COMPLEMENTARITY AND SELF-REFERRAL AT THE INTERNATIONAL CRIMINAL COURT AND THE AFRICAN STATES: THE MYSTERY BEHIND THE ANOMALIES

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"African leaders have come to a consensus that the (ICC) process that has been conducted in Africa has a flaw. The intention was to avoid any kind of impunity ... but now the process has degenerated to some kind of race hunting."[1]

ABSTRACT

Complementarity principle is one of the founding principles of the ICC. The establishment of the Court itself is partly attributed to the deliberate incorporation of this principle. It was designed by way of balancing the interests of member states to retain some leverage over crimes that are committed on their territory or by their nationals to have the first-hand right to investigate and prosecute. As can be seen, the principle by balancing the jurisdictions of states and the ICC was there to play the role of ameliorating the unnecessary frictions over the right to prosecute. It seems that this principle has not been properly appreciated by the majority of the African States. This is because, by engaging in self-referral, they have derailed the purpose of the principle. In the process, these states have also undermined their own sovereign right of investigation and prosecution. This is because the practice of self-referral has given the Court a free ticket to pursue as many cases as can be seen from the record of the Court so far. These self-referrals and the unabated and ambitious involvement of the Court in criminal process of the referring states have challenged the credibility of the Court since the voluntary surrender of jurisdictional right by these states has painted a politicized picture on the operation of the Court. So, it is the position of this paper that the African states failed in applying the principle and by unwittingly

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[1] Hailemariam Desalegn, Ethiopia's Prime Minister and the then AU Chair, was speaking at the conclusion of the 50th-anniversary summit of the AU, *The Telegraph*, 27 May 2013, available at https://www.telegraph.co.uk/news/worldnews/africaandindianocean/10082819/International-Criminal-Court-is-hunting-Africans.html , visited August 17, 2019.

inviting the Court, finally could not protect their sovereignty on criminal matters. As a logical consequence these decisions, therefore, they cannot blame the Court alone for bias towards the Continent.

Key Words: *complementarity, self-referral, state sovereignty, African States, politicization of prosecution,*

1. INTRODUCTION

When the international criminal tribunals and the criminal court were to be established at the international level, one of the major issues was how to determine the relationship that might exist between these courts and tribunals on the one hand and national courts on the other. The Tribunals that were established to address criminal issues committed in the former Yugoslavia and Rwanda were given the power to entertain cases in these specific areas with the primacy principle i.e. having a prevailing jurisdictional power in case of contested jurisdiction.

The principle followed in the establishment of the ICC, however, is different. The Statute of the ICC opted for the regulation of this relationship based on the principle of complementarity. This way of entertaining criminal cases allows domestic courts and for that matter, other courts to assume jurisdiction, so long as the courts are able and willing to adjudicate the case with the view of serving justice and preventing impunity. In many parts of the world, states have strictly followed this principle and have managed to ward-off the unwarranted presence of the Court in their domestic jurisdictions. The same approach should have been followed in Africa. The African member states that are under consideration in this article, nonetheless, have failed to live up to this commitment. The States whose cases or situations are under consideration have principally engaged in a self-referral rather than investigating and prosecuting criminal cases committed in their jurisdiction or by their nationals.

What are the consequences of this inappropriate appreciation of the principle of complementarity by these states? What has forced these states to engage in the practice of unwarranted self-referral? What are the ramifications of self-referral on the sovereignty of the states and the number of cases the Court has entertained on the African continent? How have these states responded to the frequent visitation of the ICC prosecutors to the Continent for investigation and prosecution? In this article, I will raise these issues and discuss by relating them to the principle

of complementarity in juxtaposition with the practice of self-referral and try to show some of the potential anomalies in the ICC and African states disgruntled relationship. To accomplish this purpose, the article uses close scrutiny of the cases and situations referred to the ICC and the responses of these states relating them to the subject matter of complementarity and self-referral.

Accordingly, the article is divided into three parts. The second part of the paper deals briefly with the ways of determining the relationship between domestic courts and international ones. In this part, the article addresses the procedure that has been followed in the two Criminal Tribunals and discusses the principle of complementarity with the view of elucidating the way it was envisaged by the Rome Statute. The third part analyzes how the African states have approached the principle of complementarity and try to situate the practice of self-referral with regard to the legal and political consequences of the approach that has been adopted by these states. And finally, in the fourth part, the article ends with some concluding remarks.

