court has occurred.⁵⁸ Moreover, resource constraints, a potent brake even on over prosecution in domestic systems will also limit the ICC prosecutor's ability to pursue all meritorious cases.⁵⁹ Given that the ICC prosecutor is enjoined to establish the truth of the events in question and also to investigate incriminating and exonerating circumstances equally,⁶⁰ his duty to investigate is broad and requires enormous resources than what would ordinarily be required on a search based solely on

⁵⁴ Annalisa Campi, 'The Law and Practice of International Courts and Tribunals' (March 2004) Vol. 1 issue 3, 143,146 Available <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/lpict3&div=3&id=&page=>> Accessed 1 April 2014. See also Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34 *Fordham International Law Journal* 1584, 1598. See also Margaret M. de Guzman, 'Choosing To Prosecute: Expressive Selection at The International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265, 275.

⁵⁵ The Rome Statute, article 42. See also Daniel D. Ntanda Nsereko 'Prosecutorial Discretion Before National Courts and International Tribunals' (University of Botswana) 12. Available at <https://www.google.co.ke/search?q=Daniel+D.+Ntanda+Nsereko+%E2%80%98Prosecutorial+Discretion+Before+National+Courts+and+International+Tribunals%E2%80%99&ie=utf-8&oe=utf-8&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gws_rd=cr&ei=xRNUUpfeDcjS4QSi5oCADA> Accessed 1 April 2014.

⁵⁶ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, 519.

⁵⁷ William A. Schabas, *An Introduction to the International Criminal Court* (2nd edition Cambridge University Press 2004) 100. The author notes the likelihood of some states lobbying the prosecutor to initiate investigations *proprio motu*, even if the state could have referred the case to the prosecutor itself. The result would be the same, but they will save diplomatic discomforts that accompany public denunciation.

⁵⁸ Ibid. See for example Article 53. The prosecutor may decline to investigate in "interest of justice".

⁵⁹ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, 519.

⁶⁰ Rome Statute, Article 54(1)

incriminating evidence. This unavoidably highlights the necessity of prosecutorial discretion to prevent overwhelming the investigatory functions of the OTP.

Selectivity in light of limited resources is particularly more pronounced in the ICC as the court has permanent jurisdiction over a high number of potential cases.⁶¹ Obligating the prosecutor to launch investigations into all such cases would be a practical impossibility and therefore, the prosecutor is expected to be highly selective both in launching an investigation against only those individuals liable for the most serious offences and, as there are no official means to plea bargain, in selecting the charges to be applied.⁶²

Similarly as international criminal courts and tribunals have historically been established in the wake of widespread armed conflicts, these courts have jurisdiction over, potentially, thousands of cases thus making the trial of every potential offence a practical impossibility and the prosecutor must as a matter of necessity be selective in deciding which cases to investigate in order not to overload the system.⁶³ This additionally forms one of the numerous reasons for including prosecutorial discretion within the ICC mandates.

A more principled reason for anchoring prosecutorial discretion into the ICC Statute is that it forms the cornerstone of prosecutorial independence given that it insulates the prosecutor from political interests and promotes impartiality and independence.⁶⁴ Arguably, the ICC will be able to hold all persons accountable regardless of their position or political interests of states only if it exercises discretion to investigate cases independently.⁶⁵

3.4.2 Screening Cases and Choosing Charges

Apart from selecting situations to investigate, the prosecutor determines which individuals to charge and with which crimes.⁶⁶ These screening decisions undoubtedly shape the content of the

⁶¹Cianiello M and Illuminati G, 'From the International Criminal Tribunal For the Former Yugoslavia to The International Criminal Court', (2001) 26 North Carolina Journal of International Law and Commercial Regulation 407, 440.

⁶²Ibid.

⁶³Matthew R Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 Journal of International Criminal Justice 71, 75.

⁶⁴Ibid 76.

⁶⁵Ibid.

⁶⁶William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 Journal of International Justice 731, 734.

cases to be heard by the ICC and determine the overall direction of the institution.⁶⁷ The statute also rubberstamps the prosecutor's discretion to screen and select charges by declaring that that the OTP, 'shall act independently as a separate organ of the court'⁶⁸ and further that no external entity can direct the prosecutor to charge cases against particular individuals.⁶⁹ Screening determinations will be particularly difficult for the prosecutor. The kind of crimes that fall within the court's jurisdiction are typically committed by multiple perpetrators, not all of whom could be tried by the court because of constraints on its resources.⁷⁰ This problem has been articulated by the prosecutor of the *ad hoc* tribunals for Yugoslavia and Rwanda in her address to the SC⁷¹ who states that 'even limiting her focus to high level accused, she has been forced to select cases from "many thousands of significant targets"'. That any prosecutions in an international forum will necessarily involve only a few accused rather than the many that might have been pursued highlights the problem posed by discretion; it can be used in a way that produces arbitrary or even worse, discriminatory results.⁷² Discretion makes easy the arbitrary, the discriminatory and the oppressive and produces inequality of treatment⁷³ and the fact that the Rome Statute is almost totally silent with policy questions about which potential accused should be pursued by the prosecutor exacerbates the situation.⁷⁴ While the statute provides that the Court has jurisdiction over persons for the most serious crimes of international concern it does not however provide guidance on how the prosecutor should treat this provision.⁷⁵

In addition, the prosecutor will have to determine which charges to bring against the individuals he has decided to prosecute.⁷⁶ Conspicuously, deciding how many charges to bring and for what

⁶⁷ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 American Journal of International Law 510,520.

⁶⁸ The Rome Statute, Article 42(1).

⁶⁹ Ibid.

⁷⁰ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 American Journal of International Law 510,520.

⁷¹ ICTY Press Release GR/P.I.S/ 642 e, Address by Carla Del Ponte to the UN Security Council on 27 November , 2001 Available at <<http://www.icty.org/sid/7926>> Accessed 6 April 2014.

⁷² Charles D. Breitel, 'Controls in Criminal Law Enforcement' (1960) 27 University of Chicago Law Review 427, 429.

⁷³ Ibid.

⁷⁴ Leila Nadya Sadat and Richard S. Carden, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 Georgia Law Journal 381, 408.

⁷⁵ The preamble and also Articles 1, 5 and 8.

⁷⁶ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 American Journal of International Law 510,521.

kind of crimes will significantly affect the complexity, length and character of individual cases heard by the court. Furthermore, the significance of the prosecutor's charging decisions takes on heightened importance in the light of the statute's disavowal of plea bargaining.⁷⁷

While it may be rightly said that the prosecutor has discretion in the choice of charges, it must also be appreciated that this discretion is not untrammelled. The choice is never absolute since it is usually under judicial scrutiny.⁷⁸ Precisely, the PTC in *Prosecutor vs. Thomas Lubanga Dyilo*⁷⁹ stated that pursuant to Article 61(7), it could either confirm the charges once it is satisfied that there is sufficient evidence or decline to confirm the charges all together. Interestingly, the PTC may also adjourn the hearing and request the prosecutor to consider amending the charge if the evidence submitted appears to establish a different crime within the jurisdiction of the court.⁸⁰ The discretionary powers to amend charges are also under judicial watch. After charges have been confirmed, the prosecutor may only amend charges after the PTC has permitted and after notice to the accused.⁸¹ Moreover if the prosecutor wishes to bring additional charges or substitute more serious charges, a hearing to confirm the charges must be held.⁸² Arguably, the control powers by the PTC at the confirmation stage have potential to influence charges in a particular case and charging practice in general.

Additionally, it is also worth noting that the TC in its decision under Article 74, may change the legal characterization of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.⁸³ Once done in the right manner, the recharacterization has the capability of curtailing the prosecutor's discretion in dealing with his initial choice of charges more so because it may result to prosecutor prosecuting something other than he planned to do based on evidence available to him.⁸⁴ The AC in

⁷⁷ Ibid.

⁷⁸ See Article 61 generally.

⁷⁹ Decision on confirmation of charges, ICC-01/04-01/06-803-tEN 14-05-2007 par 33.

⁸⁰ Ibid. See also Article 61(7) (c) (ii)

⁸¹ Article 61(9).

⁸² Ibid.

⁸³ Regulations of the International Criminal Court, Regulation 55(1).

⁸⁴ Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edition Cambridge University Press 2013) 458.

*Prosecutor vs. Thomas Lubanga Dyilo*⁸⁵ noted that Regulation 55 was necessary for the routine functioning of the court and that Article 61(9) did not foreclose the possibility that a TC can modify legal characterization of facts. However, it insisted that these powers may not be used to exceed the facts and circumstances described in the charges and amendment thereto.⁸⁶ Moreover, the new facts and circumstances not described in the charges may only be added under article 69(1) of the Statute.⁸⁷ Otherwise, to give TC the power to extend *proprio motu* the scope of trial to facts not alleged by the prosecutor would be contrary to distribution of power under the statute.⁸⁸

3.4.3 Determining Admissibility

Generally, it must be appreciated that the Rome Statute bestows upon the prosecutor both the obligatory and discretionary powers in determination of admissibility. For example, when seeking authorization to open an investigation, the prosecutor is obligated to satisfy the Pre-Trial Chamber through tendering of ‘any supporting material collected’ that the situation or a case is admissible.⁸⁹ The victims may also make presentations in support thereof to the Pre-Trial Chamber in accordance with the Rules of Procedure and evidence.⁹⁰ Moreover, during the confirmation of charges hearing, the prosecutor is under a duty to ‘support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged’.⁹¹ Adherence to these provisions is imperative since acting contrary thereto may lead to undesirable results for the OTP including a decline of an authorization to investigate⁹² and non confirmation of charges.⁹³

On the other hand, Article 19 of the Statute allows a party to mount an admissibility challenge and equally, the regime also confers upon the ICC prosecutor discretion to challenge or not to

⁸⁵ Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2205.

⁸⁶ Ibid, par.88

⁸⁷ Ibid, par.94.

⁸⁸ Ibid.

⁸⁹ Article 15.

⁹⁰ Ibid.

⁹¹ Article 61(5).

⁹² Article 15 (5).

⁹³ Article 61(7) (b).

challenge a party's assertion of inadmissibility.⁹⁴In this regard, the prosecutor has discretion to demonstrate to the ICC that the concerned state is unable or unwilling genuinely to carry out investigations or prosecution or its decision not to prosecute the person concerned has resulted from its unwillingness or inability to genuinely prosecute that person; and secondly the case is of sufficient gravity to justify the exercise of court's jurisdiction.⁹⁵

The prosecutor's discretion with regard to this question carries unmistakable political overtones. Moreover, the admissibility regime particularly the prosecutor's ability to challenge a state's willingness to investigate or prosecute forces the prosecutor to decide whether and when to pit the credibility of the court against a state whose leaders presumably deny that they are unwilling to prosecute.⁹⁶Therefore, the high stakes nature of admissibility questions further highlights the importance of prosecutorial discretion.⁹⁷

3.5 Controlling Prosecutorial Discretion at the ICC: Threshold and Limitations

As hereinbefore noted, prosecutorial discretion is a concept already generally embedded in the Rome Statute. Opinions however differ on whether or not proper checks are in place to avoid its misuse which may amount to discrimination, ill will and a generalized miscarriage of justice.⁹⁸The questions that supplicate for responses at this juncture are whether or not there exist any checks on the enormous discretion wielded by the prosecutor and whether or not the same are sufficient so as to diffuse fears that they are inadequate. It is opined herein that the statute provides for checks but some are generally inadequate on account of the fact that their contours are ill demarcated and consequently there is need for a remedy.

⁹⁴See for example *The Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute, ICC-01/09-01/11-307.

⁹⁵ Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008)342 -344.

⁹⁶ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97American Journal of International Law 510,521.

⁹⁷ Ibid.

⁹⁸See Charles D. Breitel, 'Controls in Criminal Law Enforcement' (1960) 27 University of Chicago Law Review 427, 429 and also Leila Nadya Sadat and Richard S. Carden, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 Georgia Law Journal 381, 408.

3.5.1 Judicial Control of Prosecutorial Discretion

It must be appreciated that the exercise of prosecutorial discretionary powers by the OTP are at various stages subjected to judicial control. Compared to other control mechanisms (reasonable basis test, gravity threshold and interests of justice- discussed below), judicial control is less controversial simply because the Statute has, to its credit, laid bare on how it is to be applied. Judicial control is as provided under certain provisions which are; Article 15 relating to authorization on commencement of investigations, Article 61 on confirmation of charges and Regulation 55 on the recharacterization of facts.

3.5.1.1 Judicial Control on Commencement of Investigations

On basis of information from any reliable source including Inter- Governmental Organizations and NGOs the Prosecutor can initiate investigations ex officio.⁹⁹ If he is of the opinion that a reasonable basis for an investigation exists, he must apply to the PTC for permission to proceed with the investigations.¹⁰⁰ Only if the PTC is satisfied that there is sufficient basis for an investigation can the Prosecutor actually commence the proper investigations.¹⁰¹ If, according to the PTC, a sufficient basis is lacking, the Prosecutor may only present another request on the basis of other facts or fresh evidence.¹⁰² If before applying to the PTC, the Prosecutor realizes that the information is insufficient, he must inform the parties concerned. This does not however preclude further investigations on basis of fresh evidence.¹⁰³ Arguably, this is not an onerous burden.¹⁰⁴ The Prosecutor may discharge it by merely showing that “there is smoke”; and there can no smoke without fire.¹⁰⁵ Simply, representations of states and credible reports from reputable Inter- Governmental Organizations, NGOs and media houses should suffice to provide the necessary basis for the investigations.

⁹⁹ Articles 13 (c) in conjunction with Article 15

¹⁰⁰ Ibid, Article 15(3).

¹⁰¹ Article 15(4).

¹⁰² Article 15(5).

¹⁰³ Article 15(6).

¹⁰⁴ Daniel D. Ntanda Nsereko ‘Prosecutorial Discretion Before National Courts and International Tribunals’ (University of Botswana) 13. Available at <https://www.google.co.ke/search?q=Daniel+D.+Ntanda+Nsereko+%E2%80%98Prosecutorial+Discretion+Before+National+Courts+and+International+Tribunals%E2%80%99&ie=utf-8&oe=utf-8&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gws_rd=cr&ei=xRNUUpfeDcjS4QSi5oCADA> Accessed 22 November 2014.

¹⁰⁵ Ibid.

3.5.1.2 Judicial Control During the Confirmation of Charges

On receiving authorization, the Prosecutor must investigate incriminating and exonerating circumstances.¹⁰⁶ If, after the investigation, the prosecutor determines that there exists sufficient evidence to establish substantial ground to believe that a given suspect committed a crime within the Statute he must proceed to prepare the appropriate charges which the PTC must confirm.¹⁰⁷ Backed with sufficient evidence, the Prosecutor must satisfy the PTC that there exist substantial grounds to believe that the indictee committed each of these crimes charged.¹⁰⁸ The PTC may either confirm the charges once it is satisfied that there is sufficient evidence or decline to confirm the charges all together.¹⁰⁹ Interestingly, the PTC may also adjourn the hearing and request the prosecutor to consider amending the charge if the evidence submitted appears to establish a different crime within the jurisdiction of the court.¹¹⁰ Notably, after charges have been confirmed, the prosecutor may only amend charges after the PTC has permitted and after notice to the accused.¹¹¹ Moreover if the prosecutor wishes to bring additional charges or substitute more serious charges, a hearing to confirm the charges must be held.¹¹² On charges withdrawal, the OTP may only do so with the permission of the TC where it is done after the trial has commenced and needless to say, the Chamber will not automatically grant the request.¹¹³

3.5.1.2 Judicial Control and the Recharacterization of Facts

The recharacterization of facts stems from a renowned principle *iura novit curia* (the court knows the law) whereby the Prosecutor's legal characterization is not binding but merely a recommendation¹¹⁴ and therefore allowing a TC to 'modify the legal characterization of facts; that is, to determine that the facts and circumstances pleaded in the charges should be characterized as a different crime or a different form of participation from that which prosecutor has chosen. At the ICC, Regulation 55 of the Court Regulations establishes the principle. Done rightly, the recharacterization has the capability of curtailing the prosecutor's discretion in

¹⁰⁶ Article 54(1).

¹⁰⁷ Article 61.

¹⁰⁸ Article 61(7).

¹⁰⁹ *Prosecutor vs. Thomas Lubanga Dyilo* Decision on confirmation of charges, ICC-01/04-01/06-803-tEN 14-05-2007 par 33.

¹¹⁰ *Ibid.* See also Article 61(7) (c) (ii).

¹¹¹ Article 61(9).

¹¹² *Ibid.*

¹¹³ Article 61(9).

¹¹⁴ Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edition Cambridge University Press 2013) 458.

dealing with his initial choice of charges more so because it may result to prosecutor prosecuting something other than he planned to do based on evidence available to him.¹¹⁵

In *Prosecutor vs. Thomas Lubanga Dyilo*,¹¹⁶ the AC had an opportunity to give an exposition on the context in which the TC could recharacterize facts. This was after the TC had after the victims' representatives sought an additional legal characterization of the facts as sexual slavery, a war crime or crime against humanity under the Rome Statute, and inhuman and/or cruel treatment as a crime against humanity under the Statute, allowed the same. The application for re-characterization referenced the testimony of numerous prosecution witnesses indicating that the FPLC's child conscripts endured inhuman and cruel treatment as well as sexual violence.¹¹⁷ The victims' representatives also highlighted U.N. reports that FPLC child soldiers were exposed to hard labour, food rations and grueling punishment and that girls in particular were recruited by the militia as sex slaves.¹¹⁸ On the basis of such evidence already in the record, the victims' representatives argued, the charges against Lubanga should be supplemented to include inhuman/cruel treatment and sexual slavery.¹¹⁹

While allowing the re-characterization, the TC opined that sub-regulation (2) did not expressly limit a legal characterization to the facts and circumstances described in the charges and that any re-characterization under this provision - that is, any re-characterization during trial- could exceed the factual scope of the charges.¹²⁰ As further support for its conclusion, the majority reasoned that the due process procedures set out in sub-regulation (3) would only be necessary if new factual bases for charges were allowed.¹²¹

¹¹⁵ Ibid.

¹¹⁶ Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2205.

¹¹⁷ *Prosecutor v. Lubanga*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, Case No. ICC-01/04-01/06.

¹¹⁸ Ibid, par.23.

¹¹⁹ Ibid, par.42.

¹²⁰ *Prosecutor v. Lubanga*, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06 par.31.

¹²¹ Ibid par. 29-31. In particular, 'A right to call new evidence or to examine previous witnesses is only relevant to challenge evidence that is provided to substantiate a different factual basis.

While reversing the TC's ruling, the AC¹²² observed *inter alia* that Regulation 55 was necessary for the routine functioning of the court. However, it insisted that these powers may not be used to exceed the facts and circumstances described in the charges and amendment thereto.¹²³ Moreover, the new facts and circumstances not described in the charges may only be added under article 69(1) of the Statute.¹²⁴ Otherwise, to give TC the power to extend *proprio motu* the scope of trial to facts not alleged by the prosecutor would be contrary to distribution of power under the statute.¹²⁵ The AC also found Trial Chamber I's justification for permitting a change in the legal characterization of the facts "extremely thin" because no details on the elements of the offences to be considered were included nor was there any analysis on how such elements might be covered by the facts and circumstances described in the charges.¹²⁶

As already observed, the judicial control mechanism is far less controversial when compared with other mechanisms discussed below. This may be attributable to the fact that, unlike others, it is never marred with OTP's subjectivity.

3.5.2 Reasonable Basis Test

The reasonable basis test is captured under articles 15 and 53 of the statute wherein is provided thus:

Article 15 (3) If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

¹²² Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2205.

¹²³ Ibid, par.88

¹²⁴ Ibid, par.94.

¹²⁵ Ibid.

¹²⁶ Ibid, par.109.

15(6) If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation; he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 53 (1) The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.

From the foregoing, it is noticeable that the ICC prosecutor must determine that there is or there is no reasonable basis to proceed before he can initiate an investigation based on information available to him.¹²⁷ If he has the basis, he must submit a request for authorization to a pre-trial chamber of the court which may then authorize the commencement of an investigation if it believes there is such a reasonable basis and the case appears to fall within the jurisdiction of the court.¹²⁸ Although this has been lauded as a positive step towards depoliticizing the investigation process,¹²⁹ the same is however enshrouded in a mist of confusion which arises from two circumstances. First, as various authors¹³⁰ have rightly held, the criteria for deciding whether to initiate an investigation rely largely on subjective decision by the prosecutor. It is his preserve to

¹²⁷Brian D Lepard, 'How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles' (2010) 43 *John Marshall Law Review* 553,554.

¹²⁸ Kai Ambos, 'The International Criminal Court and The Traditional Principles of International Cooperation in Criminal Matters' in *The Finnish Yearbook of International Law* (Volume IX Kluwer law International 1998) 417.

¹²⁹For example see William A. Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43 *John Marshall Law Review* 535,541. The author opines: Thus, for the first time, we have an international criminal tribunal where the choice of situations and investigations for prosecution is the prerogative of a judicial official within the institution and not a political body outside it. For most supporters of the Court, this is viewed as its great strength. The Court is largely, if not purely, "depoliticized." The "victor's justice" charge is thereby defeated.

¹³⁰For example Avril McDonald and Roelof Haveman, 'Prosecutorial Discretion – Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion By the Prosecutor of the ICC' (2003)3. Available <http://www.issafrica.org/anij/uploads/McDonald-Haveman_issues_relevant.pdf> Accessed 6 April 2014.

make the subjective calculation on what is reasonable.¹³¹ This is quite precarious given that even the Statute, the Rules of Procedure and Evidence (RPE) and even the Regulations of the court have not defined what the term “reasonable basis” means as rightly observed by the ICC pre Trial Chamber II¹³² by averring thus:

Of the three outlined standards, the closest to the "reasonable basis to believe" found in article 53(1)(a) of the Statute is the one required for the issuance of a warrant of arrest pursuant to article 58 of the Statute. Article 58 of the Statute uses almost the same wording, "reasonable grounds to believe", but this standard, as explained below, has a completely different object and purpose. It applies to the criminal responsibility of an individual; something which is not at stake for the authorization of an investigation. **Since neither the Statute, the Rules, nor the Regulations of the Court define any of these standards, an independent analysis by the Chamber to define the "reasonable basis to believe" standard is warranted.** (Emphasis added).

Although the pre- Trial Chamber may decline to grant leave for an investigation upon request by the prosecutor, it has still acknowledged that at this particular stage, the information available to the prosecutor is ‘neither expected to be comprehensive nor conclusive, if compared to evidence gathered during the investigation’.¹³³ This consequently sets a low threshold that the prosecutor can easily surmount in his quest to commence investigation.¹³⁴ There is therefore a dire need for ‘objectifying’ or pinning down the largely subjective criteria by identifying criteria which can be applied to determine what the prosecutor may label as reasonable or not.¹³⁵

Secondly, it is worth noting that while the decision to espouse an investigation (on the reason of reasonable basis) is subject to the pre- trial chamber review¹³⁶ the same does not apply when he declines to investigate on determination that there is no reasonable basis to proceed.¹³⁷ The

¹³¹Ibid.

¹³²See The International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC -01/09 par 29.

¹³³Ibid par. 27

¹³⁴The International Criminal Court, *ibid.* See also, Joseph M. Isanga, ‘International Criminal Court Ten Years Later’ (2013) 21 *Cardozo Journal of International and Comparative law* 235, 264.