2. GENERAL BACKGROUND

The establishment of the international court or tribunal requires the determination of the sphere of their jurisdictions since naturally domestic courts also tend to exercise competence on the same subject matter. However, there seems to be no general principle of international law or customary international law rules that address this question.[2] As such, the regulation of this matter was considered by the Resolution establishing the Tribunals and the Statute of International Criminal Court (ICC hereinafter). Accordingly, the Resolutions of the International Tribunal for Former Yugoslavia (ICTY) & the International Tribunal for Rwanda (ICTR) have established that the Tribunals exercise concurrent jurisdictions with national courts.[3] However, the Tribunals were given primacy over all the national courts in the exercise of their jurisdictions with the power to request national courts to defer the cases in their favor "at any stage of the procedure."[4] But it was not an absolute primacy that the Tribunals used since they referred a case to national courts when an appropriate trial was expected as such.[5] Because of the above preference for national courts, the ICTY established three procedural guidelines in its Rules of Procedure & Evidence to exercise this primacy. The Tribunal can only exert its primacy when

[2] Antonio Cassese, *International Criminal Law*, (2nd ed, Oxford University Press, 2008), p. 348.
[3] Statute of the Tribunal for Former Yugoslavia, Security Council Resolution 827/1993, Art. 9(1) & Statute of the Tribunal for Rwanda, Security Council Resolution 955/1994, Art. 8(1)
[4] Ibid., Art. 8(2)& 9(2).
[5] Antonio Cassese, *International Criminal Law*, *fn* 2, p. 340.

the case is tried as ordinary crime without the seriousness it requires or when the trial is conducted in domestic courts in an unreliable fashion because of impartiality or any other matter and finally when the case is relevant for the trial of other cases under consideration at the Tribunal.[6] The same procedure was followed by the ICTR.[7]

2.1. The Principle of Complementarity[8]

Unlike the primacy principle adopted for the ICTY & ICTR, the ICC Statute adopts a complementarity principle. According to this principle, the Court plays a "subsidiary role and supplements the domestic investigation and prosecution" of crimes under its jurisdiction.[9] As such, the Preamble[10] and Article 1 of the Statute clearly provide that the Court exercises jurisdiction complementing the national legal systems that have the primary right and responsibility to investigate and prosecute the crimes.[11] The complementarity principle was in the International Law Commission`s Draft, "but was substantially remodeled during the negotiation,"[12] showing the importance attached to this principle by the state-parties negotiating the Statute. Complementarity is considered to be one of the most important subjects in the

[6] Ibid
[7] Ibid
[8] There is a wide range of scholarly material on the subject of complementarity. For further and elaborated consideration of the subject matter, the following writings can be of indispensable guidance. Tom Ruys, 'Justiciability, Complementarity and Immunity: Reflections on the crime of aggression', *13 Utrecht Law Review (2017)*; Mohamed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law, *23 Michigan Journal of International Law (2002);* Thomas M. Dunn, 'The ICC and Africa: Complementarity, Transitional Justice, and the Rule of Law' available at https://www.e-ir.info/2014/07/12/the-icc-and-africa-complementarity-transitional-justice-and-the-rule-of-law/. Accessed on August 20, 2019*;* David Tolbert & Laura A. Smith, Complementarity and the Investigation and Prosecution of Slavery Crimes, *14 Journal International Criminal Justice, (2016);* Cedric Ryngaert, 'Applying The Rome Statutes Complementarity Principle: Drawing Lessons From The Prosecution Of Core Crimes By States Acting Under The Universality Principle', *19 Criminal Law Forum (2008):*153–180*;* William A. Schabas, Carsten Stahn And Mohamed M. El Zeidy, 'The International Criminal Court And Complementarity: Five Years On', 19 *Criminal Law Forum (2008)*:1–3; Carsten Stahn, Complementarity: A Tale Of Two Notions', 19 *Criminal Law Forum,* 87–113; HJ van der Merwe and Gerhard Kemp (eds) *International Criminal Justice In Africa, 2017,* (Konrad Adenauer Stiftung, 2017)
[9] Marcus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity", *7 Max Planck Yearbook of United Nations Law*, (2003) p.592.
[10] Rome Statute of the International Criminal Court of 1998, Preamble Para 10
[11] Ibid., Preamble para. 6.
[12] Robert Cryer & et al, *An Introduction to International Criminal Law & Procedure,* (2nd ed, Cambridge University Press, 2009), P. 153

Statute leading to its acceptance at the end of the negotiation.[13] Nouwen considers this principle as the "cornerstone of the Statute", that even enabled the realization of the Court itself.[14]

2.2. The Purpose of Complementarity

The importance attached to the complementarity principle is observable from the negotiating history that states wanting to retain some level of control over the exercise of criminal jurisdiction. As such, Cryer underlines that "for the success of the negotiation," agreement on the complementarity principle was considered a precondition making sure that states are not stripped of all their competence in criminal matters.[15] In line with this, there were even proposals to make the jurisdiction of the Court based on state consent rather than an automatic.[16] Accordingly, Countries like the US argued to the fullest to make the jurisdiction of the Court on the basis of consent, which was not accepted, leading to its renunciation of the membership of the Rome Statute eventually.[17]

Coming to the purpose of the principle, one of the major purposes of the principle is the protection of state sovereignty to investigate and prosecute crimes of national interest. In this relation, it has been argued that the exercise of criminal jurisdiction can indeed be said to be a central aspect of sovereignty itself.[18] As such, it can be argued that one of the aims of the principle is recognizing state competence so far as they are willing and able to investigate and prosecute the crimes under the jurisdiction of the Court. In this relation, it is believed that the existence of complementarity not only allows the states to investigate and prosecute the perpetrators but also encourages them to do so, for the failure to do so leads to the stepping in of the Court.[19] This is believed to lead to compliance of the states with their primary responsibility

[13] *M.* Bergsmo, O. Bekou and A. Jones, 'Capacity Building and the ICC's Legal Tools', *2 Goettingen Journal of International Law (2010), p.* 830
[14] S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalyzing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013), p. 133
[15] Robert Cryer & et al, *An Introduction to International, fn 12,* p. 154.
[16] Ruth P. Philips, "The International Criminal Court Statute: Jurisdiction and Admissibility", *10 Criminal Law Forum*, (1999), P. 69.
[17] Ibid.
[18] Ian Brownlie, *Principles of Public International Law*, (6th ed Oxford University Press 2003), p. 301
[19] John M. Czarnetzky and Ronald J. Rychlak, 'An Empire of Law? Legalism and the International Criminal Court' *79 Notre Dame Law Review, (2003)* p. 96

to investigate and prosecute core crimes without the need to involve the Court.[20] Seen from this point of view, the Court can be said to have a prospective jurisdiction, based on the decision and action of the home state.

The second purpose of the principle relates to practical issues. As an international institution, the Court can only entertain a few cases given the resources at its disposal.[21] Accordingly, the Court can only address matters that could not be dealt with at a domestic level due to various reasons; otherwise, it will be "flooded with cases from all over the world."[22] Besides, the proximity of states to the accused and the crime scene make them best positioned for carrying out the investigation and prosecution.[23] Accordingly, states are in a much better position to carry out the investigation and prosecution in an "efficient and effective way" than the Court.[24]

In sum, the complementarity principle allows states to exercise criminal jurisdiction appropriately.[25] However, the principle does not leave the exercise of the jurisdiction entirely to the discretion of the states since there is also an international community interest in fighting impunity.[26] As such, to balance these two interests, the Statute has devised a way that the complementarity principle can be put in action when the state claiming jurisdiction, in fact, is unable or unwilling to genuinely carry out the investigation and prosecution. The next sections will raise issues relating to the operation of the complementarity principle. However, before moving on to the discussion of these issues, a few words about the nature of the complementarity principle seem warranted.

2.3. Nature of Complementarity

The nature of complementarity principle is more of admissibility issue than jurisdictional.[27] This is because, the jurisdiction of the Court is determined by Article 5, which enumerates the core crimes under the jurisdiction of the Court and other Articles that establishes the conditions for

[20] Ibid, p.97. Czarnetzky and Rychlak argued in this relation that since the Court determine the willingness and ability "---in order to convince the ICC that it is willing and able to prosecute those crimes that are defined in the Rome Statute; a state may need to adopt its own laws prohibiting those crimes."
[21] Marcus Benzing, "*The Complementarity Regime of the International Criminal Court*, *fn 9,* p. 599.
[22] Antonio Cassese, *International Criminal Law, fn 2* p. 351.
[23] *Informal expert paper, fn 19,* p.3.
[24] Ibid., see also *Robert Cryer & et al, An Introduction to International, fn 12,* p. 153.
[25] Antonio Cassese, *International Criminal Law, fn 2* p.351.
[26] John M. Czarnetzky and Ronald J. Rychlak, *An Empire of Law?, fn 19,* p. 95
[27] Marcus Benzing, "*The Complementarity Regime of the International Criminal Court*, *fn 9,* p. 595.

that trigger the exercise of the jurisdiction of the Court.[28] Accordingly, when a state is a party to the Statute or a non-party state declares that it accepts the jurisdiction of the Court, the Court is considered to have jurisdiction.[29] Therefore, once the core crimes under Article 5 are committed in a situation provided under Article 12, the Court has jurisdiction.[30] Then, what is the role of the principle concerning the jurisdiction of the Court? The role of the principle is to regulate the exercise of this jurisdiction. Accordingly, when we consider the relationship between the two, Article 12 determines the existence of the jurisdiction while Article 17 establishes situations in which the existing jurisdiction can be exercised. The Rules of Procedure and Evidence of the Court also supports this understanding by stating that the Court first determines the existence of jurisdiction after which it addresses the issues of admissibility.[31]