¹³⁵For example Avril McDonald and Roelof Haveman, ‘Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion By the Prosecutor of the ICC’ (2003)3.

¹³⁶Articles 15 and 53, Rome Statute.

¹³⁷James A. Goldston, ‘More Candor About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court’ (2010) *Journal of International Criminal Justice* 1, 9.

decision not to investigate after referral may only be reviewed when he decides on his own motion not to investigate in ‘interests of justice’ but not otherwise.¹³⁸ In other cases the prosecutor is only required to inform the informants that he has concluded that there is no reasonable basis.¹³⁹ Apparently, this gives the prosecutor a great deal of latitude susceptible to abuse especially when the prosecutor concludes that there is no reasonable basis to proceed in a certain situation even though all the other factors may be indicating otherwise.¹⁴⁰

In summation, the inadequacies bedeviling this test may only be attributed to the dearth of a standard criteria that if formulated would gracefully replace the extant subjectivity which one author has rightly termed as ‘ill sorted and sometimes hazy’.¹⁴¹

3.5.3 The Gravity Criterion

The gravity provisions under Article 53 (1) flow from Article 17 of the Statute. The Articles provide in part thus:

17(1) Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where :.....(d) The case is of sufficient gravity to justify further action by the Court.

53(1) The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether..... (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

Just like the reasonable basis test, the gravity criterion is also controversial¹⁴² yet it has been crucial to the Prosecutor's selection of investigations to initiate and crimes to prosecute¹⁴³ and it

¹³⁸Margaret M.de Guzman, ‘Choosing To Prosecute: Expressive Selection at The International Criminal Court’ (2012) 33 *Michigan Journal of International Law* 265, 275.

¹³⁹Article 15(6)

¹⁴⁰See generally, Melanie O’ Brien, ‘Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/ Small Fish Debate and the Gravity Threshold’ (2012) 10 *Journal of International Criminal Justice* 525.

¹⁴¹Kenneth J Melilli, ‘Prosecutorial Discretion in an Adversary System’ (1992) *Brigham Young University Review* 669,673. See also Luc Cote, ‘Reflections on the Exercise of prosecutorial Discretion in International Criminal Law’ (2005) *Journal of International Criminal Justice* 4.

¹⁴²William A. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 *Journal of International Justice* 731, 735, opines that the notion of gravity is ‘rather enigmatic’.

generally resides at the epicenter of the legal regime of the ICC.¹⁴⁴ The controversy is exacerbated by the fact that even the *travaux préparatoires* fail to shed more light on the meaning of the term ‘gravity’ as provided for in the Statute¹⁴⁵ and further, there is virtually no discussion in academic or judicial sources of the theoretical basis and doctrinal contours of this concept.¹⁴⁶ This has left the concept of gravity to remain a matter of debate. Indeed various authors have conceded that ‘one of the most contentious issues to be considered before initiating an investigation or prosecution is gravity of the crimes’.¹⁴⁷

The ICC however came closest to defining the meaning of the term ‘gravity’ in early 2006 when a three – judge Pre-Trial Chamber (PTC 1) issued a decision setting forth a test for the gravity threshold.¹⁴⁸ Briefly, the Chamber construed that gravity criterion required that the conduct in question be ‘systematic or in a large scale’ and that due consideration be given to the ‘social harm’ such conduct may have caused to the international community.¹⁴⁹ Further, it opined that the gravity threshold required the court to prosecute the ‘most senior leaders suspected of being most responsible for crimes within the jurisdiction of the court in any given situation’.¹⁵⁰

However, the test did not offer any help as the Appeals Chamber rejected it for several reasons.¹⁵¹ First, it contradicted the drafters’ intent to require that all crimes be systematic or

¹⁴³Susana SáCouto, and Katherine A. Cleary, ‘The Gravity Threshold of the International Criminal Court’ (2008) 23 American Journal of International Law 809.

¹⁴⁴Margaret M.de Guzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2009) 32 Fordham International Law Journal 1400. See also Article 1 of the Rome Statute which grants the ICC power to exercise its jurisdiction over persons for the ‘most serious crimes’ of international concern as referred to in the statute. William A. Schabas, ‘Victor’s Justice: Selecting “Situations” at the International Criminal Court’ (2010) 43 John Marshall Law Review 535, 548 also states the notion of ‘gravity’ has now become quite central to the prosecutor’s discourse about selection of situations.

¹⁴⁵Brian D Lepard, ‘How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles’ (2010) 43 John Marshall Law Review 553, 562.

¹⁴⁶Margaret M.de Guzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2009) 32 Fordham International Law Journal 1401.

¹⁴⁷For example Ray Murphy, ‘Gravity issues and the International Criminal Court’ (2006) 17 Criminal Law Forum 281, 282. The author argues that despite its focus on the concept of gravity, the Rome Statute provides little guidance regarding how the ICC should apply its gravity standards.

¹⁴⁸*Prosecutor V. Lubanga Dyilo*, Case No. ICC-01/04-01/06-08 Corr, Decision Concerning Pre- Trial Chamber 1’s Decision and the incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo. Available at <<http://www.icc-cpi.int/iccdocs/doc/doc236260.PDF>> Accessed 14 April 2014.

¹⁴⁹*Ibid* par. 46

¹⁵⁰*Ibid* par. 50

¹⁵¹*Prosecutor V. Lubanga Dyilo*, Case No. ICC-01/04-169- PUB-Exp, Judgment on the Prosecutor’s Appeal Against the Decision of Pre- Trial Chamber 1 entitled “Decision on the prosecutor’s Application for Warrants of Arrest” Available<<http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf>> Accessed 14 April 2014.

large scale in order to pass gravity threshold.¹⁵² The requirement of large scale or systematic conduct was [as court held] inconsistent with the definitions of war crimes within the court's jurisdiction, for which the drafters explicitly rejected such a requirement.¹⁵³ The Chamber also stated that it had not found basis in the Statute for the subjective and conjectural requirement of 'social harm' in the international community.¹⁵⁴ Furthermore it opined that the requirement the target be on the most senior leaders was ill-founded since 'the statute mentions the 'most serious crimes' but not 'most serious perpetrators'.'¹⁵⁵

Despite the Appeals Chamber's rejection of the PTC 1 reasoning, it is poignant that it did not pronounce its own interpretation of gravity threshold provision¹⁵⁶ thus leaving the prosecutor in a flimsy situation fitting to Danner's¹⁵⁷ description of a "lone ranger running wild" coming up with policy papers and regulations on investigations and prosecutions that are habitually analyzed and more often than not trashed by the readers.¹⁵⁸ According to the 2009 OTP Regulations,¹⁵⁹ the prosecutor shall accord preeminence to various factors such as scale of crimes, nature of crimes, manner of commission and the impact¹⁶⁰ in order to assess the gravity of crimes allegedly committed in a given situation. This provision is further buttressed by the

¹⁵²Linda M.keller, 'The Practice of the International Criminal Court: Comments on the Complementarity Conundrum' (2010) 8 Santa Clara Journal of International Law 199,216.

¹⁵³Margaret M.de Guzman, 'Gravity and the Legitimacy of the International Criminal Court' (2009) 32 Fordham International Law Journal 1427.

¹⁵⁴Linda M.keller, 'The Practice of the International Criminal Court: Comments on the Complementarity Conundrum' (2010) 8 Santa Clara Journal of International Law 199,216.

¹⁵⁵ Ibid.

¹⁵⁶Margaret M.de Guzman, 'Gravity and the Legitimacy of the International Criminal Court' (2009) 32 Fordham International Law Journal 1427.

¹⁵⁷Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 American Journal of International Law 510,513.

¹⁵⁸ For Example, William A. Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43 John Marshall Law Review 535,549 has ironically questioned whether the 2009 OTP regulations have brought in the much needed objective criteria in determining gravity. Specifically he states: 'The 'gravity' language strikes the observer as little more than obfuscation, a contrived attempt to make the determinations look objective and judicial.....[therefore] the quest for the judicial prosecutor, one who is above politics, and one who is modeled on domestic prosecutors where all serious crimes against the person are addressed regardless of political considerations, is like looking for the Emerald city. It is as elusive as the search for the end of the rainbow. For this reason, the Rome Statute is incomplete...'

¹⁵⁹International Criminal Court, 'Regulations of the Office of the Prosecutor' ICC-BD/05-01-09 Available at <http://www.iccpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/regulations%20of%20the%20otp.aspx> Accessed 15 April 2014.

¹⁶⁰ Ibid, regulation 29(2)

provisions of the OTP's 2010 Policy Paper on Preliminary Examinations¹⁶¹ which concede that the OTP's assessment of gravity includes 'non exhaustive quantitative and qualitative considerations' based on the prevailing facts and circumstances as stipulated in Regulation 29(2) of the OTP Regulations.¹⁶² The ICC also seems to have adopted this approach¹⁶³ by ruling thus:

In making its assessment, the Chamber considers that gravity may be examined following a quantitative as well as a qualitative approach. Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave. When considering the gravity of the crime(s), several factors concerning sentencing as reflected in rule 145(l)(c) and (2)(b)(iv) of the Rules, could provide useful guidance in such an examination. These factors could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes {i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families. In this respect, the victims' representations will be of significant guidance for the Chamber's assessment.

The ICC seems to be dangerously complacent with the extant state of affairs. As a body legally mandated to come up with precedent setting decisions¹⁶⁴ that would at least settle the ambiguity exhibited by the gravity provisions by coming up with definitive gravity criteria, it has instead, just like the OTP, failed to offer much assistance. This raises two fundamental questions. First, does the applicability of 'non exhaustive quantitative and qualitative considerations' by both the OTP and the ICC contravene one of the cardinal principles of international criminal law namely the principle of legality of crimes?¹⁶⁵ Secondly, is it not therefore true that the powers wielded

¹⁶¹International Criminal Court, 'Policy Paper on Preliminary Examinations' 4 October 2010 Available at <http://www.icc-cpi.int/NR/ronlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf> Accessed 15 April 2014.

¹⁶²Ibid, par. 70

¹⁶³The International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC -01/09 par 62.

¹⁶⁴Rome Statute, Article 21(2).

¹⁶⁵For an exposition see, Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 41-50. The principle of legality of crimes demands for specificity and at the same time creates a ban on analogy. Criminal rules must be detailed as possible, so as to clearly indicate to their addressees the conduct prohibited, namely the objective and subjective elements of the crime. This is aimed at ensuring that all those who may fall under the prohibitions of law in advance which specific behavior is proscribed. The continued use of non exhaustive quantitative and qualitative considerations' trashes the fundamental ban on analogy whereby both the ICC and the OTP have generally continued to broaden surreptitiously by way of interpretation the scope of gravity criterion so as

by the prosecutor in determining gravity are enormous and the existing mechanisms do not offer an adequate check on the same?

It must be noted that reliance on ‘non exhaustive quantitative and qualitative considerations’ invites the use of *ejusdem generis* canon of statutory construction thus creating an avenue through which the interpreter can add a non existing consideration so as to fit his point of view concerning circumstances facing him at a given time. In as much as the decision thereof may be correct, chances are also rife that the decision may be arbitrary or bad in law altogether. Moreover, the deficiency in a definitive criterion of the gravity notion does not augur well with the firmly established principle of legality of crimes as it leaves room for ambiguity and offers the prosecutor an opportunity to adopt an interpretation tailor made to suit his wishes. Furthermore, these unchecked prosecutorial powers combined with the ICC’s interpretation may also be seen as a possible move towards supranational supremacy.¹⁶⁶

It is now widely accepted that in the ICC regime, gravity plays an important role in informing the prosecutor’s discretionary selections of situations and cases to pursue.¹⁶⁷ However, it is suggested herein that it would enhance the legitimacy of the entire ICC prosecutorial process if the OTP was to communicate as clearly as possible a definitive criteria it would rely upon in determining whether or not a requisite gravity threshold has been attained so as to warrant investigations and prosecution of cases in a given situation.

3.5.4 Interests of Justice

Another factor that the ICC’s Prosecutor is bound to consider while exercising his discretionary powers is ‘whetherthere are serious reasons to believe that an investigation would not serve the interests of justice.’¹⁶⁸ The ability to decline to investigate or prosecute on the grounds of

to make it applicable to instances not specifically envisaged by the Rome Statute .See also William Musyoka, *Criminal Law* (Law Africa Publishing Co. Ltd 2013) 8-11.

¹⁶⁶Michael A Newton, ‘The Complementarity Conundrum: Are we Watching Evolution or Evisceration?’ (2010) 8 Santa Clara Journal of International Law 115.

¹⁶⁷Margaret M.de Guzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2009) 32 Fordham International Law Journal 1465.

¹⁶⁸Luc Cote, ‘International Criminal Justice: Tightening up The Rules of the Game’ (2006) 88 International Review of the Red Cross 133, 142.

‘interests of justice’ provides the prosecutor with a relatively high degree of discretion¹⁶⁹ and stems from Article 53 (1) (c) of the Rome Statute which provides thus:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether :.....(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

The Statute further provides;¹⁷⁰

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:.....(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.3 (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

The 2009 OTP Regulations¹⁷¹ and the 2010 policy paper on preliminary examinations¹⁷² also make reference to the concept of interests of justice. Apparently, upon investigation, the prosecutor can decide not to prosecute because a prosecution is not ‘in the interest of justice’.¹⁷³

¹⁶⁹Henry M. Lovat, ‘Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of the International Criminal Court (2006) paper 1435 Bepress legal Services 1,2.

¹⁷⁰Article 53 (2) (c) and (3) (b).

While this may be the case, questions abound as to what is the true meaning of the term ‘interests of justice’ in the international criminal justice system since neither the Statute, the OTP Regulations nor the 2010 policy paper on preliminary examinations offer any cogent definition . This fundamental flaw is noted by various authors who have as a consequence termed Article 53(1) (c) as conspicuous on account of its vagueness.¹⁷⁴ The very fact that the *travaux preparatoires* of the Rome Statute (which in any case is a supplementary method of treaty interpretation utilized to confirm the meaning resulting from the application of Article 31 of the Vienna Convention on The Law of Treaties or to determine the meaning when the first test leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable)¹⁷⁵ do not express an authoritative interpretation ¹⁷⁶ of the term leaves the state of affairs in a portentous position in need of attention. Further, the absence of an ultimate criterion to determine what the phrase ‘interests of justice’ means has left authors to grapple with the search of an elusive true meaning of the phrase but it is improbable that a definite answer will be attained.¹⁷⁷ Some have opined that a broader interpretation of the concept will suffice¹⁷⁸ while others have supported a restrictive approach.

¹⁷¹International Criminal Court (n114) regulation 31

¹⁷²International Criminal Court (n116) par 76.

¹⁷³Luc Cote, ‘International Criminal Justice: Tightening up The Rules of the Game’ (2006) 88 International Review of the Red Cross 133, 142.

¹⁷⁴For example, Avril McDonald and Roelof Haveman (n 84)5. The author says: ‘Subparagraph (c) is characterised by its vagueness. Notwithstanding the fact that the information available indicates that there is a reasonable basis to believe that an ICC crime has been committed, and the case would be admissible under Article 17, and regardless of the gravity of the crime and the interests of victims, the prosecutor may decide not to proceed to an investigation where he considers that it ‘would not serve the interests of justice’. The question is, what is meant by justice here, what serves the interest of justice. And for whom is justice served? The victims? The state affected? International lawyers? The world? It could well be decided in a particular case that justice is served not by prosecuting before the ICC or even by stimulating prosecution in a particular case but by the encouragement of alternative disputes mechanisms.

¹⁷⁵For an exposition on the rules of treaties interpretation, see F X Njenga, *International Law and World Order Problems* (Moi University Press, 2001) 193-194.

¹⁷⁶Drazan Dukic, ‘Transitional Justice and the International Criminal Court- in “the interests of justice”?’(2007) 89 International Review of the Red Cross 691,700.

¹⁷⁷ Ibid.

¹⁷⁸For example, Matthew R Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (2004) 2 Journal of International Criminal Justice 71, 81. The author says ‘Beyond the considerations identified in article 53(2) (c), the term ‘in interests of justice’ also requires the prosecutor to take account of the broader interests of the international community, including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction.

Robinson¹⁷⁹ for example opines that Article 53 (2) (c) contemplates broad considerations such as the age and infirmity of the accused and Article 53(1) (c) allows the ‘interests of justice’ to trump other criteria. On the other hand, Stahn¹⁸⁰ holds the view that the express distinction between specific criteria (gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime) and the interests of justice may suggest that the latter embodies a broader concept. Gavron¹⁸¹ argues that Article 53 could accommodate wider considerations, although it could lead to speculation about future events and the deterrence argument would be turned on its head.

Conversely, the Amnesty International (AI)¹⁸² and the Human Rights Watch (HRW)¹⁸³ favor a restrictive interpretation of Article 53. The AI’s position is that the interests of justice are always served by prosecuting the crimes within the ICC’s Jurisdiction, absent a compelling justification.¹⁸⁴ It further considers that national amnesties, pardons and similar measures of impunity that prevent judicial determinations of guilt or innocence, the emergence of the truth and full reparations to victims are contrary to international law and it would not be in the interests of justice for the prosecutor to decline to prosecute on the ground that the suspect had benefitted from one of these measures.¹⁸⁵ The HRW on the other hand concludes that if the phrase ‘interests of justice’ is construed in the light of the object and object of the Rome Statute, a construction that permits consideration of a domestic amnesty, domestic truth commission or peace process and results in permanently not initiating an investigation or proceeding from

¹⁷⁹Darryl Robison, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and The International Criminal Court’ (2003) 14 *European Journal of International Law* 488.

¹⁸⁰ Carsten Stahn, ‘Complementarity, Amnesties and the Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’ (2005) 3 *Journal of International Criminal Justice* 697-698.

¹⁸¹Jessica Gavron, ‘Amnesties in The Light of Developments in International Law and the Establishment of the International Criminal Court’ (2002) 51 *International and Comparative Law Quarterly* 110.

¹⁸²Christopher Keith Hall ‘Suggestions concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations’, *Contribution to an Expert Consultation Process on General Issues relevant to the ICC Office of the Prosecutor*, 28 March 2003, 28 Available <http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/hall.pdf> Accessed on 13 April 2014.

¹⁸³ Human Rights Watch, ‘Policy Paper: The Meaning of “the Interests of Justice” in Article 53 of the Rome Statute’ (2005) 4-6 <<http://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>> Accessed on 13 April 2014.

¹⁸⁴Drazen Dukic, ‘Transitional Justice and the International Criminal Court- in “the interests of justice”?’ (2007) 89 *International Review of the Red Cross* 691,700.

investigation to trial would be in principle at odds with the object and purpose of the Rome Statute, as set forth in its preamble.¹⁸⁶

However, although authors have attempted to argue on whether or not the interpretation of the concept needs to be broad or restrictive, none has gone forth to accord it a true meaning. The ICC also has played no role in delineation of the concept. Even though it had an opportunity to promulgate an ultimate meaning of the concept by setting forth a criterion thereof in the *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC -01/09¹⁸⁷ the court instead chose to circumvent its own duty and therefore the meaning thereof continues to be enigmatic. The Court stated thus:

The final requirement that the Chamber is called upon to review under article 53(l) (c) of the Statute is whether "[taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". Unlike sub-paragraphs (a) and (b), which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect. Thus, the Chamber considers that a review of this requirement is unwarranted in the present decision, taking into consideration that the Prosecutor has not determined that an investigation "would not serve the interests of justice", which would prevent him from proceeding with a request for authorization of an investigation. Instead, such a review may take place in accordance with article 53(3)(b) of the Statute if the Prosecutor decided not to proceed with such a request on the basis of this sole factor. It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber.

It is worth mentioning that although Article 53 lists a number of criteria for determining whether or not the interests of justice will be served by an investigation or a prosecution, this list is not

¹⁸⁵Christopher Keith Hall 'Suggestions concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations', *Contribution to an Expert Consultation Process on General Issues relevant to the ICC Office of the Prosecutor*, 28 March 2003, 28.

¹⁸⁶Human Rights Watch, 'Policy Paper: The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute' (2005) 6.

¹⁸⁷The International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC -01/09 par 63.

exhaustive¹⁸⁸ and as already herein above discussed,¹⁸⁹ the cardinal principle of legality of crimes appears to have been given a wide berth.

3.6 Conclusion

In conclusion it is pertinent to state that prosecutorial discretion is a concept generally embedded in the Rome Statute being an upshot of tempestuous negotiations of the preparatory committee delegates leading to the final adoption of the Statute at the 1998 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference), held in Rome. The concept has generally been lauded as an essential tool in dispensation of criminal justice.¹⁹⁰ The Rome Statute generally sets the prerequisites to the ICC trial processes which are jurisdiction, triggering authority and admissibility. These basics are important as they lay the foundation upon which the prosecutor may exercise his discretionary powers which are generally manifest in selection of situations and investigations, screening cases and selection of charges and in determination of admissibility.

As Lord Acton once said that ‘Power tends to corrupt and absolute power corrupt absolutely,’¹⁹¹ it has been recognized under the Rome Statute that there is a need to keep the discretionary powers of the prosecutor under a check arguably, to enhance legitimacy of the ICC trial processes.¹⁹² To this end, the ‘reasonable basis test’, the ‘gravity threshold’ and ‘interests of justice’ have been fronted as some of the checks that the ICC prosecutor must surmount before he can exercise his discretion. Sadly however, the Statute, RPE and even the OTP Regulations have not defined clearly what these concepts represent and similarly there are no definitive criteria to determine how and when each of these tests is satisfied so as the prosecutor may have a green light to assert his discretionary role. This state of affairs leaves the OTP with enormous unchecked powers.

¹⁸⁸ Luc Cote, ‘International Criminal Justice: Tightening up The Rules of the Game’ (2006) 88 International Review of the Red Cross 133, 143.

¹⁸⁹ See footnotes 120 and 121, above.

¹⁹⁰ Ernst K. Pakuscher, ‘The use of Discretion in Germany’ (1976) 44 University of Chicago Law Review 94.

¹⁹¹ See Lord Acton quotes Archive available at <<http://www.acton.org/research/lord-acton-quote-archive>> Accessed 14 April 2014

¹⁹² See generally, Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 American Journal of International Law 510.

Furthermore, the dearth of a definitive criterion in determination of the tests flouts the cardinal principle of international criminal law namely, namely principle of legality of crimes which *inter alia* demands for precision in criminal rules and generally imposes a ban on analogy. The use by the OTP of a non exhaustive list of criteria in determining the tests opens room for the use of the *ejusdem generis* canon of interpretation which generally has no applicability in criminal law context.¹⁹³ It is therefore proposed that there is need for the OTP to come up with an exhaustive criterion that will help eliminate the extant confusion regarding the true contours of the tests.

The following chapter looks at the exercise of prosecutorial discretion in Kenya, Uganda and the Democratic Republic of Congo to determine whether the exercise thereof is in tandem with the Rome Statute.

¹⁹³Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An introduction to International Criminal Law and Procedure* (2nd Edition Cambridge University Press 2013) 19.

CHAPTER FOUR

THE ICC PROCESS AND THE EXERCISE OF PROSECUTORIAL DISCRETION IN SITUATIONS IN THE REPUBLIC OF KENYA, UGANDA AND THE DEMOCRATIC REPUBLIC OF CONGO

4.0 Introduction

Generally, this chapter encapsulates the factual circumstances in the situations under study namely, Kenya, the Democratic Republic of Congo and Uganda and which led to the exercise of the prosecutorial discretionary powers by the OTP. It also discusses the manner in which the OTP has exercised the said powers in the situations but concludes that the same was not done wholly judiciously.