2.4. Substantive Issues of Complementarity

As has been discussed in the preceding parts, the principle is the best compromise between the respect for national sovereignty allowing domestic courts to entertain criminal cases of international concern and fighting impunity in the face of the commission of heinous crimes. And in the event that the national courts cannot properly carry out the investigation and prosecution, the system allows the ICC to step in. Accordingly, Article 17 regulates this procedure based on certain grounds which have to be evaluated and determined before the case is admissible if it is already before the national court. As such, admissibility before the Court is determined on the basis of three grounds. These are the unwillingness and inability on the one hand and inaction being the third one on the other. The next section sheds light on these criteria starting with inaction.

2.4.1. Inaction

This criterion is added based on the logical understanding flowing from the purpose of complementarity.[32] As has been stated above, one of the main reasons for having the principle is

[28] For the Court to exercise jurisdiction, it has to convince itself of the existence of all the required elements under the Statute dealing with the personal, temporal and territorial jurisdictions, as laid down under articles 11 and 12 of the Statute. See generally instance for Morten Bergsmo, "The Jurisdictional Regime of the International Criminal Court, Part II, Articles 11-19", *6 European Journal Crime Criminal Law & Criminal Justice, No.4, (1998*).
[29] Rome Statute, Art.12, See also Ruth P. Philips, *The International Criminal Court Statute, fn 16,* p.66.
[30] Ruth P. Philips, *The International Criminal Court Statute, fn 16,* p.68. As such, the Court has jurisdiction when the crime is committed by the national or on the territory of a state-party or consent is granted by the non-party state or referral by the Security Council.
[31] Rules of Procedure and Evidence, ICC-ASP/1/3, (2002), Rule 58(4).
[32] See Mahnoush H. Arsanjani and W. Michael Reisman, 'The Law-In-Action of the International Criminal Court', *99 American Journal of International Law, (2005)*, p. 390, see also W. Schabas, 'Prosecutorial Discretion v. Judicial

to allow states to exercise their criminal jurisdiction on the crimes under the Statute with the first-hand opportunity. However, if there is no state claiming sovereign right to exercise this jurisdiction, then there is no impediment to the admissibility of the case.[33] This is true even though some writers argue that the exercise of jurisdiction by the Court in case of inaction is not covered under the wording Article 17[34], others have specifically refuted this position claiming that the wording of Article 17 clearly covers the role of the Court in case of inaction.[35] The determination of the veracity of either of the position requires an independent research, at least for academic purpose. This is because the ICC seems to have a concurring opinion with the latter group of writers and as such this ground is still used for the purpose of admitting situation for consideration. [36]

2.4.2. Unwillingness

This is one of the most important complementarity grounds that the Statute recognizes, allowing the Court to exercise jurisdiction when a state is unwilling to genuinely conduct the investigation and proceedings on the basis of the investigation.[37] According to the Statute, a state is considered 'unwilling' when the investigation or prosecution is conducted for the purpose of "shielding" the perpetrator or when the "proceeding is unjustifiably delayed" or when the proceeding is not conducted in an "independent or impartial way".[38] In comparison to the other grounds of admissibility, the proof of unwillingness is considered to be very difficult for it requires

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Activism', 6 *Journal of International Criminal Justice, (2008),* p. 731. The writer stated that "in relation to the charges faced by an accused, the Court has been more active, and has even been willing to add the criterion of 'inactive' to Article 17 ICC Statute."

[33] Darryl Robinson, 'The 'Inaction' Controversy: Neglected Words and New Opportunities,' in Carsten Stahn and Mohamed El Zeidy, (ed), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011) p. 463

[34] William A. Schabas, *Prosecutorial Discretion v. Judicial Activism, fn 32,* p. 757. Schabas argued that "in Lubanga, the Pre-Trial Chamber invented a third prong, 'inactivity'". And by doing that the Court has solved some of the challenge to the admissibility issue yet. There was only one problem: it is not in the ICC Statute. See also William A. Schabas,"First Prosecution at the International Criminal Court", *27 Human Rights Law Journal,* (2006), p.32

[35] Darryl Robinson, *The 'Inaction' Controversy, fn 33,* p. 463. The writer contrasted this position by writing that "a case is admissible before the ICC where there is not and has not been any national proceeding in relation to that case (the 'inaction' scenario); this proposition flows, not from any creative interpretation, but rather from straightforward application of the black-and-white words of the Statute"

[36] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 Decision on the Prosecutor`s Application for a Warrant of Arrest 10.2.2006, para.29; *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman,* Decision on the Prosecution Application under Art. 58(7) of the Statute, ICC-02/05-01/07, 27 April 2007, paras. 19-25;

[37] Rome Statute Art. 17(2)

[38] Ibid., Art.17(2 a-c).