4.1 Prosecutorial Discretion in ICC's situations in Kenya, Uganda and the Democratic Republic of Congo in Context

It is now settled that the ICC may only be seized of a situation through any of the three trigger mechanisms envisaged in the Rome Statute.¹ These trigger mechanisms are Security Council referral, state party referral and prosecutorial own initiative. Of importance however is that whatever trigger mechanism is employed, once this has taken place, the prosecutor has great discretion in the selection of cases² investigations,³ screening of cases and selection of charges⁴ and in determination of admissibility⁵ of the chosen cases. Undoubtedly, this enormous

¹ See generally, Volker Roben, 'The Procedure of the ICC: Status and Function of the Prosecutor' in A. Von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Volume 7, Koninklijke Brill N.V., 2003) 513-552. See also, Matthew R Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 71, 77. See also Antonio Cassese, *International Criminal Law* (2nd edition, Oxford University press 2008) 399- 400. See also Daniel D Ntanda Nsereko, 'Triggering the Jurisdiction of the International Criminal Court' (2004) 4 *African Human Rights Journal* 256-273. See also, Rome Statute of The International Criminal Court, Articles 13, 14 and 16. Available at <<http://cil.nus.edu.sg/rp/il/pdf/1998%20Rome%20Statute%20of%20the%20International%20Criminal%20Court-pdf.pdf>> Accessed 26 April 2014.

² Luc Cote, 'International Criminal Justice: Tightening up The Rules of the Game' (2006) 88 *International Review of the Red Cross* 133, 135.

³ Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34 *Fordham International Law Journal* 1584, 1598.

⁴ William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Justice* 731, 734.

⁵ See for example *The Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute, ICC-01/09-01/11-307.

discretion has already been exercised in the above captioned situations. Notably, Kenya became the first ever *proprio motu* prosecutorial investigation situation on March 31, 2010⁶ following the ICC's decision⁷ authorizing the OTP's request for such authorization pursuant to article 15 of the Rome Statute.

Earlier on, the ICC had assumed jurisdiction over the situation in Northern Uganda following President Museveni's referral to the ICC Prosecutor in December 2003.⁸ This was the first ever state referral to the ICC.⁹ Similarly, the Congolese President Joseph Kabila referred the situation in DRC to the ICC Prosecutor in March 2004¹⁰ by way of a letter of referral requesting that 'the Prosecutor investigate the situation in order to determine if any individuals should be charged with crimes falling within the ICC's jurisdiction, and thereby committing to cooperate with the ICC in that regard'.¹¹ This resulted to the indictments of Lubanga, Katanga and Ngudjolo.¹²

On March 14, 2012 the International Criminal Court rendered its first judgment.¹³ Thomas Lubanga, President of the *Union des Patriotes Congolais* (UPC), was convicted of the enlistment and conscription of children under 15 in his army the *Forces Patriotiques pour la Libération du Congo* (FPLC) and using them to participate actively in hostilities.¹⁴ Ngudjolo has already been

⁶ Charles C Jalloh, 'International Decision: Situation in the Republic of Kenya No. ICC-01/09-19. Decision on the Authorization of an Investigation' (2011) 105 *American Journal of International Law* 540.

⁷ See Generally, Situation in the Republic of Kenya, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, No. ICC-01/09 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf>> Accessed 26 April 2014

⁸ Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 42. See also Michael P. Scharf and Patrick Dowd, 'No Way Out? The Question of Unilateral Withdrawals or Referrals to the ICC and Other Human Rights Courts' (2009) *Chicago Journal of International Law* 573, 575.

⁹ Ibid.

¹⁰ Ibid 39.

¹¹ Coalition for the International Criminal Court, 'International Criminal Court Announces State Referral From the Democratic Republic of Congo' Media Advisory 20 April 2004. Available <<http://www.iccnw.org/documents/04292004DRCReferralWEB.pdf>> Accessed 26 April 2014.

¹² Linda E. Carter 'The international Criminal Court in 2011' (2011) 18 *South Western Journal of International Law* 199, 200.

¹³ Caroline Buisman, 'Delegating Investigations: Lessons to be Learned from the *Lubanga* Judgment' (2013) 3 *Northwestern Journal of International Human Rights* 30.

¹⁴ Ibid.

acquitted of all crimes¹⁵ while Katanga was convicted as an accessory to the war crimes of directing an attack against a civilian population, pillaging, and destruction of property, as well as murder as a war crime and a crime against humanity.¹⁶ However, he was acquitted as an accessory to rape and sexual slavery as war crimes and crimes against humanity. He was also acquitted of the war crime of using child soldiers.¹⁷

Cases against three Kenyans charged of crimes against humanity are on course¹⁸ following the confirmation of charges in the year 2012 with the trial of President Kenyatta earlier on expected to commence in October 2014¹⁹ now hanging on the balance following the OTP's application to the Trial Chamber that the case be suspended indefinitely owing to the insufficiency of evidence against the President.²⁰ While substantial steps have been taken towards finalization of cases in the DRC's and Kenya's situations, nothing much may be said regarding the situation in northern Uganda. Although the ICC's Presidency assigned the case to Pre-trial chamber II on 5 July 2004

¹⁵Elinor Fry, 'International Criminal Court' (2013) 2 *Netherlands Quarterly of Human Rights* 217, 220.

¹⁶ Women Initiatives for Gender Justice, 'Partial Conviction of Katanga by ICC Acquittals for Sexual Violence and Use of Child Soldiers' 7 March 2014 .Available at <<http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf>> Accessed 26 April 2014.

¹⁷ Ibid.

¹⁸ Coalition for the International Criminal Court, 'Four Kenya Post-Election Violence Suspects to Face Trial at ICC: Pre-Trial Judges Confirm Charges of Crimes Against Humanity for Ruto, Sang, Muthaura and Kenyatta But Say They Lack Evidence to Try Kosgey and Ali' Media Advisory 23 January 2012. Available at <http://www.iccnw.org/documents/CICCMA_KENYA6_23012012_final_3_.pdf> Accessed 26 April 2014. In the case against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, judges confirmed charges of crimes against humanity against Ruto and Sang, but declined to confirm those against Kosgey. In the case against Francis Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, judges also confirmed charges of crimes against humanity against Kenyatta, but declined to confirm those against Ali. Mathura's case was later dropped by the OTP. The decisions were taken by majority of the Chamber, with Judge Hans-Peter Kaul dissenting. See also International Criminal Court Situation in the Republic of Kenya in the case of the *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* No ICC-01/09-01/1 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>> Accessed 26 April 2014 and also International Criminal Court Situation in the Republic of Kenya in the case of the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* No. ICC-01/09-02/1. Available at <<http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>> Accessed 26 April 2014.

¹⁹ International Criminal Court, 'Questions and Answers on the Decision Dated 31 March 2014 Re-scheduling the Kenyatta Trial Commencement Date' Available at <<http://www.icc-cpi.int/iccdocs/PIDS/publications/QandAKenyattaEng.pdf>> Accessed 26 April 2014.

²⁰ International Justice monitor, 'Kenya's President Called to the Hague with The ICC case at 'Critical Juncture' Available at <<http://www.ijmonitor.org/2014/10/issues-to-consider-before-next-weeks-status-conference-on-the-kenyatta-trial/>> Accessed 15 October 2014.

which consequently elected a president on 16 September 2005,²¹ the last procedural step taken in this case was the designation of a single judge to the situation.²²

4.2 ICC's Intervention in Kenya: Background to the Kenya's Post –Election Violence

Following a disputed presidential election in December 2007 where both the former President Mwai Kibaki of the Party of National Unity (PNU) and his challenger Raila Odinga of the Orange Democratic Movement (ODM) claimed victory,²³ large-scale violence erupted in Kenya.²⁴ During the course of a few weeks more than a thousand Kenyans were killed in clashes between Kibaki supporters and Odinga supporters.²⁵ The police were also involved in the violence, responsible for perhaps one-third of the total casualties.²⁶ The violence took place in many parts of the country, but—as is frequently the case in Kenya—it was most intense in the Rift Valley.²⁷ As a further result of the clashes, several hundred thousand Kenyans were displaced from their homes,²⁸ some of whom continue to live in internally displaced person camps today.²⁹

Headed by former U.N. Secretary-General Kofi Annan, an internationally sponsored mediation process known as the Kenyan National Dialogue and Reconciliation enabled a political settlement to the dispute.³⁰ This entailed the creation of a coalition government in which Mr.

²¹Jan Wouters and Sten Verhoeven, 'Justice For Africa: The Cases of the Democratic Republic of Congo, Uganda and Darfur Before the International Criminal Court' (K.U. Lueven Faculty of Law, Institute For International law Working paper No 81- July 2005) 11.

²² Ibid 12.

²³Charles C Jalloh, 'International Decision: Situation in the Republic of Kenya No.ICC-01/09-19.Decision on the Authorization of an Investigation' (2011) 105 American Journal of International Law 541. Also see generally, Clark C Gibson and James D. Long, 'The Presidential and Parliamentary Elections in Kenya December 2007, Electoral Studies' (Department of Political Science, University of California, San Diego 2009) Available at <<http://www.africog.org/reports/Gibson%20and%20Long%202009.pdf>> Accessed 5 May 2014.

²⁴ Thomas Obel Hansen, 'The Policy Requirement in Crimes Against Humanity: Lessons Fromand For The Case of Kenya' (2011) George Washington International Law Review 1, 3.

²⁵ See generally, Commission of Inquiry into Post –Election Violence, Report of the Commission of Inquiry into Post –Election Violence (2008). Available at <http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459DFull_Report.pdf> Accessed 5 May 2014.

²⁶ Ibid 384-385.

²⁷ Ibid 37-38. See also Thomas Obel Hansen, 'The Policy Requirement in Crimes Against Humanity: Lessons Fromand For The Case of Kenya' (2011) George Washington International Law Review 1, 3.

²⁸ Commission of Inquiry into Post –Election Violence, ibid 271-273.

²⁹ See South Consulting, 'Kenya National Dialogue and Reconciliation Monitoring Project, Review Report: Progress in Implementation of the Constitution and Preparedness for 2012 (January 2012, First Draft Review Report) 58-59. Available at <<http://s3.marsgroupkenya.org/media/documents/2012/01/9511298a2666bfac2b6f50b9087dc05.pdf>>. Accessed 5 May 2014.

³⁰ See generally, Government of Kenya, *The National Accord and Reconciliation Act* (Government Printers Nairobi 2008).

Kibaki remained president and Mr. Odinga became the prime minister.³¹ Under pressure from the international community and Kenyan civil society, the two parties to the dispute publicly stated their commitment to the establishment of a number of mechanisms aimed at addressing Kenya's legacy of political violence, including criminal prosecutions, a Truth, Justice and Reconciliation Commission, a constitutional review process, and other measures.³²

The Commission of Inquiry into Post-Election Violence, which was created by the parties to the election dispute, made recommendations for the establishment of a special tribunal composed of Kenyans and foreigners to prosecute those responsible for the post election violence.³³ Following parliament's rejection of a February 2009 bill to establish such a tribunal, it became increasingly clear that key elements in the Kenyan leadership remained opposed to dealing judicially with the violence. As a result, in July 2009 Kofi Annan handed over a list of key suspects in the violence to the former ICC Prosecutor Luis Moreno-Ocampo.³⁴

Acting on Prosecutor Ocampo's request, 20 on March 31, 2010, Pre-Trial Chamber II of the ICC issued a decision authorizing the prosecutor to commence an investigation into Kenya's post-election Violence.³⁵ However, Pre-Trial Chamber II was split on the issue of whether the ICC has subject-matter jurisdiction in the case. Arguing that there were not sufficient grounds to believe that the crimes committed in Kenya in early 2008 took place "pursuant to or in furtherance of a State or organizational policy" to commit an attack on a civilian population, as

³¹Ibid, sections 3, 4 and 5.

³²For an exposition on the upshot of the declaration, see International Center for Policy and Conflict 'The Kenya National Dialogue and Reconciliation; Stock Taking of Agreed Reforms: Empowering People and Transforming Public Policy' (2011) 29-32. Available at <<http://www.icpcafrica.org/annual-reports/Social%20audit%20Final.pdf>> Accessed 5 May 2014.

³³Commission of Inquiry into Post –Election Violence, Report of the Commission of Inquiry into Post –Election Violence (2008). 472.

³⁴Thomas Obel Hansen, 'Political Violence in Kenya: A Study of Causes, Responses, and a Framework for Discussing Preventive Action' (ISS Paper No. 205, November 2009) 9. Available <<http://www.issafrika.org/uploads/P205.PDF>> Accessed 6 May 2014.

³⁵See, The International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* ICC No. 01-09 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf>> Accessed 6 May 2014.

required by Article 7(2)(a) of the Rome Statute, Judge Hans-Peter Kaul issued a dissenting opinion.³⁶

Having finalized his investigations, on December 15, 2010, Prosecutor Ocampo submitted two applications requesting Pre-Trial Chamber II to issue summonses for six Kenyans, all suspected of having committed crimes against humanity, to appear before the ICC.³⁷ The suspects included high-ranking civil servants and prominent politicians, some with presidential ambitions.³⁸ On March 8, 2011, Pre-Trial Chamber II issued summonses for the six Kenyans to appear before the Court in early April of the same year.³⁹ Again Judge Kaul dissented, maintaining that the crimes committed in Kenya do not meet the threshold of crimes against humanity since the requirement of a state or organizational policy in Article 7(2) (a) is seen not to be met.⁴⁰

Prior to the six suspects appearing before the ICC, the Kenyan government filed an admissibility challenge, claiming that the ICC cannot exercise jurisdiction since reforms of the Kenyan judiciary would shortly lead to domestic prosecution of post-election cases.⁴¹ However, on May

³⁶Thomas Obel Hansen, 'The Policy Requirement in Crimes Against Humanity: Lessons From and For The Case of Kenya' (2011) George Washington International Law Review 1, 5.

³⁷ International Criminal Court, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang Pursuant to Article 58, No. ICC-01/09-01/11-01. Available at <<http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf>> Accessed 6 May 2014. See also *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali Pursuant to Article 58 No. ICC-01/09-02/1 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf>> Accessed 6 May 2014

³⁸Thomas Obel Hansen, 'The Policy Requirement in Crimes Against Humanity: Lessons From and For The Case of Kenya' (2011) George Washington International Law Review 1, 5. Indeed, Uhuru, Ruto and Kosgey were cabinet ministers at this particular time. Muthaura was the Civil Service Head while Ali was the Post master General. Uhuru and Ruto had given indications that they would contest for presidency in 2012. See also Congressional Research Service, 'International Criminal Court cases in Africa: Status and Policy Issues' 22 July 2011, 6. Available at <<http://www.fas.org/sgp/crs/row/RL34665.pdf>> Accessed 7 May 2014

³⁹ International Criminal Court, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang Pursuant to Article 58, No. ICC-01/09-01/11-01. See also *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali Pursuant to Article 58 No. ICC-01/09-02/1.

⁴⁰Thomas Obel Hansen, 'The Policy Requirement in Crimes Against Humanity: Lessons From and For The Case of Kenya' (2011) George Washington International Law Review 1, 5.

⁴¹ See *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang and The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ICC No. ICC-01/09-01/11 and

30, 2011, the ICC rejected the admissibility challenge, noting that the Kenyan government had failed to show that investigations of the Ocampo Six—as they became known—were taking place in Kenya.⁴² Further, on April 8, 2011—the same day that three of the suspects appeared before Pre-Trial Chamber II—the U.N. Security Council made clear that it would not support Kenya’s bid to have the cases deferred under Article 16 of the Rome Statute.⁴³

4.3 Delineating Prosecutorial Discretion in the Kenyan ICC Cases

A discussion on the exercise of discretionary powers by the OTP in Kenya touches on various aspects including jurisdiction, admissibility, gravity, selection of cases and even the choice of charges. As a result, divergent opinions have been fronted touching on these aspects with an ultimate aim of probing whether the exercise has been above board.

4.3.1 Reflections on Jurisdiction and Admissibility

Jurisdiction of the ICC over a situation forms a key component in determination by the OTP on whether or not to exercise its discretionary powers in that particular situation.⁴⁴ It must however be noted that jurisdiction of the ICC is premised on admissibility of cases and further on complementarity. Disagreement is endemic on whether the Kenya ICC cases were in the first place admissible into the court or not.⁴⁵

ICC-01/09-02/11 Available at <<http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf>> Accessed 6 May 2014.

⁴²*The Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-307

⁴³Thomas Obel Hansen, ‘The Policy Requirement in Crimes Against Humanity: Lessons From and For The Case of Kenya’ (2011) *George Washington International Law Review* 1, 5.

⁴⁴For an exposition see, The ICC in *Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang* Pre Trial II, Decision on the Confirmation of Charges, ICC- 01/09-01/11 para. 24 whereby it stated thus: ‘This chamber has stated on different occasions that, regardless of mandatory language of article 19(1) of the statute, which requires an assessment of whether the court has the competence to adjudicate the case *sub judice*, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential component in the exercise of any judicial body of its functions and is derived from the well recognized principle of *la competence de la competence*.’ See also Michael P. Scharf and Patrick Dowd, ‘No Way Out? The Question of Unilateral Withdrawals or Referrals to the ICC and Other Human Rights Courts’ (2009) *Chicago Journal of International Law* 573,588. The Kenyan Court of Appeal had earlier on in *The Owners of Motor Vessel “Lilian S” v Caltex Oil Kenya Ltd* (1989) KLR underscored the importance of jurisdiction by declaring thus: ‘Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction’.

⁴⁵For example, see Gabrielle Lynch and Miša Zgonec-Rožej, ‘The ICC Intervention in Kenya’ *Africa/International Law* AFP/ILP 2013/01, February 2013, 9. Available at

Political considerations may not be ruled out⁴⁶ in the quest by OTP to have the Kenyan cases determined at The Hague⁴⁷ and this explains why it exercised its discretionary role to vehemently oppose admissibility challenge espoused by the Government of Kenya. It may also rightly be argued that even though the prosecutor contended that the cases were admissible on account of failure by Kenya to investigate, a close look at the summonses and what is known of the case against the suspects confirms that the prosecutor relied substantially on the evidence (obtained long before the ICC involvement) from the Kenya National Commission on Human Rights and the Commission of Inquiry into the Post Election Violence.⁴⁸ Against this backdrop, it was an egregious error and also hypocritical for the prosecutor to push for the admission of the cases on the ground of deficiency of investigative steps and yet evidence relied upon came from investigations by a government agency.

It is also hard to conclude that there was investigatory ‘inaction’ in the country to warrant admissibility of the cases.⁴⁹ As noted by dissenting Judge Usacka, the material that Kenya submitted in the admission challenge ‘contained specific information as to the investigations that were carried out by Kenya’, including information that indicated that a case file had been opened on one of the ICC suspects, William Ruto.⁵⁰ More specifically, the information provided

<http://www.chathamhouse.org/sites/default/files/public/Research/Africa/0213pp_icc_kenya.pdf>. See also Thomas Obel Hansen, ‘A Critical Review of the ICC’s Recent Practice Concerning Admissibility Challenges and Complementarity’ (2012) 13 Melbourne Journal of International Law 217, 232.

⁴⁶William A. Schabas, ‘Victor’s Justice: Selecting “Situations” at the International Criminal Court’ (2010) 43 John Marshall Law Review 535, 549. Indeed Schabas concedes thus: ‘The discretion of Prosecutor in selecting situations under Article 15, and in agreeing to proceed with selections that have already been referred by the Security Council or by the States Parties, pursuant to Article 13(b) and 14 respectively, has an inherently political dimension. Even when the situation has been selected, political choices are also made in terms of which parties to a conflict are to be targeted for prosecution...’

⁴⁷Charles C Jalloh, ‘Situation in the Republic of Kenya’ (2012) 106 American Journal of International Law 118, 123. The author states “As a corollary, one might consider whether similar levels of cooperation could be fostered between the ICC Prosecutor and the national authorities after both sides have taken some or substantial steps towards investigations of the alleged offenses. Of course, in the Kenyan situation, the question of genuine willingness to investigate will remain relevant despite the majority’s insistence that the issue whether the country is actually investigating is separate from assessment of the genuineness of its investigation. In fact a close reading of the pre trial as well as the appeals decisions reveals that this concern tainted the government’s entire admissibility **challenge because the suspects are closely aligned with the powers that be in Nairobi...**” emphasis added.

⁴⁸Ibid

⁴⁹Thomas Obel Hansen, ‘A Critical Review of the ICC’s Recent Practice Concerning Admissibility Challenges and Complementarity’ (2012) 13 Melbourne Journal of International Law 217, 232.

⁵⁰*The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber H of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of

by Kenya ‘referred to him as “suspect”, indicated his case file number, and stated where the case was pending’.⁵¹ It also contained information indicating ‘the scope of the investigations and the allegations against Mr. Ruto, including the location and time of the alleged criminal conduct’.⁵² As further noted by Judge Ušacka, the government had provided information indicating that ‘orders had been given, apparently by the authorities in charge, to start investigations against the other five persons under investigation by the Court’.⁵³ In other words, there was no absence of investigatory action at the point when the prosecutor opposed the admissibility challenge and when the Court rejected the same. Furthermore, there was no iota of evidence to suggest that the intended proceedings would not or were not being conducted independently or impartially⁵⁴ as by law required.

Although the Statute enjoins the prosecutor to act independently,⁵⁵ the over reliance on evidence from other institutions really casts doubts on the OTP’s readiness to fulfill this preemptory statutory duty. The OTP relied on the information gathered by third parties in lieu of, rather than in addition to, its own investigations. This reliance is clear from the Prosecutor’s own submissions. In a press release on January 24, 2012, following the confirmation of the charges of four out of six Kenyan suspects, the Prosecutor himself stated that the OTP had no witnesses in

the Statute" Case No ICC-01/09-01/11-336, 20 September 2011. Judge Ušacka cites annex 2 attached to the 13 May 2011 reply by Kenya, which is a report conducted by the director of Kenya’s Criminal Investigations Department concerning the progress of investigations into the 2008 post-election violence: see also *Ruto Admissibility Reply* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-89-Anx2, 13 May 2011) (*‘Ruto Admissibility Reply (Annex 2)’*).

⁵¹ Ibid.

⁵² See *Ruto Admissibility Reply (Annex 2)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-89-Anx2, and 13 May 2011) 2–3, which states: “The investigations have not been completed for various reasons that include unreliable and uncooperative witnesses. Some of the prominent pending cases include: Nakuru CID Inquiry file No 10/2008, the suspect in this inquiry is Hon William Samoei Ruto — immediate former Minister for Agriculture. The allegations were that, the Minister together with others from the Kalenjin community incited Kalenjin youths to commit violence against non-Kalenjins living in some parts of Rift Valley Province. The matter is still under investigation because there are some areas requiring further corroboration in order to reach to a fair conclusion.”

⁵³ Ibid 3–4 the annex stated ‘ the Commissioner of Police ... tasked the team of investigators to carry out exhaustive investigations relating to the Ocampo six and other high ranking citizens [and further noted that the] team is currently on the ground conducting the investigations as directed’.

⁵⁴ Mireille Delmas Marty, ‘Interactions Between National and International Criminal Law in the Preliminary Phase of Trial at the ICC’ (2006) 4 *International Journal of Criminal Justice* 1, 4.