"assessing the motives of the national authorities…"[39] Thus, "inferences" should be made based on the "objective factors"[40] to establish whether the state is conducting the proceedings in "good faith",[41] with the view to punishing the perpetrators. However, this interference on the basis of unwillingness is regarded as "politically sensitive", since it has the tendency of accusing the authorities for not conducting the proceedings genuinely or for not having good faith.[42]

Be that as it may, it has been established that there are indicators that might help in the establishment of unwillingness on the part of the state that contends that it is undertaking a genuine investigation and prosecution. As such, it is said that the "direct or indirect political interferences…" by the national authorities or "general institutional deficiencies-subordination of the proceedings" or "procedural irregularities showing an unwillingness to investigate or prosecute" can be used as an indicator of the absence of willingness on the part of a state.[43] Something that needed to be underlined in this context, however, is the fact that unwillingness is not determined by the outcome of the case, rather by the "procedural and institutional factors."[44] If the outcome is considered as the basis for admissibility, it amounts to the assumption that the accused deserves punishment or severe punishment, which violates his right to be presumed innocent until proven guilty.[45]

2.4.3. Inability

The third ground of admissibility is the inability of a state to genuinely carry out investigation and prosecution. This is linked to the absence of a central government or the existence of civil disorder or natural disaster or any other similar situation affecting the state`s capability to conduct a genuine proceeding.[46] Proving inability seems somehow easier compared to unwillingness since it depends on certain objective factors.[47] Besides, the Statute provides clear criteria to determine inability stating that a "total or substantial collapse or unavailability of the

[39] Robert Cryer & et al, *An Introduction to International, fn 12,* p.128.
[40] Ibid.
[41] Frank Meyer, "Complementing Complementarity", *6 International Criminal Law Rev*iew, *(*2006), p. 565
[42] *Informal expert paper, fn 19,* p. 14
[43] Ibid.
[44] Robert Cryer & et al, *An Introduction to International, fn 12,* p. 128, see also *Informal expert paper, fn 19,* p. 14.
[45] *Informal expert paper, fn 19,* p. 14.
[46] See Nidal Nabil Jurdi, 'The Complementarity Regime of the International Criminal Court in Practice: Is it Truly Serving the Purpose? Some Lessons from Libya,' *30 Leiden Journal of International Law (2017),* pp. 199–220
[47] Robert Cryer & et al,, *An Introduction to International, fn 12,* p.129.

national judicial system…," which can be determined objectively.[48] Accordingly, the Court can exercise jurisdiction when the state could not obtain the suspect or the evidence and testimony or could not carry out the proceeding in general caused by the total or substantial collapse or unavailability of the judicial system.[49]

The Independent Expert Group commenting on this principle has also put in place certain indicative factors that can lead to the conclusion that there exists an inability on the part of the state. Accordingly, factors like, "lack of necessary personnel- judges, investigators, & prosecutors" or absence of the normal "judicial infrastructure" or the "absence of substantive or procedural penal legislations" can be used to establish inability.[50] The determination of the level of devastation or the absence of these resources is very controversial as will be demonstrated in the preceding parts. Following this, it has been argued that a state is considered to be unable to prosecute a perpetrator if its penal legislation only allows proceedings for "ordinary crimes" without appreciating the grave nature of the crimes as provided under the Statute.[51] In this last regard, it should be admitted that the experts were drawing parallel experience from the ICTY/ICTR in the exercise of jurisdiction when the state can only conduct investigation and prosecution for ordinary crimes.[52] The consideration of the relevance of this ground for the admissibility of cases with regard to the ICC is beyond the scope of this article. And hence, it suffices for now to outline some of the possible grounds used for the purpose of determining inability

The above part of the article has dealt with the concept and operation of the principle of complementarity, very briefly I should admit though, and tried to shed light on its core contents. If this is the way the jurisdiction of the Court operates and what is the international community has accepted and applied, how have the African States applied the principle of complementarity? Where does the practice of self-referral fit in the components of the principle? In the following parts, the paper tries to examine the application of the principle of complementarity in juxtaposition with self-referral to elucidate how the relationship between the African States and

[48] Rome Statute art. 17(3).
[49] Marcus Benzing, *The Complementarity Regime of the International Criminal Court, fn 9,* p.613.
[50] *Informal expert paper, fn 19,* p. 15.
[51] Marcus Benzing, *The Complementarity Regime of the International Criminal Court, fn 9,* pp. 614-617.
[52] Antonio Cassese, *International Criminal Law, fn, 2,* p. 340.

the ICC has gone awry causing so much trouble- whereby some of the States even threatening to withdraw individually or in an *en masse* fashion.