⁵⁵ Rome Statute of The International Criminal Court, Article 42. See also, Volker Roeben, ‘The Procedure of the ICC: Status and Function of the Prosecutor’ in A. Von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Volume 7, Koninklijke Brill N.V, 2003) 517.

Kenya and that their investigations had been carried out mainly outside Kenya.⁵⁶ Failure to conduct independent investigations of course had its own outcome as it led in part to the non-confirmation of the cases two of the Kenyan defendants - Henry Kiprono Kosgey and Mohammed Hussein Ali.⁵⁷ These cases were not confirmed due to insufficient evidence or inherent contradictions and inconsistencies between witness statements.⁵⁸ Later, the case against Francis Kirimi Muthaura was withdrawn as well, essentially because the key witness against him had recanted a crucial part of his evidence.⁵⁹ The Prosecution was already in possession of this witness's recanting statement at the time the confirmation was held, but had failed to make timely disclosure thereof to the defence.⁶⁰

In a nutshell, this does not depict the OTP in a good picture. Had proper and independent investigations been done, the cases against the three Kenyans would not have been admitted at the ICC in the first place and arguably, ICC would not have been seized of the matter. It is also an indicator that the OTP never considered any exculpatory information it may have had on the discharged suspects. This puts the OTP's faithfulness to the express provisions of the Statute that requires the prosecutor to *inter alia* investigate incriminating and exonerating circumstances equally⁶¹ into sharp focus.

Despite the fact that it is still very early to conclude that the case against President Kenyatta has collapsed, there is reasonable grounds to conclude that all is not well for the OTP.⁶² The Chief Prosecutor has already admitted that 'currently the case against Mr Kenyatta does not satisfy the high evidentiary standards required at trial'.⁶³ Further the OTP has also stated that 'the only

⁵⁶Caroline Buisman, 'Delegating Investigations: Lessons to be Learned from the *Lubanga* Judgment' (2013) 3 Northwestern Journal of International Human Rights 47.

⁵⁷ See *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang*, Decision on Confirmation of Charges, ICC-01/09-01/11-373,

⁵⁸ Ibid.

⁵⁹Caroline Buisman, 'Delegating Investigations: Lessons to be Learned from the *Lubanga* Judgment' (2013) 3 Northwestern Journal of International Human Rights 49.

⁶⁰ Ibid.

⁶¹Rome Statute of The International Criminal Court, Article 54(1) (a).

⁶² Henry D Gombya, 'Future of The ICC in Question as Kenyatta Case Collapses' The London Evening Post, 21 December 2013.

⁶³The AFP, 'Bensouda Wants Case Against President Uhuru Adjourned' in the Daily Nation, 19 December 2013

stones left unturned in Uhuru's case are now pebbles'⁶⁴ and that that 'even the President's financial records might be insufficient to meet the high evidentiary standard required for trial'.⁶⁵ Definitely, these statements portray OTP's doubts as to the culpability of President Kenyatta and yet it keeps on insisting the trial must proceed.⁶⁶ Three questions therefore arise. If the president's co-accused have already been discharged on account of lack of evidence, why should the OTP continue with the case in which it already has doubts on its merits? Secondly, where does the OTP place one of the international criminal law cardinal principles - *dubio pro reo* (which means – in case of doubt, one should hold for the accused)?⁶⁷ Is it not true therefore that these cases were inadmissible *ab initio* and the only reason why they were admitted is because of the 'overzealousness' of the OTP in exercise of its discretionary role?

The OTP is obliged to be impartial⁶⁸ and should not insist on admissibility even when facts suggest otherwise. Should the President Kenyatta's case collapse, 66% of the ICC's Kenyan cases would have collapsed and this would impact negatively on the OTP's legitimacy. The same would only be attributed to the OTP's failure to exercise its discretionary powers impeccably as would be demanded of it especially in determination of admissibility.

⁶⁴ The Standard Digital News, 'President Uhuru Kenyatta Fate at the ICC Now Linked to His Cash Records' 12 February 2014. Available at <http://www.standardmedia.co.ke/mobile/?articleID=2000104458&story_title=president-uhuru-kenyatta-s-fate-at-icc-now-linked-to-his-cash-records&pageNo=2> Accessed 8 May 2014

⁶⁵ Ibid.

⁶⁶ Indeed, it was anticipated that President Kenyatta's trial would commence in October 2014, See International Criminal Court, 'Questions and Answers on the Decision Dated 31 March 2014 Re-scheduling the Kenyatta Trial Commencement Date' Available at <<http://www.icc-cpi.int/iccdocs/PIDS/publications/QandAKenyattaEng.pdf>> Accessed 26 April 2014. However, the OTP filed an application seeking to have the matter adjourned indefinitely owing to the insufficiency of evidence against President Kenyatta, see International Justice monitor, 'Kenya's President Called to the Hague with The ICC case at 'Critical Juncture' Available at <<http://www.ijmonitor.org/2014/10/issues-to-consider-before-next-weeks-status-conference-on-the-kenyatta-trial/>> Accessed 15 October 2014.

⁶⁷ Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 51. Indeed, in *Flick and others*, a US Military Tribunal sitting at Nuremberg held that it must be guided amongst other things by the standard whereby 'if from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must be taken'.

⁶⁸ Rome Statute, Article 42 (7).

4.3.2 Observations on Gravity

As already highlighted, the precise meaning of the term ‘gravity’ within the Rome Statute remains inscrutable.⁶⁹ Accordingly, the prosecutor’s appraisal of the gravity within the Kenyan situation remains a contested issue.⁷⁰ Since the gravity of crimes has traditionally been analyzed on the basis of the number of victims involved,⁷¹ reasons are bountiful as to why it has generally been felt that the situation in Kenya would have failed the gravity test. This would be more so if comparison to other situations especially the DRC⁷², Sudan⁷³ and even in Northern Uganda⁷⁴ is done given that the number of victims would be far below than in these situations. However, despite lack of a definitive criterion by the OTP, the ICC as an outgoing institution⁷⁵ appears to have (in the Kenyan cases) departed from this antiquated ‘quantitative’ approach to a more progressive ‘qualitative’ approach in determination of gravity.⁷⁶ The Pre-Trial Chamber II stated

⁶⁹See Chapter 3 generally. See also William A. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 Journal of International Justice 735, see also Margaret M.de Guzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2009) 32 Fordham International Law Journal 1401 and also Ray Murphy, ‘Gravity issues and the International Criminal Court’ (2006) 17 Criminal Law Forum 281,282.

⁷⁰Nmamu MC, ‘Violence in Kenya: Any Role For the ICC in the Quest for Accountability?’ (2009) 3 African Journal of Legal Studies 78-95.

⁷¹Frederiek de Vlamming, ‘The Yugoslavia Tribunal and the Selection of Defendants’ (2012) 4 Amsterdam Law Forum 89,101. See also Mark Osiel, How Should the ICC office of the Prosecutor Choose its Cases? The Multiple Meanings of ‘Situational Gravity’ The Hague Justice Portal, 5 March 2009. Available at <<http://www.haguejusticeportal.net/index.php?id=10344>> Accessed 10 May 2014. See also William A. Schabas, ‘Complementarity in Practice’: Some Uncomplimentary Thoughts’ Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, 23 June 2007 22-26. See Further Kevin Jon Heller, ‘Situational Gravity Under The Rome Statute’ in Carsten Stahn and Larissa van den Herik, (eds) *Future Directions in International Criminal Justice* (TMC Asser/CUP, 2009) 2.

⁷²It is estimated that about 5.4 million deaths occurred as a result of the atrocities’ related causes. For an exposition, please see, Sigall Horowitz, ‘DR Congo: Interaction Between International and National Judicial Responses to the Mass Atrocities’ Domac Reykjavik University 14 February 2012, 19. Available at <<http://www.domac.is/media/domac/DRC-DOMAC-14-SH.pdf>> Accessed 10 May 2014

⁷³About 300,000 people have died since hostilities began; millions have been displaced while about 4.7 million people have been affected. See Australia Darfur Network, ‘Darfur: Statistics’ Available at <<http://www.darfuraustralia.org/files/Darfur%20-%20The%20Statistics.pdf>> Accessed 10 May 2014.

⁷⁴By the year 2003, thousands of people had been killed and about 1.6 million people had become IDPs. See, Tim Raby, and Tearfund, ‘Advocacy: The International Criminal Court and the Conflict in Northern Uganda’ Humanitarian Exchange magazine, Issue 36, December 2006. Available <<http://www.odihpn.org/humanitarian-exchange-magazine/issue-36/advocacy-the-international-criminal-court-and-the-conflict-in-northern-uganda>> Accessed 10 May 2014.

⁷⁵Melanie O’Brien, ‘Prosecutorial Discretion as an Obstacle to Prosecution of United Nations peacekeepers by the International Criminal Court: The Big Fish /Small Fish Debate and the Gravity Threshold’ (2012) 10 Journal of International Justice 526,541.

⁷⁶The International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC -01/09 -19 par 188. See also generally, Kevin Jon Heller, ‘Situational Gravity Under The Rome Statute’ in Carsten Stahn and Larissa van den Herik, (eds) *Future Directions in International Criminal Justice* (TMC Asser/CUP, 2009).

that it is guided by factors such as the scale, nature, manner of commission, impact of the crimes committed on the victims and the existence of aggravating circumstances. Scale of crimes (quantity) is only one aspect of the gravity assessment.⁷⁷ These elements have subsequently been adopted by the OTP in its application to investigate and for arrest warrants⁷⁸ and this demonstrates the OTP's willingness to look beyond numbers.

In as much the ICC has gone forth to promulgate an indicative criterion, this may however not be relied upon as an ultimate solution for reasons that ICC precedents are merely persuasive rather than binding.⁷⁹ A future court may depart from the already existing view with a possibility of a future confusion on the proper content of gravity. Further, the prosecutor has applied the criterion selectively.⁸⁰ For example why has the prosecutor not applied the same to prosecute the British soldiers accused of committing crimes in Iraq and yet all the gravity conditions seem to exist? The only plausible answer is - influence by political considerations.⁸¹

The outcome is that the OTP does not apply the criteria uniformly and therefore it remains to be vague and susceptible to political manipulation.⁸² Further there is no typical criterion that the OTP may employ in determining that a case is severe than the other and desolately; the OTP has not set a basis on which to differentiate a situation from another.

⁷⁷Ibid, see also Melanie O'Brien, 'Prosecutorial Discretion as an Obstacle to Prosecution of United Nations peacekeepers by the International Criminal Court: The Big Fish /Small Fish Debate and the Gravity Threshold' (2012) 10 Journal of International Justice 526,542.

⁷⁸See the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minuar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al- Senussi, Situation in the Libyan Arab Jamahiriya, ICC-01/11-4-Red, PTC1 16 May 2011 par.55.

⁷⁹See generally, Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 24-26. 'As stated above, judicial decisions – even of the same court – do not constitute per se a source of International Criminal Law. Formally speaking they may only amount to a 'subsidiary means for the determination of international rules of law (see Article 38(1) (d) of the ICJ Statute which reflects customary International law)'. See also Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Law and Procedure* (2nd edition, Cambridge University Press 2013) 12. The authors rightly state 'The ICC may also apply principles and rules of law as interpreted in its previous decisions. The ICC is not, however, bound by its previous decisions; it has no equivalent to the common law principle of *stare decisis*.'

⁸⁰William A. Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts' Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, 23 June 2007, 27.

⁸¹Pavel Caban, 'Preliminary Examination s By the Office Prosecutor of the International Criminal Court' (2011) 2 *Czech Yearbook of Public and Private International law* 199, 208. See also Schabas, *ibid*. The author states 'This results in the nagging suspicion that the decision not to proceed in Iraq, for example, may well have been influenced by political considerations. Uganda and the DRC are "soft targets" for the Prosecutor; Britain is a hard one.'

⁸²Ibid.

In conclusion, it is worth noting that the OTP has been a major stumbling block towards consistency and coherence in delineating gravity. It ought to have come up with its own criterion long before the ICC gave a guideline in the Kenyan Case. The significance of a criterion needs no emphasis. As already stated, the indicative test set by the ICC may be departed from in the future and the only resort would be to a more acceptable, prior published criterion by the OTP. Indeed, this would be in tandem with the ICL principle of legality which demands *inter alia* that criminal rules must be detailed as possible, so as to clearly indicate to their addressees the conduct prohibited, namely the objective and subjective elements of the crime and further that they be published before criminal liability is imputed.⁸³

4.3.3 Discretion in Selection of Cases

Criticism that the prosecutor is highly selective when it comes to selection of defendants in the ICC cases is ubiquitous.⁸⁴ The situation in Kenya is not different. Some questions regarding selection of defendants in the Kenyan cases remain unanswered. In the past, the OTP has avowed that it will pursue only those who bear the greatest responsibility including those who ordered, incited, financed, or otherwise planned the commission of the alleged crimes.⁸⁵ It is clear that the 2007/2008 skirmishes pitted the ODM supporters against the PNU supporters and both parties were at the time led by the former Prime Minister, Raila Odinga and the retired President Mwai Kibaki.⁸⁶ Although it is not clear whether they participated in any manner, some quarters⁸⁷ had

⁸³ Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 41-50.

⁸⁴ FIDH-LIDHO-MIDH – Ivory Coast, ‘The Fight Against Impunity at a Crossroad’ 9 Available at <<http://www.fidh.org/IMG/pdf/cotedivoire617uk2013basdef.pdf>> Accessed 13 May 2014. The authors observe that the Prosecutor seemed to concentrate on one side of the conflict and precisely targeting Laurent Gbagbo’s sympathisers. See also Phil Clark, ‘Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.’ in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 39 whereby the OTP has been accused of targeting rebel leaders in both the Uganda and DRC situations and leaving out government officials who are equally implicated in committing atrocities. See also Akhavan P, ‘The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court’ (2005) 99 *American Journal of International Law* 403, 411.

⁸⁵ The Office of the Prosecutor, ‘First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970’ (2011) 4. Available <<http://www.icc-cpi.int/NR/rdonlyres/A077E5F8-29B6-4A78-9EAB-A179A105738E/0/UNSCLibyaReportEng04052011.pdf>> Accessed 13 May 2014.

⁸⁶ Charles C Jalloh, ‘International Decision: Situation in the Republic of Kenya No. ICC-01/09-19. Decision on the Authorization of an Investigation’ (2011) 105 *American Journal of International Law* 541.

⁸⁷ Nzau Musau, ‘Ocampo Links Uhuru to Mungiki’ in The Star, Saturday 20 August 2011 Available <<http://www.the-star.co.ke/news/article-52506/ocampo-links-uhuru-mungiki>> Accessed 13 May 2014. See also Aggrey Mutambo, ‘Activist Gachoka Writes to ICC on Post-Poll Chaos Evidence’ The Daily Nation, 6 August 2012. See also Paul Muite, ‘Tell us Mr. Kigeugeu, if You benefitted From Ethnic Mobilisation: From 41 Tribes Against One Formular’ in the Hard Talk Kenya, 29 July 2012. Available

opined that both ought to have been made answerable under the command/ superior responsibility as envisaged under the Rome Statute.⁸⁸ Perhaps the OTP kept off this path for political reasons bearing in mind that country's future political stability was at stake.⁸⁹ Moreover, the names of all the other suspects (apart from the famous 'Ocampo six') in the illustrious 'Waki list' remain a mystery.⁹⁰ Apart from reiterating that the OTP would charge those bearing greatest responsibility, the OTP gave no other criteria upon which it relied in picking three individuals from the ODM side and three from the PNU wing.

It ought to be reaffirmed that prosecutorial decisions are best premised on transparency⁹¹ and where the same is thrown into the dale of forgetfulness, the legitimacy of the entire process wanes. The absence of a cogent explanation by the OTP on why the entire Waki's list was not made public casts doubts on the OTP's transparency in the selection process.

4.3.4 Discretion in the Choice of Charges: Traditional or Expansive Approach?

Since the Post election violence offences in Kenya would not have amounted to genocide,⁹² the prosecutor wittingly settled on crimes against humanity.⁹³ This choice has also been controversial

<<http://hardtalkkenya.wordpress.com/2012/07/19/tell-us-mr-kigeugeu-if-you-benefited-from-ethnic-mobilisation-from-the-41-tribes-against-one-formula-senior-counsel-paul-muite/>> Accessed 13 May 2014.

⁸⁸Article 28.

⁸⁹Arguably, this approach is not novel. At the IMTFE Emperor Hirohito was not indicted, on the ground that his immunity was necessary for Japan's post war stability, and he was deliberately neither mentioned by the prosecution nor the defence. For an exposition see, Herbert P. Bix, *Hirohito and the Making of Modern Japan* (Harper Collins Publishers 2000) 591-618.

⁹⁰ Onyango Oloo, 'Ramifications of the Waki Report' 28 October 2008 Available <<http://jukwaa.proboards.com/thread/2737>> Accessed 13 May 2014.

⁹¹Brian D Lepar, 'How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles' (2010) 43 *John Marshall law Review* 553,564. The author states thus 'The principle of open-minded consultation also indicates that the Prosecutor has certain ethical obligations to share his or her own line of reasoning not only with relevant ICC institutions, but also with the general public. Transparency is an important ethical value. It furthermore naturally helps to build and sustain political trust of the Court and enhance its legitimacy'.

⁹² Article II of the Genocide Convention, and the Corresponding rule of customary law, clearly defines the conduct (objective elements) that may amount to Genocide. They are (i) Killing members (hence more than one member) of what could be termed as 'protected group', namely a national or ethnic, racial or religious group; (ii) Causing serious bodily or mental harm to a member of the protected group; (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) Imposing measures intended to prevent birth within the group; or (v) Forcibly transferring children of the group to another group. The mental requirement (subjective elements) for genocide is 'intent to destroy in whole or in part, a national, ethnic, racial or religious group'. For an exposition, see Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008)127-143. See also Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C.Asser Press 2009) 250-283. Clearly, the OTP would not have chosen genocide for a simple reason that the violence targeted political groups (either ODM or PNU supporters). Political groups are not part of the "protected

with both the supporters and dissenters differing on whether or not the choice was infallible. Controversy stems from disagreements on whether or not the crimes were committed ‘pursuant to or in furtherance of an organizational policy to commit such an attack’ as contemplated by the Rome Statute.⁹⁴ Dissenters⁹⁵ argued that the crimes were not committed strictly pursuant to such policy and therefore crimes did not pass the threshold set for crimes against humanity. Supporters⁹⁶ however favored an expansive approach therefore holding that even non state like entities have capability of committing crimes against humanity. This brought a conflict on whether to adopt a traditional definition of the term ‘organization’ or to shift to a ‘new expansive definition’⁹⁷ which would accommodate non state like entities in commission of crimes against humanity.

Traditionally, it is the state organs, i.e. individuals acting in an official capacity such as military commanders, servicemen, etc. who perpetrate crimes against humanity⁹⁸ and even when such are committed by individuals, the offences must be approved or at least condoned or countenanced by a governmental body for it to amount to a crime against humanity.⁹⁹ This also applies even when crimes are committed by state officials in their private capacity. Some sort of explicit or implicit approval or endorsement by the state or governmental authorities is required, or that it is necessary for the offence to be clearly encouraged by a general government policy or

groups” as provided for by the Genocide Convention as well as relevant rules of customary law on genocide and therefore preferring genocide charges against the suspects would not have withstood the requisite legal threshold.

⁹³*Prosecutor V. William Samoei Ruto, Henry K. Kosgei and Joshua Arap Sang* Pre Trial II, Decision on the Confirmation of Charges, ICC- 01/09-01/11 para. 22. The suspects were charged with murder, deportation or forcible transfer of people and persecution. See also *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* Pre Trial II, Decision on the Confirmation of Charges, ICC- 01/09-02/11 para. 21. The suspects were charged with murder, deportation or forcible transfer of people, rape and other forms of sexual violence, persecution and other inhumane acts constituting a crime against humanity.

⁹⁴Rome Statute , Article 7(2)

⁹⁵For Example see the International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, Dissenting Opinion of Judge Hans – Peter Kaul, ICC-01/09-02/11-382-Red par 15.

⁹⁶For example Judges Ekaterina Trendafilova and Cuno Tarfusser in the Decision on the Confirmation of Charges against Muthaura , Ali and Kenyatta, ICC- 01/09-02/11

⁹⁷*Ibid* par 27.

⁹⁸Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008)116.

⁹⁹*Ibid*.

at least to fit within such a policy.¹⁰⁰This is the position that has prevailed since the ruling by the German's Supreme Court in *Weller's case* on 21 June 1950.¹⁰¹

Going by the traditional view, the Kenyan cases would (as opined by Dissenting Judge Hans – Peter Kaul) have been dismissed since the OTP had not fully demonstrated that the commission of the offences was committed pursuant to an organizational policy condoned or endorsed by the state.¹⁰² Further, the Judge had opined that ‘mungiki’ could not qualify as an organization within the meaning of article 7(2) (a) of the Statute and accordingly they fell outside the scope of statute.¹⁰³The judge stated thus:¹⁰⁴

Even if, for the sake of argument, and taking into consideration the Majority's finding to that effect, the Mungiki gang alone were to be considered as the entity which had established a policy of attacking the civilian population, I hold that the Mungiki gang as such does not qualify as an 'organisation' within the meaning of article 7(2) (a) of the Statute. Admittedly, the Mungiki gang appears to control core community activities and to provide services, such as electricity, water and sanitation, and transport. However, the activities of the Mungiki gang remain limited in nature and are territorially restricted, in particular, to the slums of Nairobi. Moreover, as noted above, the evidence reveals that a

¹⁰⁰Ibid.

¹⁰¹The supreme court (at pp 206-7) said, ‘The national –socialist leadership often , and quite readily , utilized for its criminal goals its criminal goals and plans actions which appeared to have, or actually had, originated from quite personal decisions. This was true even for actions that were outwardly disapproved of, perhaps because it was felt that some sort of consideration should be shown and it was inappropriate openly to admit such actions...The link, in this sense, with the national socialist system of power and tyranny does in the case at issue manifestly exist. The State and the party had long before the action at issue made Jews out to be sub humans, not worthy to be human beingsAlso the action of the accused fitted into the numerous persecutory measures which then affected the Jews in Germany, or could at any time affect them. As the trial court established, the accused, influenced by official propaganda, acted from racial hatred. In the decision of Court of appeal....it is rightly pointed out that the link with the national –socialist system of power and tyranny exists not only in the case of those actions which are ordered and approved by the holders of hegemony. That link also exists when those actions can only be explained by the atmosphere and conditions created by the authorities in power. The trial court was wrong when it attached decisive value to the fact that after his action the accused was ‘rebuked’ and that even the Gestapo disapproved of the excesses as an isolated infringement. This action nevertheless fitted into the persecution of Jews carried out by the state and the party. This is proved by the fact that the accused, assuming he was subject of an order for summary punishment or a criminal measure for payment of 20RM- a matter that in any case has not been clarified - was in any event not held criminally accountable in a manner commensurate to the gravity of his guilt ...Given the gravity of the abuse, the harm caused to victims brought about the consequences extending beyond the single individuals and affecting the whole community’.

¹⁰²Dissenting Opinion of Judge Hans –Peter Kaul, ICC-01/09-02/11-382-Red.The judge says: ‘Given these historic experiences, it continues to seem a logical application of a lesson learnt that the drafters of the Statute confirmed in 1998 in article 7(2)(a) of the Statute the requirement ‘pursuant to or in furtherance of a State organizational policy’ as a decisive, characteristic and indispensable feature of crimes against humanity’

¹⁰³Ibid, par 19.