3. ICC AND THE AFRICAN STATES

After a very long reluctance and misunderstanding among the major players on international plane regarding the status and role of international criminal law, the turning point seemed to have emerged with the consensus to establish the two criminal tribunals for Yugoslavia and Rwanda. This development has contributed significantly towards the realization of the Rome Statute that has given birth to the ICC. Following the establishment, although the heavyweights on the negotiating table like the USA, China and Russia have withheld their membership citing various claims, the African bloc has shown an impressive track record in signing and ratifying the Statute and in the process becoming members of the ICC in a remarkable number. Today, out of the 122 members of the ICC, 33 are the African States.[53] In terms of regional setting, Africa has the biggest number of memberships compared to all other regions contributing to the ICC.

What was the motive behind this impressive ratification? As a matter of fact, some tend to believe that countries with weak legal and political institutions are the ones who try their best to circumvent the scrutiny of international institutions into their actions and decisions.[54] With this logic as a springboard, Dutton has examined the number of ratifications and the nature of the states that have engaged in the process and argued that "states with good human rights practices are quite likely to join the ICC".[55] The defiant pattern followed by the majority of African States, particularly those in the Sub-Saharan, however, has been an ill-fitted exercise to common sense. That is why Chapman & Chaudoin argued that "the ratification patterns in Sub-Saharan Africa are an exception to the trends described above."[56]

[53] The States Parties to the Rome Statute, available at https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx
[54] See for instance, Yvonne M. Dutton, 'Explaining State Commitment to the International Criminal Court: Strong Enforcement Mechanisms as a Credible Threat', *10 Washington University Global Studies Law Review* (2011), pp. 520-1, see also Terrence L. Chapman & Stephen Chaudoin, 'Ratification Patterns and the International Criminal Court,' *57 International Studies Quarterly*, (2013), p. 405
[55] Dutton, *Explaining State Commitment to the International Criminal Court, fn 54,* p. 520
[56] Chapman & Chaudoin, *Ratification Patterns, fn 54,* p. 404

A closer scrutiny, nonetheless, shows that there are various reasons justifying the record number of ratification that the Rome Statute has received from the African States.[57] In the interest of space and time, it seems imperative to concentrate on a few of the following. One of the major contributing factors for the overwhelming support of the African States is the Rwandan genocide where a million innocent civilians have been the victim of a horrendous crime and the States wanted to have a lasting solution in avoiding this kind of catastrophe from happening in Africa ever again.[58]

Although not of the same magnitude, similar patterns of atrocities have been witnessed in many parts of Africa. In concurring with the above desire of minimizing the violation of human rights, Jalloh writes that "---fresh memories of the tragic and preventable Rwandan genocide in 1994, [---] strengthened Africa's resolve to support the idea of an independent and effective international penal court that would punish, and hopefully deter, perpetrators of such heinous crimes in the future."[59] Similar willingness on the part of African States in deterring the violation of the rights of their citizens has been captured by Rodman & Booth while writing that "therefore, ICC membership is likely to coincide with progress in peace processes as well as improvement in the accountability practices of the security forces."[60] So, following the bad record that the States have shown and the unprecedented human rights violations that the Continent in entirety has endured over the years,[61] the enthusiasm that has been shown by the African States towards the ICC, at least in the beginning, seemed genuine.

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[57] See for instance, H. Jallow and F. Bensouda , 'International Criminal Law in an African Context', in M. du Plessis (ed.), *African Guide to International Criminal Justic*e (Pretoria: Institute for Security Studies, 2008), see also Phakiso Mochochoko, 'Africa and the International Criminal Court', In E Ankumah and E Kwakwa (eds), *African perspectives on international criminal justice*, (Ghana: Africa Legal Aid, 2005), Charles Chernor Jalloh, Africa and the International Criminal Court: Collision Course or Cooperation? , *34 North Carolina Central Law Review 203 (2012).* Available at: http://ecollections.law.fiu.edu/faculty_publications/253

[58] Philipp Kastner, Africa- A Fertile Soil for the International Criminal Court?, *Die Friedens-Warte*, Vol. 85, No. 1/2, Konfliktregion Afrika (2010), p. 133