¹⁰⁴Ibid, par 15.

series of police operations were directed against the Mungiki gang before and after the 2007/2008 violence and that it could only have committed the crimes alleged with the support of certain individuals within the Kenyan political elite and the police apparatus. That said, I doubt whether the Mungiki gang had the capacity and the means at its disposal to attack any civilian population on a large scale. In light of the foregoing, I therefore do not find that the Mungiki gang, a criminal organisation, could have qualified as an 'organisation' within the meaning of article 7(2) (a) of the Statute.

Departing from this traditional view however, the prosecutor chose to press for the expansive approach and did in fact convince the trial chamber as much. To this end, majority of the judges opined that even though the entities behind the post election violence were not of a state-like nature, this did not preclude the court from considering them as organizations within the meaning of Article 7(2) of the Statute. The chamber therefore ruled:¹⁰⁵

Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values

Even though some leading scholars have supported the ICC's view and the expansive approach,¹⁰⁶ this research however takes the view that the OTP and the Chamber in general erred in championing for the expansive approach for a number of reasons. M. Cherif Bassiouni, who played a prominent role in the negotiations on the drafting of the Rome Statute, has observed that a state or organizational policy is an essential characteristic of crimes against humanity and that non state actors must have characteristics of state actors to be able to implement policies similar in nature to those offenses.¹⁰⁷ Other leading scholars have adopted similar position.¹⁰⁸ On his part,

¹⁰⁵*The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* Pre Trial II, Decision on the Confirmation of Charges, ICC- 01/09-02/11 para. 112.

¹⁰⁶See generally, Gerhard Werle and Boris Burghardt, 'Do Crimes Against Humanity Require participation of a State or a 'State-like Organization?'' (2012) *Journal of Criminal Justice* 1-20.

¹⁰⁷M.C. Bassiouni, *International Criminal Law* (2nd Edition Brill Academic Publishers 1999) 275-277.

Hansen,¹⁰⁹ opines that the expansive approach seems to have been adopted to suit the Kenyan situation only. Kress stresses that this type of approach would ‘stretch the scope of international law to the realm of national and transnational conflicts between states and destructive organizations of all kinds’.¹¹⁰ Furthermore, departure from the traditional approach is not a harbinger to the commitment of drawing a clear boundary between international crimes and human rights violations and also between international crimes and ordinary crimes.¹¹¹

4.4 Prosecutorial Discretion in the Democratic Republic of Congo

The situation in the DRC was referred to the OTP in April 2004¹¹² by way of a letter of referral requesting the OTP to look into situation in Ituri region.¹¹³ Unlike the Kenyan situation where the ICC processes were triggered by the OTP acting *proprio motu*, this was a self referral. However, as already noted, whatever trigger mechanism is employed, once this has taken place, the prosecutor has great discretion in the selection of cases investigations, screening of cases and selection of charges and in determination of admissibility of the chosen cases.¹¹⁴ The referral in this situation amounted to the indictment of Katanga, Ngudjolo and Lubanga.¹¹⁵

¹⁰⁸For example William A. Schabas, ‘State Policy as an Element of International Crimes’ (2008) 98 Journal of Criminal Law & Criminology 953.

¹⁰⁹ See generally Thomas Obel Hansen, ‘The Policy Requirement in Crimes Against Humanity: Lessons From and For The Case of Kenya’ (2011) George Washington International Law Review.

¹¹⁰Claus Kress, ‘On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision’ (2010) 23 Leiden Journal of International Law 855, 873.

¹¹¹Dissenting Opinion of Judge Hans –Peter Kaul, ICC-01/09-02/11-382-Red par.65

¹¹²Michael P. Scharf and Patrick Dowd, ‘No Way Out? The Question of Unilateral Withdrawals or Referrals to the ICC and Other Human Rights Courts’ (2009) Chicago Journal of International Law 573,576.

¹¹³William A. Schabas, ‘Complementarity in Practice’: Some Uncomplimentary Thoughts’ Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, 23 June 2007, 6.

¹¹⁴See footnotes 2, 3, 4 and 5 above.

¹¹⁵Linda E. Carter ‘The international Criminal Court in 2021’ (2011) 18 South Western Journal of International Law 199,200.

4.4.1 Democratic Republic of Congo: The Factual Situation

Forces led by Laurent Desiré Kabila fought the Mobutu government since 1993.¹¹⁶ In 1994, the tensions were further fueled by the massive inflow of refugees fleeing the conflicts in Rwanda and Burundi. In November 1996, Kabila's forces, backed by neighboring Rwanda and Uganda, brutally dismantled the refugee camps in the North and South Kivu provinces, where Rwandan Hutus settled in the aftermath of the 1994 Rwandan genocide.¹¹⁷

The rebel movement progressed toward Kinshasa and in May 1997, still backed by Rwanda and Uganda, Kabila's forces victoriously ousted the Mobutu regime and Kabila became the president of the DRC.¹¹⁸ Kabila subsequently requested the Rwandan and Ugandan militaries to leave the country, but they remained. In August 1998, war broke out again in the DRC, with Rwanda and Uganda this time fighting against Kabila in support of a local insurrection. Angola, Namibia and Zimbabwe intervened on behalf of Kabila.¹¹⁹ Given the involvement of several countries in the conflict and its impact on the African continent, this second DRC war is sometimes called "Africa's World War".¹²⁰

In July 1999, a ceasefire was agreed upon.¹²¹ In 2000, the UN established a peacekeeping mission in the DRC, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).¹²² In January 2001, Laurent Desiré Kabila was assassinated and his son Joseph became president.¹²³ Rwandan and Ugandan forces withdrew in late 2002, but proxies of these states, in the form of rebel groups, remained in the DRC, where they committed massive human

¹¹⁶The Beacon Editorial Board, 'Pay Attention, World: DRC Genocide Threatens Humanity' 28 November 2008. Available at <<http://www.wilkesbeacon.com/opinion/pay-attention-world-drc-genocide-threatens-humanity-1.920172#.U3XOHXZiRJE>> Accessed 16 May 2014.

¹¹⁷Sigall Horovitz, 'DR Congo: Interaction Between International and National Judicial Responses to the Mass Atrocities' Domac Reykjavik University 14 February 2012, 16. Available at <<http://www.domac.is/media/domac/DRC-DOMAC-14-SH.pdf>> Accessed 10 May 2014.

¹¹⁸Ibid.

¹¹⁹See generally, Central Intelligence Agency, 'World Fact Book' Available at <<https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>> Accessed 16 May 2014.

¹²⁰Gerard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press 2010) 47.

¹²¹See generally, Electoral Institute for Sustainable Democracy in Africa, 'The 1999 DRC Cease-fire Agreement and the 1994 Lusaka Protocol from a Gender Perspective' 1-3. Available at <<http://www.content.eisa.org.za/old-page/1999-drc-cease-fire-agreement-and-1994-lusaka-protocol-gender-perspective>> Accessed 16 May 2014.

¹²²Sigall Horovitz, 'DR Congo: Interaction Between International and National Judicial Responses to the Mass Atrocities' Domac Reykjavik University 14 February 2012, 16. Available at <<http://www.domac.is/media/domac/DRC-DOMAC-14-SH.pdf>> Accessed 10 May 2014

¹²³International Crisis Group, 'From Kabila to Kabila: Prospects for Peace in the Congo' (ICG Africa Report No. 27, 16 March 2001) 1.

rights violations and illegally exploited and smuggled the DRC's natural resources. In December 2002, all Congolese belligerents and political groups signed the Pretoria Peace Agreement, pursuant to which a transitional power-sharing government was instituted in June 2003 and national elections were held in 2006.¹²⁴

Although a relative peace was achieved, regional hostilities prevailed in the eastern parts of the DRC, especially in the Ituri district of Orientale province and in the North Kivu and South Kivu provinces, and to a certain degree also in Katanga province.¹²⁵ On 23 January 2008, a peace agreement was signed in Goma between the government and 22 rebel groups in eastern DRC (Goma Peace Agreement).¹²⁶ However, armed hostilities between the FARDC and rebel groups and among rebel groups continue in eastern DRC to this day.¹²⁷

In Orientale province, in addition to local armed groups, the Ugandan rebel group Lord's Resistance Army (LRA) is currently active.¹²⁸ In North Kivu and South Kivu provinces, numerous rebel groups are active including the *Forces Démocratiques de Libération du Rwanda* (FDLR) and the *Congrès National pour la Défense du Peuple* (CNDP).¹²⁹ It is however

¹²⁴ International Crisis Group, 'Conflict History: DR Congo' 15 June 2010 .Available at http://reliefweb.int/sites/reliefweb.int/files/resources/644802B7530B82DBC125774300076FFB-Full_Report.pdf Accessed 16 May 2014.

¹²⁵ In Katanga province, battles between the Mai Mai militia and the National army led to widespread abuses of the civilian population between 2003 and 2006. See also Sigall Horovitz, 'DR Congo: Interaction Between International and National Judicial Responses to the Mass Atrocities' Domac Reykjavik University 14 February 2012, 17. Available at <<http://www.domac.is/media/domac/DRC-DOMAC-14-SH.pdf>> Accessed 10 May 2014

¹²⁶ See, The Democratic Republic of Congo, 'Peace Agreement between The Government and The Congres National Pour La Defense Du Peuple' Available at <<http://www.ucdp.uu.se/gpdatabase/peace/DRC%2020090323.pdf>> Accessed 16 May 2014.

¹²⁷ Human Rights Watch, *World Report 2009: Events of 2008* (New York 2009) 61 Available at <http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf> Accessed 16 May 2014. It is noted therein thus 'Violence, impunity, and horrific human rights abuses continue in the Democratic Republic of Congo, two years after historic elections were expected to bring stability. Early in 2008 a peace agreement brought hope to eastern Congo, but combat between government and rebel forces resumed in August. During the year, hundreds of civilians were killed, thousands of women and girls were raped, and a further 400,000 people fled their homes, pushing the total number of displaced persons in North and South Kivu to over 1.2 million. In western Congo, state authorities used violence and intimidation against political opponents, killing over 200 protestors and others in Bas Congo and arresting scores of supposed opponents, many of them from Equateur province, on charges of plotting against the government. Officials harassed press and civil society critical of the government'.

¹²⁸ Sigall Horovitz, 'DR Congo: Interaction Between International and National Judicial Responses to the Mass Atrocities' Domac Reykjavik University 14 February 2012, 17. Available at <<http://www.domac.is/media/domac/DRC-DOMAC-14-SH.pdf>> Accessed 10 May 2014.

¹²⁹ International Crisis Group, 'From Kabila to Kabila: Prospects for Peace in the Congo' (ICG Africa Report No. 27, 16 March 2001) 1 .

important to mention in this context that the illegal exploitation of natural resources in the DRC, including by multinational corporations, has fueled the conflict and has been considered one of the main causes of human rights abuses in the DRC.¹³⁰

Atrocities against civilians have been committed by all sides to the DRC conflicts, including FARDC soldiers and non-state actors. The atrocities include rape and other forms of sexual and gender-based violence, recruitment of child soldiers, murder, abduction, forceful displacement of civilians, arbitrary arrest and detention, forced labour, summary executions, as well as torture and other cruel, inhuman or degrading treatment.¹³¹ According to the International Rescue Committee, Between August 1998 and April 2007, around 5.4 million people died in the DRC either directly from the violence or as a result of war-related diseases and starvation.¹³²

In 2007 and 2008, more deaths and atrocities were recorded.¹³³ In 2009, the situation deteriorated further, in particular with respect to the sexual violence.¹³⁴ A UN expert report from 2010 stresses that the sexual violence crimes committed in eastern DRC in 2009 nearly doubled in comparison to 2008, and was mainly committed by FDLR troops.¹³⁵ It adds that the LRA has also been committing sexual violence crimes in Orientale province, in their reprisals for government military operations.¹³⁶ Regarding the use of children in active hostilities, the report states that ‘ in addition to the recruitment of children, FARDC and armed groups continue to be cited for other grave child rights violations, including the direct involvement of children on the front lines, the killing and maiming of children and sexual violence.’¹³⁷ Atrocities continued to

¹³⁰Sigall Horovitz, ‘DR Congo: Interaction Between International and National Judicial Responses to the Mass Atrocities’ Domac Reykjavik University 14 February 2012, 17. Available at <<http://www.domac.is/media/domac/DRC-DOMAC-14-SH.pdf>> Accessed 10 May 2014

¹³¹United Nations Human Rights Council, ‘Expert Report on DRC’ (15 November 2010) par. 18, 23 Available at <<http://www.slideshare.net/NoBloodMinerals/united-nations-group-of-experts-report-on-congo-nov-15-2010>> Accessed 16 May 2014

¹³² International Rescue Committee, ‘Measuring Mortality in the Democratic Republic of Congo’ 1. Available at <http://www.rescue.org/sites/default/files/resource-file/IRC_DRCMortalityFacts.pdf> Accessed 16 May 2014.

¹³³ Human Rights Watch, *World Report 2009: Events of 2008* (New York 2009) 61 Available at <http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf> Accessed 16 May 2014.

¹³⁴ Human Rights Watch, *World Report 2010: Events of 2009* (New York 2010) 98. Available at <<http://www.hrw.org/sites/default/files/reports/wr2010.pdf>> Accessed 16 May 2014.

¹³⁵United Nations Human Rights Council, ‘Expert Report on DRC’ (15 November 2010) par. 27 Available at <<http://www.slideshare.net/NoBloodMinerals/united-nations-group-of-experts-report-on-congo-nov-15-2010>> Accessed 16 May 2014

¹³⁶Ibid par. 29

¹³⁷Ibid par. 37

be committed in eastern DRC throughout 2010. For example, from 30 July to 2 August 2010, about 200 members of three non-state armed groups committed a series of attacks on the civilian population in Walikale, North Kivu, raping at least 303 civilians, looting hundreds of houses and shops, and abducting 116 people who were forced to carry the loot.¹³⁸ It is noted that MONUC and its successor UN peacekeeping force in the DRC, MONUSCO, have occasionally been criticized for not intervening to protect civilians from mass atrocities.¹³⁹

4.4.2 Demarcating Prosecutorial Discretion in the DRC's ICC Situation

Unlike the situation in Kenya, questions of jurisdiction and admissibility did not pose a major challenge to the OTP's exercise of prosecutorial discretion. This is because the crimes were committed after 1 July 2002 after the Statute had come into force¹⁴⁰ and therefore the question of temporal jurisdiction does not arise.¹⁴¹ The crimes were committed on the territory of a state party by its nationals and they qualified either as genocide, crimes against humanity or war crimes¹⁴² and therefore fell within the substantive jurisdiction of the ICC.¹⁴³ Regarding admissibility, there had been a collapse of state institutions (due to war) including the judiciary¹⁴⁴ and it can therefore be rightly argued that the DRC would have been unable to conduct proceedings as required by Article 17(3) of the Statute. Furthermore, the fact that no state requested for a deferral (informing the OTP that it has or it is investigating the crimes) as contemplated by the Statute¹⁴⁵ meant that the legal hurdles had been cleared thus paving way for the admission of this particular situation.

¹³⁸UN News Centre 'Preliminary UN Report Confirms Over 300 Rebels in Eastern DRC' 24 September 2010. Available at <<http://www.un.org/apps/news/story.asp?NewsID=36129#U3X9JnZiRJF>> Accessed 17 May 2014.

¹³⁹Sigall Horowitz, 'DR Congo: Interaction Between International and National Judicial Responses to the Mass Atrocities' Domac Reykjavik University 14 February 2012, 19.

¹⁴⁰Jan Wouters and Sten Verhoeven, 'Justice For Africa: The Cases of the Democratic Republic of Congo, Uganda and Darfur Before the International Criminal Court' (K.U. Leuven Faculty of Law, Institute For International law Working paper No 81- July 2005) 5.

¹⁴¹Ibid.

¹⁴²Rome Statute, Articles 12 (2). See also Articles 5-8.

¹⁴³Jan Wouters and Sten Verhoeven, 'Justice For Africa: The Cases of the Democratic Republic of Congo, Uganda and Darfur Before the International Criminal Court' (K.U. Leuven Faculty of Law, Institute For International law Working paper No 81- July 2005) 6.

¹⁴⁴Ibid 7. See also Avocats Sans Frontieres, 'Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo' (2009) 6. Available at <http://www.asf.be/wp-content/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf> Accessed 17 May 2014.

¹⁴⁵Article 18.

However, although jurisdiction and admissibility did not present a major challenge, qualms were prevalent regarding choice of the Ituri, choice of the indictees as well as charges preferred against the indictees among them, Lubanga Dyilo and Germain Katanga.¹⁴⁶

4.4.3 Prosecutor's Selectivity in Areas to Investigate

As already stated, regional hostilities prevailed in many parts of the DRC for example the Ituri district of Orientale province, North Kivu and South Kivu provinces, and also in Katanga province.¹⁴⁷ Unanswered questions however proliferate as to why the prosecutor zeroed in on Ituri region only and not other areas which had experienced similar if not graver atrocities.¹⁴⁸ Clark contends the OTP must have exercised political caution while selecting Ituri and ignoring other regions.¹⁴⁹ He charges thus:¹⁵⁰

First, while there is little doubt that atrocities committed in Ituri have been among the gravest in the DRC, immense political caution characterized the ICC's strategy, raising questions about the validity of its approach. Of the various conflicts in the DRC, that in Ituri is the most isolated from the political arena in Kinshasa. In particular, there is less clear evidence to connect President Kabila to atrocities committed in Ituri, although it is suspected that he has previously supported various rebel groups in the province, including Germain Katanga's FRPI. This differs from violence in other provinces, particularly North and South Kivu and Katanga, where government forces and Mai Mai militias backed by Kabila are directly implicated in serious crimes. Therefore, investigations and prosecutions in Ituri display the least capacity to destabilize the current government.

¹⁴⁶See generally, Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008).

¹⁴⁷See footnote 121 above.

¹⁴⁸Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 40.

¹⁴⁹Ibid.

¹⁵⁰Ibid

It is also contended that the move was a crucial consideration for the ICC as it needed to maintain good relations with Kinshasa to ensure security of the ICC investigators and other personnel working in the volatile eastern provinces of the DRC.¹⁵¹ Questions that however supplicate for answers are- is this consideration that the OTP should mull over in deciding which areas to investigate? Is it one of those that are envisaged in the Rome Statute?

The OTP is enjoined to be impartial¹⁵² and nowhere in the Statute is required to give preeminence to political factors in choosing areas to investigate. Moreover, when it comes to matters of international peace and security, the Security Council and not the OTP is best legally placed to handle.¹⁵³ Furthermore, of the conflict affected provinces of the DRC, Ituri (compared to other provinces) had (at the time) the best functioning local judiciary which had already shown adeptness at investigating serious crimes including those committed by Lubanga Dyilo Germain Katanga and Ngudjolo Chui.¹⁵⁴ It was therefore unclear whether the OTP could justify its involvement in Ituri given the fact that the European Union had in July 2003 donated an Ituri focused investment of US \$ 40 million towards reforming Congolese Judiciary and immense progress in the local capacity was conspicuous.¹⁵⁵ Indeed when the OTP opened its investigations into Lubanga and Katanga cases, these leaders were already in custody and significant evidence had already been gathered by the local civilian and military courts, working closely with MONUC.¹⁵⁶ Why would a global court focus its energies where the judicial task is more straightforward due to substantial local capacity, while mass atrocities continued in

¹⁵¹Ibid.

¹⁵²Rome Statute, Article 42 (7).

¹⁵³See generally Kristen E Boon 'Coining a New Jurisdiction: The Security Council as The Economic Peace Keeper' (2008) 41 *Vanderbilt Journal of Transnational Law* 991-1042.

¹⁵⁴Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 40.

¹⁵⁵ Ibid 41. See also International Legal Assistance Consortium and International Bar Association Human Rights, 'Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo' (2009) 25. Available at <<http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDkQFjAD&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUId%3D54396461-F637-4842-AD27-416E63413AB9&ei=t6F5U5i4HqyalAWF1oDgAw&usq=AFQjCNHirM-WcjK9ZSYacWEDf8DbrDRefw&bvm=bv.66917471,d.bGQ>> Accessed 19 May 2014.

¹⁵⁶Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 42. See also William A. Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts' Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, 23 June 2007 20

provinces where judicial resources were severely lacking? Why should the OTP focus only on easiest cases? This research gives an answer that “this is what happens when the OTP glorifies political considerations over pragmatism.”

4.4.4 Prosecutor’s Selectivity in the Choice of Indictees

Having established that atrocities against civilians were committed by all sides to the DRC conflicts, including FARDC soldiers and non-state actors,¹⁵⁷ it is difficult to digest the fact that the OTP indicted only the rebel leaders leaving out the government forces and the Mai Mai militias backed by President Kabila and who were directly implicated in these heinous crimes.¹⁵⁸ It is asserted that the OTP wanted to avoid implicating government officials in the lead-up to Congo’s first post - independence elections held in July 2006.¹⁵⁹ Further, questions may be raised about the narrow geographical approach the OTP adopted regarding the DRC situation. The OTP resisted investigating the wider dimensions of the crimes including the alleged training and financing of Lubanga’s UPC by the Ugandan and Rwandan governments.¹⁶⁰ Such investigations could implicate key figures in Kampala and Kigali, including Salim Saleh, Ugandan President Museveni’s half-brother and a former Ugandan People’s Defence Force (UPDF)

¹⁵⁷United Nations Human Rights Council (n 126). See also Ted Dagne, ‘The Democratic Republic of Congo: Background and Current Developments’ (CRS Report for Congress, 1 September 2009) 11-12. The author avers, ‘In all areas of the country, state security forces continued to act with impunity throughout the year, committing many serious abuses, including unlawful killings, disappearances, torture, rape and engaging in arbitrary arrests and detention. Severe and life-threatening conditions in prison and detention facilities, prolonged pretrial detention, lack of an independent and effective judiciary, and arbitrary interference with privacy, family, and home also remained serious problems. Members of the state security forces continued to abuse and threaten journalists, contributing to a decline in press freedom. Internally displaced persons remained a major problem, and the integration of ex-combatants and members of rebel and militia groups (RMGs) into state security forces and governance institutions was slow and uneven. Government corruption remained pervasive, and some corporations purchased minerals from suppliers who financed mining activities by armed entities that committed serious human rights abuses. Elements of the state security forces were charged in the death of one of the country's leading human rights defenders and at times beat or threatened local human rights advocates and obstructed or threatened UN human rights investigators. State security forces retained and recruited child soldiers and compelled forced labor by civilians’

¹⁵⁸Phi IClark, ‘Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.’ in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008)41.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid. See also Annexe 4 C, ICC-01/04-01/07-991 available at < <http://www.icc-cpi.int/iccdocs/doc/doc650419.pdf> > Accessed 19 May 2014. See also Rebecca Bowman, ‘Lubanga, the DRC and the African Court: Lessons learned from the first International Criminal Court Case’ (2007) 7 *African Human Rights Law Journal* 412, 415. See further Julia Graff, ‘Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo’23-25. Available at <<http://www.wcl.american.edu/hrbrief/11/2graff.pdf>> Accessed 19 May 2014.

commander.¹⁶¹ Apart from portraying impartiality by the OTP, this kind of selectivity spelt continued impunity for the leaders most responsible for the immense harm the Congolese people had suffered.¹⁶²

4.4.5 Prosecutor's Discretion in the Choice of Charges

In addition to selectivity in the choice of regions to investigate and indictees thereof, expostulations have been prevalent regarding the charges preferred against the indictees from the subject situation.¹⁶³ But it is the charges preferred against Lubanga that have raised eyebrows. For example, Schabas¹⁶⁴ questions the removal of Lubanga from the DRC whereby he was facing charges of genocide and crimes against humanity only to be charged with enlisting, conscripting, and active use of children under the age of fifteen in armed conflict by the OTP. He therefore sarcastically states 'as for Lubanga himself, he must be delighted to find himself in The Hague facing prosecution for relatively less offences concerning child soldiers rather than genocide and crimes against humanity'. Similar sentiments are echoed by K'shaani¹⁶⁵ who authoritatively argues that the prosecutor should have pursued rape and other sexual offences (as crimes against humanity) since failure to do so occasioned grave injustice to women and girls involved in the atrocities. These views are valid given that the OTP finally secured a conviction of 14 years only in the Lubanga's case on charges of conscripting child soldiers.¹⁶⁶ It may therefore be rightly argued the choice of charges was impeachable given that it left rape victims who were mostly women and girls grappling with injustice.¹⁶⁷

¹⁶¹Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008)41.

¹⁶²Ibid.

¹⁶³For example, see Elena Gekker ' Rape, Sexual Slavery, and Forced Marriage at the International Criminal Court: How Katanga Utilizes a Ten-Year-Old Rule but Overlooks New Jurisprudence' (2014) 25 Hastings Women's Law Journal 105, 107. The author disparages failure by the OTP to charge the accused with forced marriage 'even though there was sufficient evidence and known instances.'

¹⁶⁴William A. Schabas, 'Complementarity in Practice':Some Uncomplimentary Thoughts' Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, 23 June 2007 20-21.

¹⁶⁵K'shaani O. Smith, 'Prosecutor V. Lubanga: How The International Criminal Court Failed the women and Girls of the Congo' (2011) 54 Howard Law Journal 467-468 .

¹⁶⁶See generally, Kai Ambos, 'The First Judgment of the International Criminal Court: Prosecutor V. Lubanga: A Comprehensive Analysis of the Legal Issues' (2012) 12 International Criminal Law Review115.

¹⁶⁷K'shaani O. Smith, 'Prosecutor V. Lubanga: How The International Criminal Court Failed the women and Girls of the Congo' (2011) 54 Howard Law Journal 467-468.

4.5 Prosecutorial Discretion in Uganda ICC's Situation

The OTP commenced its operations over the situation in Northern Uganda following President Museveni's referral to the ICC prosecutor in December 2003.¹⁶⁸ Notably, this was the first ever state referral to the ICC.¹⁶⁹ In its communication, the Ugandan government underscored crimes committed by the Lord's Resistance Army (LRA), but the OTP informed Museveni that the ICC would interpret the referral as concerning all crimes under Rome Statute committed in Northern Uganda.¹⁷⁰

4.5.1 ICC's Intervention in Northern Uganda: The Background to the Northern Uganda's Conflict

The Lord's Resistance Army, an armed rebel group led by Joseph Kony, operates in the north of Uganda from bases in Southern Sudan to establish a government based on the Bible's Ten Commandments.¹⁷¹ Although its activities are mostly concerned with destabilizing northern Uganda, the Lord's Resistance Army also linked up with Interahamwe rebels around the Bunia area in the DRC.¹⁷² Furthermore, the scope of the conflict was even bigger since Sudan allegedly supported the Lord's Resistance Army in response to suspected Ugandan support to the Sudan People's Liberation Army, the former rebel movement fighting against the Sudan government, causing a freeze in the diplomatic relations between the two countries.¹⁷³ However, relations

¹⁶⁸Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 42. See also Michael P. Scharf and Patrick Dowd, 'No Way Out? The Question of Unilateral Withdrawals or Referrals to the ICC and Other Human Rights Courts' (2009) *Chicago Journal of International Law* 573, 575. See also Linda M. Keller 'Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms' (2008) 23 *Connecticut Journal of International Law* 209, 211.

¹⁶⁹ Ibid.

¹⁷⁰Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 42.

¹⁷¹Jan Wouters and Sten Verhoeven, 'Justice For Africa: The Cases of the Democratic Republic of Congo, Uganda and Darfur Before the International Criminal Court' (K.U. Leuven Faculty of Law, Institute For International Law Working paper No 81- July 2005) 8.

¹⁷²Paul Omach, 'Regionalization of Rebel Activities: The Case of the Lord's Resistance Army' in Wafula Okumu and Augustine Ikelegbe (eds) *Militias Rebels and Islamists Militants: Human Insecurity and State Crises in Africa* (Institute for Security Studies 2010) 287-288.

¹⁷³Sudan Tribune, 'Uganda Accuses Khartoum of Resuming Support for LRA' 26 April 2014. Available at <<http://www.sudantribune.com/spip.php?article50779>> Accessed 19 May 2014.

have improved in recent years. In 1999, Sudan and Uganda signed an agreement under which Sudan would stop aiding the Lord's Resistance Army and Uganda would stop aiding the Sudan People's Liberation Army.¹⁷⁴ Furthermore, in 2000 Uganda adopted an amnesty act initially for six months, which was also applicable to the rebels of the Lord's Resistance Army, but the law has subsequently been extended six times, lastly on 14 January 2004, for three months, but excluding the leadership of the Lord's Resistance army.¹⁷⁵ The Lord's Resistance Army, however, continued to carry out its attacks and although its levels of activity diminished somewhat compared with 1997, the area that it targeted grew.¹⁷⁶ The civil strife in the north has led to the violation of the rights of many members of the Acholi tribe, which is largely resident in the northern districts of Gulu and Kitgum.¹⁷⁷ Both government forces and the Lord's Resistance Army rebels, who themselves are mainly Acholi are reported to be committing the violations.¹⁷⁸ Uganda's Gulu and Kitgum districts have been displaced by the fighting and fled inhabitants are living in temporary camps, supposedly protected by the army, which was accused in a report of May 2004 by Christian Aid of herding civilians into camps ostensibly to protect them from the Lord's Resistance Army without offering them the protection they needed.¹⁷⁹ The Ugandan government subsequently rejected the report. The continued rebel attack in northern Uganda raised questions about planned peace talks between the Lord's Resistance Army and Uganda's government.¹⁸⁰

Despite this, President Yoweri Museveni agreed to peace talks brokered by Ugandan religious leaders, but the Ugandan army remained skeptical of this new approach since it does not believe that Joseph Kony is interested in peace at all. In February 2003 Sudan allowed troops from

¹⁷⁴See generally, The Nairobi Agreement: Agreement Between the Governments of Sudan and Uganda, 8 December 1999 Available at <http://www.cartercenter.org/documents/nondatabase/nairobi%20agreement%201999.htm> Accessed 19 May 2014.

¹⁷⁵Jan Woutters and Sten Verhoeven, 'Justice For Africa: The Cases of the Democratic Republic of Congo, Uganda and Darfur Before the International Criminal Court' (K.U. Lueven Faculty of Law, Institute For International law Working paper No 81- July 2005) 9.

¹⁷⁶Ibid.

¹⁷⁷United Nations Human Rights Office of the High Commissioner, *"The Dust Has Not Yet Settled" Victims Views on the Right to Remedy and Reparations: A Report from Greater North Uganda* (UN Global Women Programme 2011)xii.

¹⁷⁸Ibid.

¹⁷⁹Jan Woutters and Sten Verhoeven, 'Justice For Africa: The Cases of the Democratic Republic of Congo, Uganda and Darfur Before the International Criminal Court' (K.U. Lueven Faculty of Law, Institute For International law Working paper No 81- July 2005) 9.

¹⁸⁰Ibid.

neighboring Uganda to enter its territory to attack the Lord's Resistance Army rebels. By early 2003 optimism was growing that 16 years of fighting in northern Uganda might soon come to an end. Rebels of the Lord's Resistance Army declared a ceasefire and stated to hold talks with the government of Yoweri Museveni.¹⁸¹

This change in stance may be due to the destruction of the Lord's Resistance Army's bases in southern Sudan by Ugandan troops following an agreement with the Sudanese government. This meant the rebels' main sources of food and military supplies to be located in northern Uganda, making them much more vulnerable to attacks by government troops.¹⁸²

However, optimism was short lived since in June 2003 Joseph Kony instigated his fighters to destroy Catholic missions, kill priests and missionaries, and beat up nuns. In 2004 the government of Uganda continued to combat the Lord's Resistance Army, but leaving the way open for negotiations. The Lord's Resistance Army, however, was still capable of striking back by attacking camps for internally displaced persons in northern Uganda. By the beginning of 2005, a ceasefire had been adopted, which only lasted 18 days, after which the violence flared up and persists even till this day.¹⁸³

4.5.2 OTP's Exercise of Discretion in Northern Uganda: Emerging Issues

The OTP's exercise of discretion in northern Uganda raises two major issues. The first one borders on selectivity of the indictees while the other one relates to the unusual grounds on which the ICC opened the LRA cases.

4.5.3 Prosecutor's Selectivity in the Choice of Indictees

Having established that both the LRA and the UPDF have committed atrocities in northern Uganda,¹⁸⁴ the investigations into LRA and not UPDF creates perception of the OTP as one sided and heavily politicized.¹⁸⁵ Indeed arrest warrants issued in October 2005 implicated Kony, Otti,

¹⁸¹Ibid.

¹⁸²Ibid.

¹⁸³Ibid.

¹⁸⁴United Nations Human Rights Office of the High Commissioner, *"The Dust Has Not Yet Settled" Victims Views on the Right to Remedy and Reparations: A Report from Greater North Uganda* (UN Global Women Programme 2011)xii..

¹⁸⁵Amnesty International, 'Uganda: First Ever Arrest Warrants by International Criminal Court- A First Step Towards Addressing Impunity' 14 October 2005. Available at <http://www.iccnw.org/documents/AI_ugandaarrests_14oct05.pdf> Accessed 20 May 2014.PhilClark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and

Lukwiya, Okot Odhiambo and Dominic Ongwen who were all LRA's Commanders.¹⁸⁶ Undeniably, the widespread view of the community leaders and members of the political opposition in Kampala and northern Uganda had been that "ICC had become Museveni's political tool"¹⁸⁷ The antipathy towards the OTP was exacerbated by the fact that even the local and international human rights groups had reported regular and grave atrocities committed by the UPDF in northern Uganda particularly the forced displacement of around 1.5 million civilians into IDP camps¹⁸⁸ and yet no one from the UPDF was indicted by the OTP. In fact, a qualitative study by the UN Office of the High Commissioner for Human Rights highlighted that the majority of the 1725 victims interviewed considered both the LRA and the government responsible for immense harm they had suffered during the conflict.¹⁸⁹ It is contended that it is in fact the OTP that approached Museveni in 2003 and persuaded him to refer the Uganda case to the ICC as the referral suited both parties, providing the ICC with its first state referral of a case and the Ugandan government with another stick with which to beat the LRA.¹⁹⁰

4.5.4 Prosecutorial Discretion *Vis a Vis* Grounds for ICC's Intervention

The OTP and the ICC in general may only be seized of a situation if the complementarity threshold is fulfilled.¹⁹¹ However, questions are numerous on whether the exercise of discretion to intervene in Northern Uganda was strictly premised on complementarity. Arguably, the grounds upon which the OTP opened the LRA's cases center not on the basis of the unwillingness or inability of the Ugandan judiciary to prosecute serious cases but rather on the inability of

Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 42 and also William A. Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts' Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, 23 June 2007 25.

¹⁸⁶ IRIN, 'ICC Issues Arrest warrants for LRA Leaders' 7 October 2005 Available at <<http://www.irinnews.org/fr/report/56630/uganda-icc-issues-arrest-warrants-for-lra-leaders>> Accessed 20 May 2014.

¹⁸⁷ Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 42.

¹⁸⁸ Ibid 43.

¹⁸⁹ UN Office of the High Commissioner for Human Rights, 'Making Peace Our Own: Victims' Perceptions of Accountability, Transitional Justice and Reconciliation in Northern Uganda' 3. Available at <http://transitionaljustice.ulster.ac.uk/pdfs/unohchr_tj_study_final_report.pdf> Accessed 20 May 2014.

¹⁹⁰ Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 42. See also, William A. Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts' Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, 23 June 2007 14.

¹⁹¹ Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 342 -344 See Chapter 3, footnote 41.

government forces to capture and arrest the LRA leadership¹⁹²- which basis is not envisaged in the Rome Statute. The Ugandan judiciary – one of the most proficient and robust in Africa¹⁹³ –is unquestionably able and willing to prosecute serious cases such as those involving LRA and more importantly, even if it is considered justifiable for the OTP to open investigations on the basis that Uganda’s military and police (rather than judicial) capacity is insufficient to address serious crimes the fact remains that ICC itself has neither military nor police capacity.¹⁹⁴

The foregoing notwithstanding, it is also absolutely important to interrogate whether the decision to initiate a self referral to the ICC by the Uganda government implied lack of capacity to prosecute or depicted unwillingness to prosecute and therefore attaining the admissibility threshold as provided for under article 17 of the Statute. This originates from the fact at the time of referral there was already an Amnesty Act which had been adopted in the year 2000.¹⁹⁵ It must be noted that in determining inability or unwillingness to prosecute, one should also add cases where the national court is unable to try a person not because of a collapse of or malfunctioning of judicial system, but on account of legislative impediments, such as amnesty law, or a statute of limitation, making it impossible for the national judge to commence proceedings against the suspect or the accused.¹⁹⁶ It is however the view of this paper that the existence of the amnesty law in Uganda was not an indicator of inability or unwillingness to prosecute. First as at the time of referral, the amnesty law did not apply to the LRA leadership who had already been identified as bearing the greatest responsibility in connection to the atrocities.¹⁹⁷ Secondly, the amnesty targeted only the lower cadres of rebels with a view of dissuading them from war leading to the end of hostilities.¹⁹⁸ The decision in *Thomas Kwoyelo alias Latoni vs. Uganda*¹⁹⁹ can demonstrate this.

¹⁹² Phil Clark, ‘Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.’ in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 43.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Jan Wouters and Sten Verhoeven, ‘Justice For Africa: The Cases of the Democratic Republic of Congo, Uganda and Darfur Before the International Criminal Court’ (K.U. Leuven Faculty of Law, Institute For International law Working paper No 81- July 2005) 9.

¹⁹⁶ Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 344.

¹⁹⁷ Jan Wouters and Sten Verhoeven, ‘Justice For Africa: The Cases of the Democratic Republic of Congo, Uganda and Darfur Before the International Criminal Court’ (K.U. Leuven Faculty of Law, Institute For International law Working paper No 81- July 2005) 9.

¹⁹⁸ Joseph M. Isanga, ‘The International Criminal Court Ten Years Later’ (2013) 21 Cardozo Journal of International and Comparative Law 235, 267.

¹⁹⁹ *Thomas Kwoyelo Alias Latoni vs. Uganda*, UGCC Petition No. 36 of 2011.

Both the Uganda Constitutional and Supreme courts stated that the Ugandan Amnesty Act did not grant blanket amnesty to all wrongdoers.²⁰⁰ With respect to arguments regarding Uganda's international obligations, the courts concurred that the indictments of the five individuals by the ICC demonstrated that Uganda was aware of its international obligations, and that the Amnesty Act did not impair those obligations.²⁰¹ Moreover the courts opined that the DPP Uganda had acted with discrimination and selectivity by not granting amnesty to Kwoyelo and yet the same had been extended to similarly situated individuals.²⁰² It must also be noted that while amnesties may be treated as an indicator of unwillingness to prosecute, domestic amnesties do not bind either ICC or its prosecutor²⁰³ and cannot generally be treated as a serious impediment to the OTP's operations.

A view may therefore be shared that the motivation of the Government of Uganda in making a self referral never bordered on inability or unwillingness to prosecute the indictees. The referral (which took place while an amnesty law was operational) amounted to a further source of pressure that Uganda could bring to bear on rebels whom it had been impossible to defeat on the battle field.²⁰⁴ In this regard, Schabas further avers:²⁰⁵

President Museveni must have calculated that the threat of prosecution might compel the leaders of the LRA to negotiate a peaceful settlement to the two- decade long war. He is a shrewd and skilled operator, and on this point he judged correctly. It is widely acknowledged that the threat of prosecution by the ICC has helped to bring the LRA to the negotiation table. On a visit to the court, the Ugandan Minister for Security, Amama Mbabazi, noted that issuance of warrants had contributed to driving the LRA leaders to the negotiating table.

Therefore, it is true that the OTP opened the case in northern Uganda on grounds that are not among those contemplated in the Rome Statute.

²⁰⁰ See generally, Kirsty McNamara 'Seeking Justice in Ugandan Courts: Amnesty and the Case of Thomas Kwoyelo' (2013) 12 Washington University Global Studies Law Review 653.

²⁰¹ Ibid.

²⁰² Ibid 662.

²⁰³ Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edition Cambridge University Press 2013) 566.

²⁰⁴ William A Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts' Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, 23 June 2007, 15.

²⁰⁵ Ibid.

4.6 Conclusion

In conclusion, it is factual to state that the exercise of OTP's discretionary powers in the afore discussed situations was not conducted in an infallible manner. Squabbles regarding the impeachable exercise of prosecutorial discretion range from selectivity of indictees, choice of charges, deviation from independence and impartiality to blatant disregard of the renowned principles of international criminal law. The OTP may also be faulted for flouting the set legal threshold for the time being governing complementarity and admissibility of cases into the ICC. Further, the OTP has not been able to free itself from political considerations in the exercise of its prosecutorial discretionary powers. These inadequacies however emanate from the fact that the OTP has been lax in crafting and promulgating definitive criteria that would assist it in making proper choices. Even though the Rome Statute requires the OTP to mull over the gravity of the situation, interests of justice and also to have a reasonable basis before the exercise of the discretion, there still lacks (from the OTP) a criterion for determining the exact contours of these notions. The following chapter therefore offers a useful discussion on how best discretion may be exercised and regulated in quest to fulfill one of the Rome Statute's preambular aspirations 'to guarantee lasting respect for and the enforcement of international justice.'²⁰⁶

²⁰⁶See generally, Rome Statute preamble.

CHAPTER FIVE

BEST PRACTICES ON THE EXERCISE OF PROSECUTORIAL DISCRETION

5.0 Introduction

This chapter shall look at how best discretion may be exercised. In brief, it is argued herein that there is no law either at national or international level that bars the ICC and specifically the OTP from borrowing first-rate practices on prosecutorial discretion from domestic laws including those of certain selected nations namely, Germany, France and England. By borrowing from these nations, the obnoxious misuse of prosecutorial powers by the OTP may be kept at bay. The chapter also heralds the position that promulgation of prosecutorial guidelines by the OTP would be a formidable step towards limiting abusive utilization of the discretionary powers to prosecute.

5.1 Why Best Practices? The Raison D'être

It is generally accepted that prosecutorial discretion which traces its origin from the English common law¹ plays an integral role in determining whether or not prosecutors will treat a certain conduct as a crime, who they will charge and what charges they will present.² Furthermore, it has been observed that in both international and municipal criminal law systems, prosecutors play a critical role in the administration of justice³ and that it is the public prosecutors not judges, who are primarily responsible for the overall effectiveness of the criminal justice system.⁴ Indeed prosecutors are public authorities who, on behalf of society and in the public interest and by exercising their discretion ensure the application of the law where the breach of the law carries a

¹John H Langbein, 'The Origins of Public Prosecution at Common Law' (1973) 17 American Journal of Legal History 313.

²Ellen S Podgor, 'Race-ing Prosecutors' Ethics Codes' (2009) 44 Harvard Civil Rights –Civil Liberties Law Review 461.

³Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 American Journal of International Law 510,512.

⁴ Council of Europe, 'The Role of Public Prosecution in the Criminal Justice System' Recommendation Rec (2000)19. See also Peter Burns, 'Private Prosecutions in Canada: The law and a proposal For Change' (1975) 21 McGill Law Journal 269. The author opines that the role of prosecutor whether in private or public is a very special one in any system of criminal justice.

criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.⁵

However, given that prosecutorial discretion is susceptible to abuse, it ought to be exercised with caution and in view of the fact that dissatisfactions on the unjust exercise of prosecutorial discretion are ubiquitous, control thereof is justified. For example, it has been observed that the latitude afforded to prosecutors can result in a decision making process with many flaws including racial bias⁶ and poses an increasing threat to justice.⁷ As a result, displeasure in the abusive use of discretion has persisted at both the national and international levels. For example, in England where the notion is believed to have germinated from, Justices of Peace were accused of abusing their prosecutorial powers leading to enactment of Marian Statutes⁸ which paved way for far ranging reforms in the exercise of prosecutorial powers. To that extent the English courts have not dithered in underscoring the need to control discretion. In *Sharp vs. Wakefield* Lord Halsbury posited thus:⁹

When it is said that something has to be done within the discretion of authorities, that something is to be done according to the rules of reason and justice, not according to private opinion that as in Rookie's case, according to the law and not humour. It must be done not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to discharge his office ought to confine himself

In the USA, prosecutors wield broad discretionary power and at the extreme, they are the most influential people in America in terms of the powers they have over the lives of citizens.¹⁰ These unreviewable excessive prosecutorial powers of an American prosecutor are said to be premised on the separation of prosecutorial powers doctrine and secondly, on the *nolleprosequi*.¹¹ The

⁵Ibid 4.

⁶Ellen S Podgor, 'Race-ing Prosecutors' Ethics Codes' (2009) 44 Harvard Civil Rights –Civil Liberties Law Review 461.

⁷Glen Harlan Reynolds, 'Ham Sandwich Nation: Due Process when everything is a Crime' (2013) 113 Columbia Law Review Sidebar 102.

⁸John H Langbein, 'The Origins of Public Prosecution at Common Law' (1973) 17 American Journal of Legal History 320-324.

⁹(1891) AC 173.

¹⁰Reichel L Philip, *Comparative Criminals Justice Systems, A Topical Approach* (2nd Edition Prentice Hall 1999) 211.

¹¹Rebecca Krauss, 'The Theory of prosecutorial in Federal Law: Origins and Developments' (2009) 6 Seton Hall Circuit Review 5-25.

Kenyan Judiciary has also had its own day in disparaging abuse of prosecutorial powers by terming as unconstitutional, selective prosecutions.¹² Comparable sentiments have been echoed by courts in Tanzania and Uganda.¹³

At the international level, the irresponsible exercise of the discretionary powers to prosecute has been cited as to blame for *ex post facto* character of the trials, violation of the rule of *nullum crimen, nulla poena sine lege* as well as the lionizing of victor's justice at the Nuremberg trials.¹⁴ Similarly, selectivity and political considerations which were prevalent during the Tokyo trials¹⁵ are attributable to abuse of these discretionary powers. Furthermore, allegations of misuse of prosecutorial powers were prevalent during the trials before the ICTR, ICTY and the Special Court for Sierra Leone.¹⁶

At the ICC, the situation is not better. A close scrutiny of the three situations discussed herein reveals an impeachable exercise of prosecutorial discretionary powers by the OTP. The exercise of the prosecutorial discretionary powers by the OTP in the ICC's Kenya situation has been marred by allegations of selectivity in the choice of defendants,¹⁷ political considerations¹⁸ as well as departure from the well established canons of International Criminal Law leading to a misinformed choice of charges.¹⁹ Similar findings are manifest regarding the situation in the DRC whereby the OTP has been castigated for bias relating to the choice of areas to investigate,²⁰ the

¹² High Court of Kenya at Nairobi Petition Nos. 227 & 230 of 2009 [2014] eKLR Available at <<http://kenyalaw.org/caselaw/cases/view/94347/>> Accessed 17 February 2014

¹³ See *Musoke V. Uganda* [1972] E.A 139 and also Tanzania Court of Appeal in *Director of Public Prosecutions V. Mehboob Akbar Haji & Anor* Criminal Appeal No. 28 of 1992 [unreported].