[59] Charles Chernor Jalloh, Regionalizing International Criminal Law?, *International Criminal Law Review* 9 (2009), pp. 446-7

[60] Kenneth A. Rodman & Petie Booth, 'Manipulated Commitments: The International Criminal Court in Uganda' 36 *Human Rights Quarterly, (2013)*, p. 273

[61] First, Representatives from twenty-five African States have met in Senegal Dakar and passed their support of the establishment of an independent international criminal court. See *the Dakar Declaration for the Establishment of the International Criminal Court*, Feb. 2, 1998, http://www.iccnow.org/documents/DakarDeclaration- Feb98Eng.pdf. Following that the Organization of Africa Unity (now the AU), during its 36th ordinary session of the Assembly of Heads of State and Government, held in Lome, Togo, had shown its full support for the establishment of the Court. *Declaration and Decisions Adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU held in Lome, Togo (2000),*

The second reason put forward by some writers to outline the ambitious acceptance of the ICC is the state of play that the African criminal justice has been in. Following similar pattern that the African justice system in general exhibits, the criminal justice system of the continent, if not worse, harbors the weakest infrastructure and as such, it has been incumbent upon the African leader to seek assistance from every source possible to deal with the commission of heinous human rights violations that it has been known for a long period of time now.[62] And the ICC has come at a very right time where the OAU was trying to remodel itself into the African Union to sort out its negative image at home and abroad. [63] Using the ICC for the purpose of saving face has been a convenient solution. Jalloh has succinctly described the situation in African writing that "it is perhaps better captured by the reality that African states are likely to be the frequent users, or "repeated customers", for the Court because of a relatively higher prevalence of conflicts and serious human rights violations and a general lack of credible legal systems to address them."[64]

There is also one final reason that needs to be mentioned that served as a factor in the massive ratification of the Statute. This is the potential pressure from the aid providing countries on the African States to show commitment with regard to the implementation of human rights.[65] Meernik & Shairick argued that "---democracies use a variety of tools to promote human rights throughout the world, including diplomatic pressure, foreign aid---"[66]. And this pressure must have also played its role in the process in addition to the factors that have been discussed-contributing to the number of ratification by the African States.[67] It seems that the above reasons

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https://au.int/sites/default/files/decisions/9545-2000_ahg_dec_143-159_xxxvi_e.pdf

[62] Francois-Xavier Bangamwabo, "International Criminal Justice and the Protection of Human Rights in Africa", in Anton Bösl and Joseph Diescho (ed), *Human Rights: in Africa Legal Perspectives on their Protection and Promotion, (Konrad Adenauer Foundation 2009),* p. 128

[63] The African Union was established based on the Constitutive Act Adopted in Lome Togo (2000) following a successive discussion conducted in Sirte 1999. *AU in a Nutshell*, available at https://au.int/en/history/oau-and-au accessed on September 26, 2018

[64] Charles Chernor Jalloh, *Regionalizing International Criminal Law, fn 59, p.* 447

[65] For an excellent discussion of the correlation between foreign aid and economic pressure by the proving states to ratify and implement human rights and humanitarian principles, including the ratification of the ICC Statute, see generally, James Meernik & Jamie Shairick, 'Promoting International Humanitarian Law: Strong States and the Ratification of the ICC Treaty,' *14 International Area Studies Review, (2011)*

[66] Ibid, p. 32

[67] Ibid, see also Jay Goodliffe & Darren G. Hawkins, "Explaining Commitment: States and the Convention against Torture", *68 Journal of Politics (2006), p. 361*

and many others have influenced the decisions of the African States to engage in massive ratification of the Rome Statute which was started by Senegal and followed by many.[68]

Emboldened by the success of ratification of the sister countries, some of the African countries did not want to limit themselves to the ratification. This practice of prompt implementation is uncommon for the many African States when seen with regard to the multitudes of international instruments, particularly the human bills being the case in point here, where the States generally forget conveniently the fact that they even have ratified a treaty. Uncharacteristically of them in this regard, however, some of the members wanted to test its relevance by referring situations that have been bothering them over the years.