¹⁴ Burcu Baytemir, 'The International Military Tribunal at Nuremberg: The Ongoing Reflections in International Criminal Law' in *USAK Yearbook of International Politics and Law* (Volume 3 International Strategic Research Organization 2010) 81

¹⁵ Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 322. See also Frederiek de Vlaming, 'The Yugoslavia Tribunal and the Selection of Defendants' (2012) 4 *Amsterdam Law forum* 89, 91.

¹⁶ Frederiek de Vlaming, *ibid* 102.

¹⁷ The Office of the Prosecutor, 'First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970' (2011) 4. Available <<http://www.icc-cpi.int/NR/rdonlyres/A077E5F8-29B6-4A78-9EAB-A179A105738E/0/UNSCLibyaReportEng04052011.pdf>> Accessed 13 May 2014.

¹⁸ Charles C Jalloh, 'Situation in the Republic of Kenya' (2012) 106 *American Journal of International Law* 118, 123.

¹⁹ See generally, Dissenting Opinion of Judge Hans –Peter Kaul, ICC-01/09-02/11-382-Red. See Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 51.

²⁰ Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 40.

choice of defendants²¹ as well as the choice of charges.²² Correspondingly, such criticism has been levelled against the manner in which the OTP has exercised its discretion in situation in Northern Uganda. Here, the OTP was accused of becoming a political tool meant to silence government dissidents.²³ It has further been accused of being openly biased in choice of the defendants²⁴ and also for relying on unusual grounds to open the LRA cases.²⁵

In view of the foregoing, the call for exercise of best practices in handling prosecutorial discretion mostly at the ICC by the OTP needs no overemphasis. Indeed, the few highlighted examples are an exquisite pointer that control of prosecutorial discretion (both at the national and international level) of course premised on best practices is a necessity rather than a luxury and arguably, reasons for such control exceed a baker's dozen.

Therefore, questions that entreat for answers at this juncture are- how best prosecutorial discretion can be controlled? What measures ought to be taken? Does there exist a prosecutorial system that can be emulated by the OTP to curb abusive exercise of prosecutorial discretion? The following discussion attempts to answer those sturdy questions.

5.2 Prosecutorial Discretion in USA, Germany and France – Do Their Prosecutorial Systems Offer a Solution?

A comparative study on prosecutorial discretion is indispensable. Indeed, the Rome Statute identifies as a source of law (applicable by the ICC) 'general principles of law derived by the court from national laws of the legal systems of the world including, where appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the Statute and with international law and

²¹Ibid 41.

²²William A. Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts' Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, 23 June 2007 20-21.

²³Amnesty International, 'Uganda: First Ever Arrest Warrants by International Criminal Court- A First Step Towards Addressing Impunity' 14 October 2005. Available at <http://www.iccnw.org/documents/AI_ugandaarrests_14oct05.pdf> Accessed 20 May 2014

²⁴IRIN, 'ICC Issues Arrest warrants for LRA Leaders' 7 October 2005 Available at <<http://www.irinnews.org/fr/report/56630/uganda-icc-issues-arrest-warrants-for-lra-leaders>> Accessed 20 May 2014.

²⁵Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 43.

internationally recognized norms and standards²⁶ and therefore nothing would authoritatively obstruct an attempt to borrow from these nations. Moreover, Article 38 of the Statute of International Court of Justice recognizes ‘the general principles recognized by civilised nations’²⁷ as a source of international law and therefore, borrowing from practices in these nations would be in order.

Critically, the US prosecutorial system offers less to be desired. This stems from the position that the exercise of the discretionary powers to prosecute is unreviewable as explained by the court in *Wayte v United States*²⁸ thus:

This broad discretion rests largely on the recognition that the decision to prosecute is ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays criminal proceedings, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing Government’s enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute

This unreviewable exercise of discretionary powers to prosecute is undesirable more so because it is largely unchecked and therefore subject to abuse.²⁹ Indeed, authors have questioned the legitimacy of an unchecked US prosecutor thus proposing radical amendments to this kind of approach³⁰ including call for enactment of prosecutorial guidelines.³¹ It ought also to be noted that one of the most contentious issues during the drafting of the Statute touched on whether the

²⁶ Rome Statute of The International Criminal Court, Article 21(1) Available at <<http://cil.nus.edu.sg/rp/il/pdf/1998%20Rome%20Statute%20of%20the%20International%20Criminal%20Court-pdf.pdf>> Accessed 3 June 2014.

²⁷ F X Njenga, *International Law and World Order Problems* (Moi University Press, 2001) 7.

²⁸ 470 US 598, 607-08 (1985).

²⁹ Roger A. Fairfax JR, ‘Prosecutorial Nullification’ (2011) 52 *Boston College Law Review* 1243, 1244.

³⁰ For example, see generally, Richard S. Frase, ‘Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do it, How Can We Find Out and Why Should We Care?’ (1990) 78 *California Law Review* 540. See also Ellen S Podgor, ‘Race-ing Prosecutors’ Ethics Codes’ (2009) 44 *Harvard Civil Rights –Civil Liberties Law Review* 470-472.

³¹ Robert L. Minser, ‘Recasting Prosecutorial Discretion’ (1996) 86 *Journal of Criminal Law and Criminology* 717, 767.

powers to act *proprio motu* were reviewable.³²Inimitably, majority states supported the view that such powers be reviewable.³³It would therefore be retrogressive to agitate for unreviewable prosecutorial powers as exercised in the USA. Furthermore, the US systems generally lack mechanisms to require or even promote prosecutorial uniformity³⁴and certainly therefore, it would be injudicious to borrow from this system.

Conversely, a study on the French prosecutorial system reveals that this system may offer some useful tips on how the abusive exercise of discretionary powers by the OTP may be restrained. Under this system although prosecutorial powers are vested in public prosecutors, private prosecution under the rubric of *l'action civile* has acquired a significant sphere³⁵. The primary function of *l'action civile* is to permit the victim of the crime to constitute himself *partie civile* and to join a claim for civil damages to the public prosecutor's action for criminal sanctions.³⁶If the public prosecutor does not initiate *l'action publique* the *partie civile* may do it himself ostensibly in order to provide the necessary basis for his parasitic damages claim.³⁷Consequently, when the French prosecutor decides not to prosecute, he decides for himself and his office alone. Someone else may still invoke the criminal process against the culprit.³⁸The value of this system which is akin to private prosecution is underscored by various authors. For example, Glanville Williams is of the view that 'power of private prosecution is undoubtedly right and necessary in that it enables the citizen to bring even the police or government which itself is unwilling to make the first move'.³⁹On his part, Dression⁴⁰ avers:

³²Silvia A. Fernandez de Gurmendi, 'The Role of the International Prosecutor' in Roy S.Lee (ed), *Introduction to the International Criminal Court: The Making of the Rome Statute – Issues, Negotiations and Results* (The Hague, Kluwer Law International 1999) 182-186.

³³ Ibid.

³⁴ Sara Sun Beale, 'Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control' (draft March 30 2014)6.

³⁵ John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 University of Chicago Law Review 439,441.

³⁶LoicCadiet, 'Introduction to French Civil Justice System and Civil Procedural Law' (2011) 28 Ritsumeikan Law Review 331.

³⁷ Ibid.

³⁸ John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 University of Chicago Law Review 442.

³⁹ Glanville Williams, 'The Power to Prosecute' (1955) Criminal Law Review 596,599.

⁴⁰ Dression, 'Private Prosecution: A Remedy For District Attorneys' Unwarranted Inaction' (1955) 65 Yale Law Journal 209, 227.

A system of private prosecutions can be justified in terms of both society's interest in increased law enforcement and individual's interest in vindication of personal grievances. Full participation by the citizen as a private prosecutor is needed to cope with the serious threat posed by the (public prosecutors) improper action and inaction.

It must be appreciated that the Rome Statute confers the prosecutor the overall authority over all prosecutions and in particular the suspects to charge.⁴¹ Moreover, no one else apart from the OTP has a real chance of shaping the charge sheet.⁴² Arguably, this peremptory provision combined with others guaranteeing independence of the OTP⁴³ has given the OTP a free hand in the choice of situations, suspects and charges. As already observed in the situations under the study, this has amounted to immense abuse by the OTP. For example, in Uganda, only the LRA commanders were indicted despite availability of evidence implicating the government forces. Similar observations have been made in the DRC where key figures were left out of prosecution by the OTP without any cogent explanation. The suggestion therefore is that just like in the French system a third party with sufficient evidence should be allowed to initiate prosecutions of those perpetrators who the OTP may have, for its own reasons chosen to spare. Furthermore, this would create an avenue through which victims of crimes may prosecute their grievances in the event the OTP deliberately or inadvertently omits some charges in the charge sheet. For example, failure by the OTP to charge Lubanga with rape despite availability of evidence has continued to raise eyebrows.⁴⁴ Had the Statute and the RPE provided for such an avenue, the DRC victims would have had an opportunity to charge and prosecute Lubanga for rape and other sexual offences as crimes against humanity thus effectively dodging the OTP's glaring omission.

A constructive lesson may also be learnt from the Germany's prosecutorial system whereby the *Legalitätsprinzip* (the legality principle; better the rule of compulsory prosecution) is the

⁴¹ Rome Statute of The International Criminal Court, Article 61. Available at <<http://cil.nus.edu.sg/rp/il/pdf/1998%20Rome%20Statute%20of%20the%20International%20Criminal%20Court-pdf.pdf>> Accessed 26 June 2014.

⁴² Godfrey M Musila, *Rethinking International Criminal Law: Restorative Justice and the Rights of Victims in the International Criminal Court* (Berlin, Lambert Academic Publishing, 2010) 148.

⁴³ For example article 42.

⁴⁴ See for example K'shaani O. Smith, 'Prosecutor V. Lubanga: How The International Criminal Court Failed the women and Girls of the Congo' (2011) 54 *Howard Law Journal* 467-468. See generally also, Suzan M. Pritchett, 'Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender – Based Violence at the International Criminal Court' (2008) 17 *Transnational Law & Contemporary Problems* 265.

norm.⁴⁵ The Germans have undertaken to forbid their monopolist prosecutor the discretion to refuse to prosecute in cases where adequate incriminating evidence is at hand.⁴⁶ Indeed, it is a criminal offence if he fails to prosecute⁴⁷ and the same applies if he does not prosecute if for example he is ordered by his minister not to prosecute in a case of political corruption.⁴⁸ The only instances during which a prosecutor can refrain from or dismiss a prosecution are when the cases relate to minor offences with low guilt and no public interest in prosecuting and also for less important criminal offences where the penalty would be insignificant alongside the punishment for some other crime committed by the same offender.⁴⁹

An import of similar provisions into the Rome Statute and the RPE would be most welcome as would it would impel the OTP to uniformly open investigations and prosecute the perpetrators of the monstrous crimes without perilous selectivity. In the past, the OTP has shown bias in the choice of situations and those to charge. Over and above the instances highlighted in the study, the OTP has also been accused for failure to open investigations and charge those implicated in crimes within the ICC's jurisdiction. For example, the OTP declined to act against the UN peacekeepers (in Bosnia) who had allegedly been accused of various offences such as sexual exploitation and abuse, gun smuggling and trading, and golds or diamonds trading, which, under specific circumstances could even be characterized either as war crimes or, more often, as crimes against humanity.⁵⁰ Similarly, the OTP also came into limelight for failure to prosecute the British soldiers in Iraq who had allegedly mistreated detainees, willfully killing civilians, brutality against persons upon capture and initial custody, causing death or serious

⁴⁵ John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 University of Chicago Law Review 443.

⁴⁶ Ibid.

⁴⁷ The German Code of Criminal Procedure, Section 152(2) Available at <http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html> Accessed 26 June 2014.

⁴⁸ John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 University of Chicago Law Review 450.

⁴⁹ Despina Kyprianou, 'Comparative Analysis of Prosecution Systems (Part II): The Role of Prosecution Services in Investigation and Prosecution Principles and policies' 17-18. This article is based on her PhD Thesis 'The Role of the Cyprus Attorney General's Office in Prosecutions: Rhetoric, Ideology and Practice' (University of London- LSE 2006)

⁵⁰ See generally, Melanie O' Brien, 'Prosecutorial Discretion as an Obstacle to Prosecution of United Peacekeepers by the International Criminal Court: The Big Fish/ Small Fish Debate and the Gravity Threshold' (2012) 10 Journal of International Criminal Justice 525.

injury.⁵¹Undoubtedly, a compulsory prosecutorial system akin to the Germany's would at least curb such and similar abuses by the OTP.

5.3 The Code for Crown Prosecutors in England and Wales: Efficacy in Controlling Prosecutorial Discretion

The significance of the formulation of the Code for Crown Prosecutors has been underscored by Ashworth⁵² who remarks:

Prosecutors must be given discretion, so that they can respond sensitively to the great diversity of factual situations and policy issues which arise. Equally, public interest in fair, consistent and principled decision making sustains the case for policy guidance and for accountability

Formulated by the DPP and revised periodically, the code has been hailed as 'a welcome step towards openness, with the publication on the CPS website of considerable amounts of prosecutorial guidance previously confidential to crown prosecutors'.⁵³ Apparently, this meticulous code of conduct for the Crown Prosecution Service gives patent factors to be considered in deciding whether to prosecute or not.⁵⁴In a nutshell, prosecutors are enjoined to make sure that the right persons are prosecuted for the right offences and that casework decisions are taken fairly, impartially and with integrity, help to secure justice for victims, witnesses, defendants and the public.⁵⁵They must also ensure that the law is properly applied; that relevant evidence is put before the court and that obligations of disclosure are complied with.⁵⁶Moreover, prosecutors are required to be fair, independent and objective and must not let any personal views about ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation, or gender identity of the suspect, victim or any witness influence their

⁵¹ See William A. Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts' Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, and 23 June 2007 23-24.

⁵² Ashworth A, 'The "Public Interest" Element in Prosecutions' (1987) *Criminal Law Review* 595, 606.

⁵³ Ashworth A and Redmayne M, *The Criminal Process* (3rd edition, Oxford University Press 2005) 147.

⁵⁴ See generally, 'The Code for Crown Prosecutors' 7th edition January 2013. Available at <http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf>. Accessed 2 July 2014.

⁵⁵ Ibid 3.

⁵⁶ Ibid.

decisions. Neither must prosecutors be affected by improper nor undue pressure from any source and must act in the interest of justice and not solely for the purpose of obtaining a conviction.⁵⁷

In making a decision whether to prosecute or not, the code dictates that the prosecutors should seek to rectify evidential weaknesses but they should swiftly stop cases which do not meet the evidential stage of the full code test.⁵⁸ A case that does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be and the prosecutors should only take a decision to prosecute only after investigations have been completed and after all evidence has been reviewed.⁵⁹ The prosecutor should also consider whether there are any reasons to question the reliability of evidence including its accuracy or integrity and also consider whether there are any reasons to doubt the credibility of the evidence.⁶⁰ Moreover, prosecutors should not start or continue a prosecution which would be regarded by the courts as oppressive or unfair and an abuse of court's process.⁶¹ Most importantly, prosecutors must take into account any relevant change in circumstances as the case progresses after charge.⁶²

Few salient lessons may be learnt from these peremptory provisions of the code. First, the code keeps at bay political considerations in the choice to prosecute. As already discussed in the previous chapters, political considerations were prevalent in the selection of defendants in the situations under study⁶³ and yet both the Statute and the RPE do not contemplate such. The logic is that with similar express provisions in either the Statute or RPE, the OTP would be forbidden from turning into detrimental political views while making its prosecutorial discretionary choices. Further, the OTP would be obliged to adhere to and apply the law properly unlike as it did in the Kenyan cases whereby certain cardinal international law principles were blatantly

⁵⁷Ibid.

⁵⁸Ibid 4.

⁵⁹Ibid 6.

⁶⁰ Ibid 7.

⁶¹Ibid 6.

⁶²Ibid 13.

⁶³Charles C Jalloh, 'Situation in the Republic of Kenya' (2012) 106 American Journal of International Law 118, 123. See also Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 40. See also William A. Schabas 'Complementarity in Practice': Some Uncomplimentary Thoughts' Paper for presentation at the 20th Anniversary Conference of International Society for the Reform of Criminal Law, Vancouver, and 23 June 2007 14.

disregarded.⁶⁴ Furthermore, a similar provision that mandatorily requires the prosecutor to ‘swiftly stop cases which do not meet the evidential stage of the full code test’ would be welcome as it would stop the OTP from clandestinely dragging the suspects through the court processes.⁶⁵ Moreover, the OTP should emulate provisions from the code that require the prosecutor to consider whether there are any reasons to question the reliability of evidence including its accuracy or integrity and also consider whether there are any reasons to doubt the credibility of the evidence. Over and above enhancing the legitimacy of the entire process, this would undoubtedly save the OTP from an unwarranted embarrassment of being impelled to drop charges upon a subsequent concession by a witness that the evidence he had tendered was false and therefore unreliable as it happened in Muthaura’s case.⁶⁶

5.4 Controlling Prosecutorial Discretion: A Case for Prosecutorial Guidelines

Generally speaking, there is absolutely no reason as to why the OTP should not come up with guidelines similar to those contained in the code for crown prosecutors. The very fact that the ICC is a court meant dispense justice through fair trial,⁶⁷ guidelines meant to streamline the exercise of the prosecutorial discretionary powers by the OTP are a necessity. In similar context, it has been stated thus:⁶⁸

It seems to be of vital importance that guidelines are developed - and made public- giving direction to the decision either or not to initiate an investigation: ‘vital’, as danger looms large that the court is accused of starting investigations on entirely arbitrary grounds, and even based on political considerations.

⁶⁴For example, the insistence by the OTP on the expansive approach instead of the traditional approach in the delineation of the organizational policy under article 7(2) of the Statute and also the blatant disregard of the *Dubio pro reo* principle would not have occurred had there been a similar provision in the Statute or the RPE requiring the OTP to apply ‘the law properly’.

⁶⁵For example, the cases two of the Kenyan defendants - Henry Kiprono Kosgey and Mohammed Hussein Ali were not confirmed due to insufficient evidence or inherent contradictions and inconsistencies between witness statements. Later, the case against Francis Kirimi Muthaura was withdrawn as well, essentially because the key witness against him had recanted a crucial part of his evidence. Similarly, The Chief prosecutor has already admitted that ‘currently the case against Mr Kenyatta does not satisfy the high evidentiary standards required at trial’. Further the OTP has also stated that ‘the only stones left unturned in Uhuru’s case are now pebbles’ and that that ‘even the President’s financial records might be insufficient to meet the high evidentiary standard required for trial’. It is true that the OTP should never have impleaded these defendants in court. With similar provisions finding way into the Statute and the RPE, this paper humbly opines that the OTP should forthwith drop the charges against President Kenyatta.

⁶⁶Caroline Buisman, ‘Delegating Investigations: Lessons to be Learned from the *Lubanga* Judgment’ (2013) 3 Northwestern Journal of International Human Rights 49.

⁶⁷Rome Statute , Article 67.

⁶⁸Avril McDonald and Roelof Haveman, ‘Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion By the Prosecutor of the ICC’ (2003) 9. Available at <http://www.issafrica.org/anicy/uploads/McDonald-Haveman_issues_relevant.pdf> Accessed 7 July 2014.

Elsewhere,⁶⁹ it has been argued that such guidelines will materially assist the prosecutor in accomplishing both the achievement of legitimacy and the perception of legitimacy. The author further concedes:⁷⁰

By contributing to the impartiality and consistency of his decision making, they will enhance its legitimacy. By announcing a standard by which the prosecutor's actions may be judged, guidelines provide a tool for holding the prosecutor accountable to his own policies, contributing to the perception of his legitimacy. In addition, by providing a rubric according to which he can judge the demands of states and NGOs, guidelines help proclaim the prosecutor's independence from those entities. Many states whose prosecutors enjoy significant discretion have adopted guidelines to guide discretion and render its use more transparent. The prosecutorial guidelines of Hong Kong, for example, declare that their purpose is to 'promote fair and consistent decision making in relation to public prosecutions [and] to make the prosecutorial process understandable and open to the people of Hong Kong.' Other jurisdictions that have also adopted national prosecutorial guidelines include the Netherlands, Canada, England, Australia and Belgium. Belgium's prosecutorial guidelines derive their authority from the Belgian constitution, which permits the minister of justice to issue compulsory prosecutorial guidelines, including provisions concerning investigations and the charging decision. The Belgian guidelines, like all national guidelines discussed above, are publicly available on a governmental website. Italy is currently considering promulgation of national prosecutorial guidelines.....The United Nations has also called for prosecutorial guidelines in criminal justice systems where the prosecutor is vested with discretionary functions. Following these precedents, the ICC prosecutor should also adopt prosecutorial guidelines to provide information about the factors that the prosecutor will consider, and those he will not consider, when making his discretionary decisions, particularly with regard to investigating, screening, charging, and admissibility decisions, where his discretion is at its apogee.

Other scholars have also supported a call for prosecutorial guidelines. For example, Goldston argues that such guidelines 'might at a minimum help bridge the yawning gap between the Hague based court and its constituencies across the world trying to balance their hopes for justice

⁶⁹ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 American Journal of International Law 541.

⁷⁰ Ibid 541-542.

against their often- uncertain knowledge of the court's operations and limitations'.⁷¹ On his part, Akande⁷² insists that in order to ensure and impose some degree of accountability on the ICC prosecutor and to ensure that prosecutorial decision making is legitimate; the prosecutor's decisions with respect to investigations and prosecutions should be guided by *ex ante* standards, a set of guidelines for prosecutorial decision making.

Similar attitude is echoed by Greenawalt⁷³ who opines that this approach will enhance legitimacy by rooting the prosecutor's decision making in neutral *ex ante* criteria that 'provide for a transparent standard that the prosecutor will consistently apply' and will also avoid the prospect of prosecutorial choice becoming subject primarily to an informal sort of 'pragmatic accountability' to various actors 'including states that are not party to the treaty, and other actors such as NGOs'.

While it is indisputable that prosecutorial guidelines may be useful in providing the missing definitive criterion in controlling abusive prosecutorial discretionary powers, questions however abound as to what these guidelines should contain. It must be appreciated that the Rome Statute sets reasonable basis, interest of justice and the gravity threshold as the tests that the OTP must overcome before it exercises its discretionary powers. The only quagmire is that there lacks a definitive criterion to elucidate on the exact contours of these tests. While it is beyond this paper to give a conclusive content of such criteria, there is still need for guidelines that should take care of factors to consider in defining the set thresholds.

For example, in determining whether there are reasonable grounds to believe that the person has committed a crime within the court's jurisdiction, the guidelines may require the OTP to conceivably construe the elements of the crimes within the Statute and also require it to assess the reliability of evidence.⁷⁴ The guidelines should also require the OTP to consider whether there are any reasons to question the reliability of evidence including its accuracy or integrity and also

⁷¹James A. Goldston, 'More Candour About Criteria: The Exercise of Discretion by the Prosecutor of International Criminal Court' (2010) *Journal of International Criminal Justice* 1, 20.

⁷² Dapo Akande, 'Is There Still a Need for Guidelines for the Exercise of ICC Prosecutorial Discretion?' (2009) 1-2 <<http://www.ejiltalk.org/is-there-still-a-need-for-guidelines-for-the-exercise-of-icc-prosecutorial-discretion/>> Accessed 9 July 2014.

⁷³ Alexander K.A. Greenawalt, 'Justice Without Politics? Prosecutorial Discretion and The International Criminal Court' (2007) *39 International Law and Politics* 583, 652.

⁷⁴ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) *97 American Journal of International Law* 542.

consider whether there are any reasons to doubt the credibility of the evidence.⁷⁵ If there are such reasons, the OTP should forthwith stop the cases.⁷⁶ The OTP must evaluate whether also the evidence and information obtained are more likely than not to secure a conviction were the accused to be brought before the court.⁷⁷

Guidelines may also be formulated to delineate the gravity threshold. This research opines that it would be judicious if the OTP departs from an antiquated approach of relying on ‘non exhaustive quantitative and qualitative considerations’ based on the prevailing facts and circumstances as stipulated in Regulation 29(2) of the OTP Regulations⁷⁸ and instead adopt a more predictable criteria. For example, the OTP may declare that it will henceforth employ factors such as scale of crimes, nature of crimes, manner of commission of crimes, impact of the crimes role/ position of the perpetrator and also the intent of the perpetrator in determination of gravity.⁷⁹ However, although the judges and the OTP should apply this criterion as consistently as possible, the context- specific nature of the enterprise means that no rigid formula should be adopted.⁸⁰ The court must not, for example set a particular number on the victims harmed or mandate a certain leadership rank for perpetrators. Rather, it should use the relevant factors, considered in the particular context, to answer the ultimate question: does this case truly involve the most serious crimes of concern to the international community or, is the conduct at issue ‘wholly peripheral to the objects of the law in criminalizing the conduct?’⁸¹

Determining what ‘interests of justice’ means is rather enigmatic. Indeed, two authors⁸² aver that ‘determining what serves the interest of justice (and whose interest is ultimately to be served by this determination) is an extraordinarily difficult if not impossible task’. They further pose: from which and whose perspective is this determination is to be made? What serves the interest of the

⁷⁵The Code for Crown Prosecutors 7.

⁷⁶Ibid.

⁷⁷Matthew R. Brubacher 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 Journal of International Criminal Justice 71, 80.

⁷⁸International Criminal Court, ‘Policy Paper on Preliminary Examinations’ 4 October 2010 Available at <http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf> Accessed 10 July 2014.

⁷⁹Margaret M.de Guzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2009) 32 Fordham International Law Journal 1400, 1451-1455.

⁸⁰Ibid 1457.

⁸¹Ibid.

⁸²Avril McDonald and Roelof Haveman, ‘Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion By the Prosecutor of the ICC’ (2003) 9.

wider society – issues of peace and security, for instance - may not serve the interests of victims, yet both are factors to be weighed in considering whether justice is being served. What is meant by justice here? Justice in the narrow sense of criminal justice, or justice in the broader, restorative, sense? Justice in terms of the right of individuals the world over to live in peace and safe from international crimes?⁸³

Although the true meaning remains elusive, the OTP may nevertheless decline to initiate an investigation on the grounds that such an investigation ‘would not serve the interests of justice’⁸⁴ and this provides the prosecutor with a relatively high degree of discretion.⁸⁵ Various authors have indeed disagreed on how to interpret this phrase with some urging for a broad interpretation that would accommodate considerations such as the age and infirmity of the accused.⁸⁶

On his part, Stahn⁸⁷ holds the view that the express distinction between specific criteria (gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime) and the interests of justice may suggest that the latter embodies a broader concept. Gavron⁸⁸ further argues that Article 53 could accommodate wider considerations, although it could lead to speculation about future events and the deterrence argument would be turned on its head.

Elsewhere, a restrictive approach while interpreting ‘interests of justice’ has been favoured. For example, the Amnesty International (AI)⁸⁹ and the Human Rights Watch (HRW)⁹⁰ favor a

⁸³Ibid.

⁸⁴Rome Statute, Article 53(1).

⁸⁵Henry M. Lovat, ‘Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of International Criminal Court’ (2006) Bepress Legal Series paper 1435, 2.

⁸⁶Darryl Robison, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and The International Criminal Court’ (2003) 14 European Journal of International Law 488.

⁸⁷Carsten Stahn, ‘Complementarity, Amnesties and the Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’ (2005) 3 Journal of International Criminal Justice 697-698.

⁸⁸Jessica Gavron, ‘Amnesties in The Light of Developments in International Law and the Establishment of the International Criminal Court’ (2002) 51 International and Comparative law Quarterly 110.

⁸⁹Christopher Keith Hall ‘Suggestions concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations’, *Contribution to an Expert Consultation Process on General Issues relevant to the ICC Office of the Prosecutor*, 28 March 2003, 28 Available <http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/hall.pdf> Accessed on 13 April 2014.

restrictive interpretation of Article 53. The AI's position is that the interests of justice are always served by prosecuting the crimes within the ICC's jurisdiction, absent a compelling justification.⁹¹ It further considers that national amnesties, pardons and similar measures of impunity that prevent judicial determinations of guilt or innocence, the emergence of the truth and full reparations to victims are contrary to international law and it would not be in the interests of justice for the prosecutor to decline to prosecute on the ground that the suspect had benefitted from one of these measures.⁹²

The HRW on the other hand concludes that if the phrase 'interests of justice' is construed in the light of the object and object of the Rome Statute, a construction that permits consideration of a domestic amnesty, domestic truth commission or peace process and results in permanently not initiating an investigation or proceeding from investigation to trial would be in principle at odds with the object and purpose of the Rome Statute, as set forth in its preamble.⁹³

In view of the foregoing contradictions and disagreements, it would be prudent for the OTP to come forth and formulate conclusive guidelines that would comprehensively define 'interests of justice' and at the same time delineating its exact contours. Perhaps, balancing the views of the legal scholars as herein above highlighted would form a splendid cocktail from which the OTP may benefit.

5.5 Supplementary Means of Checking Abusive Prosecutorial Discretion

Having legal restrictions⁹⁴ has been said to be one of the ways in which abusive prosecutorial discretion may be checked although there are few such restrictions to prosecutors in their decisions of whom to charge, what charges to use, and when to proceed or not to proceed against

⁹⁰ Human Rights Watch, 'Policy Paper: The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute' (2005) 4-6 <<http://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>> Accessed on 11 July 2014.

⁹¹ Drazen Dukic, 'Transitional Justice and the International Criminal Court- in "the interests of justice"?' (2007) 89 *International Review of the Red Cross* 691, 700.

⁹² Christopher Keith Hall 'Suggestions concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations', *Contribution to an Expert Consultation Process on General Issues relevant to the ICC Office of the Prosecutor*, 28 March 2003, 28.

⁹³ Human Rights Watch, 'Policy Paper: The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute' (2005) 6.

⁹⁴ Ellen S Podgor, 'Race-ing Prosecutors' Ethics Codes' (2009) 44 *Harvard Civil Rights –Civil Liberties Law Review* 462.

an individual. Specifically, courts should not be hesitant in using their supervisory powers to check abusive prosecutorial decisions.⁹⁵ This is important since the court's refusal to condemn a prosecutor (abusing his prosecutorial powers) negatively amplifies his exclusive powers. On the other hand, the role of ethics should not be underestimated. For example, Lepard⁹⁶ observes:

The fundamental ethical principles based on respect for law underscore the importance of the prosecutor being faithful to those standards for the exercise of his or her discretion laid down in the Rome Statute itself as governing treaty establishing the prosecutor's powers.

He further opines that 'the ethical principle of open-minded consultation is important as it highlights the importance of the prosecutor not only seeking out information from victims, nongovernmental organizations, intergovernmental organizations, governments and other actors, but also soliciting their perspectives on how justice in particular situations or cases can best be achieved'.⁹⁷ Further, transparency as an ethical value is important as it naturally helps to build and sustain political trust of the court and enhance its legitimacy.⁹⁸ Generally, the author also rightly argues that if heeded [by the OTP], ethical principles such as equal dignity for human beings, objectivity, respect for human rights, open-minded consultation, individual moral responsibility for criminal behaviour, respects for governments and law and impartiality would be useful in guiding the prosecutor in the exercise of discretion.⁹⁹

5.6 Conclusion

In conclusion, it is worth mentioning that drawing from the best practices is not forbidden by the Rome Statute. In any event, it would be imperative for the OTP to learn from some of the prosecutorial systems highlighted herein with view to improving on its approach towards the exercise of the enormous discretionary powers it currently wields. Similarly, the existence of a working code for crown prosecutors in England and Wales offers a strategic example to the OTP on how guidelines useful for controlling abusive prosecutorial discretionary powers may be formulated. Indeed, many nations have in place such guidelines. In addition to lessons learnt

⁹⁵Ibid.

⁹⁶Brian D Lepard, 'How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical principles' (2010) 43 The John Marshall Law Review 553, 561.

⁹⁷Ibid 564.

⁹⁸Ibid.

⁹⁹Ibid 558.

from USA, France, Germany and England, it is also important for courts to take stern measures in condemning instances of improper exercise of prosecutorial discretionary powers. Moreover, the OTP should also not take fundamental ethics principles lightly as they offer an important guide in the exercise of the prosecutorial powers.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.0 Introduction

This chapter contains a summary of key findings, conclusions and recommendations. Briefly, the chapter finds that although the precise origin of prosecutorial discretion is not known, the concept is currently entrenched in most legal systems in the world and has taken a central position at the ICC. It also finds that the ICC Prosecutor's discretionary powers are enormous and susceptible to abuse and were indeed abused in the situations under study. It therefore concludes that the existing legal thresholds meant to check the exercise of the OTP's discretionary powers are inadequate. As a consequence, it recommends *inter alia* that there is a dire need to buttress the existing legal thresholds through formulation of prosecutorial guidelines for proper checks on the Prosecutor's powers.

6.1 Summary of Findings and Conclusions

Prosecutorial discretion refers to the prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, plea bargaining and recommending a sentence to the court¹ and although its historical origin is not precisely known,² there is however common consensus that the modern concept of prosecutorial discretion traces its origin from the English Common Law³ and is currently entrenched in most legal systems in the world. At the ICC, it takes a central position.

¹Jingbo Dong, 'Prosecutorial Discretion at the International Criminal Court: A Comparative Study' (2009) 2 Journal of Politics 109.

²Rebecca Krauss, 'The Theory of prosecutorial in Federal Law: Origins and Developments' (2009) 6 Seton Hall Circuit Review 1, 3.

³Rebecca Krauss, *ibid* and also John H Langbein, 'The Origins of Public Prosecution at Common Law' (1973) 17 American Journal of Legal History 313.

From the study, it has fittingly been found that the concept has both its utility and a darker side. For example, prosecutorial discretion is an essential tool in dispensation of criminal justice⁴ and by promoting case-sensitive decision making, it can protect liberty⁵ and secure prosecutor's independence.⁶ On the other hand, it has also been observed that it poses an increasing threat to justice⁷ and that it may also lead to unjustified discrimination.⁸

The study has also revealed that despite utility, discretionary powers to prosecute have over a time [at the international level] been grossly misused. For example, during the Nuremberg trials, abuse of the discretionary powers to prosecute manifested itself in three ways: *ex post facto* character of the trial because of accepting the aggressive war as a crime, trials involved punishment in violation of the rule of *nullum crimen, nulla poena sine lege* and lastly, the criticisms labelled the tribunal as victor's justice.⁹

This trend persisted during the Tokyo trials. Here, the abuse of discretionary powers to prosecute bordered on claims of 'victors justice',¹⁰ political considerations¹¹ and perilous selectivity.¹² Prosecutorial discretion before the *ad hoc* tribunals [ICTR, ICTY and Sierra Leone] was also marred by the claims of selectivity.¹³

⁴Ernst K. Pakuscher, 'The use of Discretion in Germany' (1976) 44 University of Chicago Law review 94.

⁵Angela J Davis, 'Prosecution and Race: The power and privilege of Discretion' (1998) 67 Fordham Law Review 13, 18.

⁶DrazanDukic, 'Transitional Justice and the International Criminal Court- in "the interests of justice"?' (2007) 89 International Review of the Red Cross 691, 713.

⁷Glen Harlan Reynolds, 'Ham Sandwich Nation: Due Process when everything is a Crime' (2013) 113 Columbia Law Review Sidebar 102.

⁸Angela J Davis, 'Prosecution and Race: The power and privilege of Discretion' (1998) 67 Fordham Law Review 13, 18.

⁹BurcuBaytemir, 'The International Military Tribunal at Nuremberg: The Ongoing Reflections in International Criminal Law' in *USAK Yearbook of International Politics and Law* (Volume 3 International Strategic Research Organization 2010) 81.

¹⁰Antonio Cassese, *International Criminal law* (2nd edition, Oxford University press 2008) 322.

¹¹ *Ibid.*

¹² Zhang Wanhong, 'From Nuremberg to Tokyo: Some Reflections on Tokyo Trial (on the Sixtieth Anniversary of The Nuremberg Trials)' (2006) 27 Cardozo Law Review 1673, 1677.

¹³Frederiek de Vlaming, 'The Yugoslavia Tribunal and the Selection of Defendants' (2012) 4 Amsterdam Law forum 89,102. See generally also, Luc Reydam's 'The ICTR Ten Years On: Back to the Nuremberg paradigm?' (2005) 3 Journal of International Criminal Justice 977-988.

The study also has found that the OTP under the Rome Statute wields enormous prosecutorial discretionary powers which may only be exercised within the set legal thresholds namely, the reasonable basis test,¹⁴ gravity criterion¹⁵ and interests of justice.¹⁶ These improperly checked powers have however been grossly misused and the situations under study have revealed as much. For example, apart from dancing to political tunes¹⁷ while dealing with the ICC situation in Kenya, the OTP has also been accused of dragging some suspects to the court even without evidence thus leading to non confirmation of charges against them.¹⁸

In the DRC, the study shows that the OTP chose the indictees in a discriminatory manner and left free government allies who had been accused of committing similar if not more serious atrocities.¹⁹ Moreover, the OTP was 'politically cautious' by choosing to investigate atrocities in some regions while strategically ignoring others without any cogent reason.²⁰

In Uganda, the study has shown that the OTP has generally been biased against one side of the conflict²¹ by choosing to indict only the LRA commanders while ignoring government forces who had committed similar if not graver atrocities.

In view of the foregoing, it may rightly be averred that political considerations infiltrated the exercise of the discretionary powers of the OTP most profoundly regarding the choice of indictees in the situations under study. It must be noted that the OTP being an organ of the ICC is a judicial organ which engages in a judicial process and must as such strive to divorce itself from making political choices for the sake of its own legitimacy. Out of its own political choices,

¹⁴Ibid articles 15 and 53.

¹⁵ Ibid article 53.

¹⁶ Ibid.

¹⁷For example, see Gabrielle Lynch and Miša Zgonec-Rozej, 'The ICC Intervention in Kenya' Africa/International Law AFP/ILP 2013/01, February 2013, 9. Available at <http://www.chathamhouse.org/sites/default/files/public/Research/Africa/0213pp_icc_kenya.pdf>. See also Thomas Obel Hansen, 'A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity' (2012) 13 Melbourne Journal of International Law 217, 232.

¹⁸See, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang*, Decision on Confirmation of Charges, ICC-01/09-01/11-373.

¹⁹ See generally, Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008)

²⁰Ibid.

²¹Phil Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' in Phil Clark and Nicholas Waddell, (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008) 43.

atrocities by the Mai Mai militia and the UPDF have never been accounted for. This means continued impunity. Additionally, failure by the OTP to carry out its mandate impeccably especially in investigations has had its awful outcomes. At no other given time in history of the ICC did cases fail even before the full trial and in a worrying manner as it has happened with regard to the Kenyan cases. Certainly, 50% of the cases have collapsed and the OTP is currently fighting to have President Kenyatta's case sustained at the ICC owing to the lack of evidence. As a consequence and as already highlighted in the study, the accuracy of the OTP has therefore been greatly impaired.

But what is the root cause of all these? This paper concludes that first, as has rightly been observed in the course of this study, the existing thresholds meant to check the exercise of the enormous discretionary powers to prosecute completely lack the backing of the appropriate guidelines. Apparently, it is an arduous task to attach a true meaning to the reasonable basis test, gravity threshold and even the interests of justice and yet these are the checks supposed to be the gatekeeper against the abuse of prosecutorial discretion. Without a definitive criterion to assist the OTP in demarcating the exact contours of these checks, the OTP will always have room to sneak in any type of consideration while deciding whom to investigate, charge and with what charges. For example, (as already discussed) the OTP has taken political considerations in its prosecutorial choices although the same is not contemplated in the Rome Statute.

Secondly, the dearth of a system that would guarantee compulsory prosecution of all those bearing greatest responsibility (similar to that of Germany and thus putting the OTP's excessive selectivity on check) has been one of the causes of the abuses. The very fact that it is only the prosecutor who can determine whose names appear in the charge sheet and for what charges has undoubtedly given a leeway to the OTP to play prosecutorial gimmicks as it wishes. Why a prosecutor would choose some and leave others although all have committed similar acts? A system that would compel the OTP to prosecute impartially would undoubtedly assist.

Lastly, where the OTP deviates from the noble course of according preeminence to the fundamental ethical principles such as equal dignity for human beings, respect for human rights, open-minded consultation, individual moral responsibility for criminal behaviour, respects for governments and law and impartiality, abusive exercise of discretionary powers to prosecute shall definitely creep in.

6.2 Recommendations

Despite the foregoing challenges, this research however takes the view that all is not lost and therefore recommends the following as the most suitable ways in addressing the identified problems:

6.2.1 Compulsory Prosecution

First, there is need to put in place a system similar to that of Germany's *Legalitatsprinzip* (the rule of compulsory prosecution).²² Under a similar system, the OTP would be under a peremptory duty to prosecute those suspected to bear the greatest responsibility from all sides of the conflict without any form of bias or hazardous selectivity.

While the foregoing may be the case, it must at all costs be appreciated that it is virtually impossible to arraign every offender before the ICC given the complex nature and costs involved in the ICC's processes. Instead, the nature of compulsory prosecutions agitated for herein would take the character of legally obliging the OTP to select and prosecute indictees bearing greatest responsibility for atrocities without 'favouring' any side of the conflict. For example, in Uganda, the OTP left out top members of the UPDF (who had committed similar if not graver atrocities in Northern Uganda- thus also bearing greatest responsibility) despite availability of incriminating evidence. Similarly, in the DRC, top leadership of the Mai Mai militia believed to be backed by President Kabila was left out of the OTP's list although it had perpetrated even severe atrocities.

Had the Statute or the RPE made provisions legally obliging (and therefore making it compulsory for) the OTP to investigate all sides of the conflict equally, claims of favouritism and perilous selectivity would have been sunk into oblivion. For example, although the OTP was not legally obliged to do so in Kenya, it chose those bearing greatest responsibility from both sides of the conflict and even if it never explained the criteria it applied, it was however able to diffuse fears that it had intended to target only one side of the conflict. Such a move should be embraced and may only become a practice if legally implanted within the ICC's statutory framework.

²² Indeed Professor Daniel D. Ntanda Nsereko in his article titled 'Prosecutorial Discretion Before National Courts and International Tribunals' (2004) Guest Lecture Series of the Office of the Prosecutor at page 3 confirms that the Germany's public prosecution office is obliged to take action in case of all criminal offences which may be prosecuted, provided there are sufficient factual indications. A public prosecutor apparently commits an offence for failing to prosecute when the criteria to prosecute exist. The Code of Crimes against International Law also extended the public prosecutor's obligation to the international crimes of genocide and crimes against humanity.

6.2.2 Private Prosecution

In the alternative to compulsory prosecution, a system akin to the French would be suitable. Here, private entities with evidence may, where the prosecutor wantonly refuses to charge a perpetrator, espouse a claim before the ICC as long as the court has jurisdiction after both the admissibility and complementarity hurdles have been surmounted. Undoubtedly, adopting this system would check against selectivity and bias.

While it must again be appreciated that it may be impossible to arraign all the perpetrators of heinous before the ICC, the current practice whereby it is only the OTP has the real chance of shaping the charge sheet is also somehow oppressive. It is only the Prosecutor who determines the list of indictees and the order of charges. As already observed in the study, the OTP is permitted to get information from the Intergovernmental organizations and the NGO's. Apparently this information is not binding upon the OTP although it may be very well representative of the true state of affairs. For example, regarding the Northern Uganda, the Human Rights Watch and the Amnesty International had evidence incriminating the UPDF leadership and showing that they too had committed atrocities (thus also bearing greatest responsibility for crimes) of similar, if not of more serious nature than those of LRA. They could not however be able to prosecute those individuals despite availability of evidence since prosecution is generally a preserve of the OTP. The upshot has been that none from the UPDF has ever been prosecuted. The question therefore is - will justice ever be served while those known perpetrators are still roaming freely in Uganda as if nothing has ever happened? Is it that it only becomes a crime when LRA kills and a celebration when UPDF kills? The OTP has never listened to these human rights bodies despite calls to do so. But then, what could be the answer?

It is a humble recommendation of this paper that private entities (like the NGO's, Intergovernmental Organizations and Human Rights Bodies) should, if they are able to demonstrate that there are individuals bearing greatest responsibility and the OTP has wantonly refused to charge them, be allowed to bring charges against them. It is recognized that rule 103 ICC RPE allows such bodies to appear as *amicus curiae* but this is normally at the discretion of the TC. Perhaps, the rule should be amended so as to cover what is recommended herein. Certainly this would add to the fight against impunity.

6.2.3 Prosecutorial Guidelines

As already noted, the OTP has had a wide latitude in the exercise of discretionary powers to select situations, carry out investigations, choose those whom to charge and in choosing the charges to prefer against the suspects widely because there lacks guidelines meant to demarcate the exact contours of the existing thresholds namely, the reasonable basis test, gravity threshold and interests of justice. It therefore suffices to make a recommendation that the OTP with the support of other stakeholders come up with properly considered prosecutorial guidelines meant to give an exquisite exposition on the meaning, import and the extent of applicability of the existing thresholds. It is only then that the OTP would be able to apply the tests in a uniform and transparent manner. It would help in entrenching specificity in the criminal rules as it would leave no room for the applicability of the *ejusdem generis* canon of interpretation which of course has, as already seen in the foregoing chapters, left nothing much to be desired.

6.2.4 Enhanced ICC's Supervisory Powers

Further to the foregoing, the ICC should not hesitate in using its supervisory powers to check abusive prosecutorial decisions. This is important since the court's refusal to condemn the OTP (while abusing its prosecutorial powers) negatively amplifies its exclusive powers.

6.2.5 Fundamental Ethical Principles

Lastly, even if much may be borrowed from German and the French systems and although prosecutorial guidelines may be promulgated, it would be equally important that the OTP embraces the fundamental ethical principles such as equal dignity for human beings, respect for human rights, open-minded consultation, and individual moral responsibility for criminal behaviour, respects for governments and law and impartiality. Otherwise, failure to do this may just encourage complacency with the extant system to the detriment of justice.

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