The flirtation with the ICC jurisdiction has been carried out by three African Countries in succession in the form of referral of the situations that they thought merits the consideration of the ICC prosecutorial endeavors. Uganda has been the front-runner in this respect, referring the situation in Northern Uganda[69] followed by the Democratic Republic of Congo[70] and the Central African Republic followed the same pattern.[71] In the following years, the Court has received additional referral cases from Mali, Côte d'Ivoire and, the CAR II.[72] Legally speaking, all the cases merit investigation and prosecution but the issue is how this process has unfolded.[73]

In addition to the self-referral situations that are being entertained by the ICC, we have four cases that have received the attention of the court. The Al-Bashir and Libyan cases referred to

[68] Sanji Mmasenono Monageng, "Africa and the International Criminal Court: Then and Now", in Gerhard Werle, et al ed., *Africa and the International Criminal Court,* (Asser Press, 2014) p. 15

[69] Situation referred to the ICC by the Government of Uganda: January 2004, available at https://www.icc-cpi.int/uganda

[70] Situation referred to the ICC by the DRC Government: April 2004, available at https://www.icc-cpi.int/drc

[71] Situation referred to the ICC by the CAR Government: December 2004, available at https://www.icc-cpi.int/car

[72] Situations under investigation, available at https://www.icc-cpi.int/pages/situation.aspx. Mali referred the situation in 2012 while Côte d'Ivoire accepted the jurisdiction of the Court in 2003 before ratifying the Rome Statute in 2013. And compounding the complex relationship the African States have with the ICC, CAR refereed additional case to the ICC, authorizing the Court to investigate all cases committed with regard to the renewed violence in the Country.

[73] Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court,' *99 The American Journal of International Law*, 2 (2005), p. 404. The writer argues rightly that "there is little doubt that as a purely legal matter, the LRA atrocities qualify as crimes within the Court's subject-matter jurisdiction."

the Court by the Security Council under Article 13 (b)[74] and the Kenyan post-election violence that was initiated by the ICC Prosecutor after the "failure"[75] of the Government in Kenya to deal with the situation and the last one being the case from Burundi following the wide-spread violence in the Country.[76] I will come back to the other situations and how they have seized the attention of the Court in a little while.

As can be seen from the foregoing discussions, the relationship between the ICC and the African states started with high hopes to bring justice to the Continent that has been plagued by serious violations of human rights[77] and rampant impunity[78] on the part of the actors that have committed heinous crimes that human history has witnessed. In the beginning, the feeling of righteousness among the African leaders was so high because they thought that they have found the lasting solution to the problem they felt is in the African air for a long period of time.[79] Yet, in time less than a decade, the majority of these African States have found themselves at odds with the ICC and calling for a group withdrawal at the Union level because they believe that they have been wrongly targeted by the prosecutor of the ICC.[80] How? The following sections will try to address how the African States have turned from the staunchest supporters of the ICC at the beginning into formidable enemies that the Court has to deal with ever since its establishment. In this regard, the disgruntled relation can be the byproduct of various political, economic and

[74] UN Security Council Resolution 1593 (2005) para. 1 and 2, See also UN Security Council Resolution 1970/2011, article 4.

[75] A Commission of Inquiry in the Post-Election violence was established in Kenya to deal with the post-election violence in that Country and although the Commission produced reports that showed the perpetration of crimes of serious nature, the government in Nairobi failed to take action following which the Commission was forced to submit the Report to the ICC prosecutor, triggering the investigation. See Philipp Kastner, *Africa- A Fertile Soil for the International, fn 58,* p. 150

[76] ICC Prosecutor opens *proprio motu* investigation: March 2010, available at https://www.icc-cpi.int/kenya , see also The Guardian, *Burundi Becomes First Nation To Leave International Criminal Court*, Sat 28 Oct 2017, available at https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court , retrieved on September 20, 2018.

[77]Chikeziri Sam Igwe, The ICC's Favorite Customer: Africa and International Criminal Law,' *41 The Comparative and International Law Journal of Southern Africa, 2 (2008)*, p. 294. Igwe emphasizing the prevalence of violence against the rights of African people wrote that "every part of Africa has experienced internecine conflicts that destroyed millions of lives."

[78] Ibid, p. 297. On the rampancy of impunity in Africa, Igwe wrote that "---impunity continues to migrate from country to country."

[79] Professor T. Maluwa, Legal Adviser, OAU Secretariat, Statement at 6th Plenary, 17 June 1998. See Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN doc. A/CONF.183/13 (Vol. II), available at http://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_2.pdf. p. 104, para. 116

[80] Philomena Apiko & Faten Aggad, "The International Criminal Court, Africa and the African Union: What way Forward?", *European Center for Policy Development,* (November 2016), available at http://ecdpm.org/wp-content/uploads/DP201-ICC-Africa-AU-Apiko-Aggad-November-2016.pdf accessed on September 26, 2018, p. 10

diplomatic circumstances. And as such, it seems quite reasonable to delimit the grounds of contention to the concept of complementarity that has been discussed in the first part of the paper.

Before the discussion of this subject starts, it seems imperative that I have to make two things clear from the very beginning. These are the concern over the concentration of the Court on African situations and the politicized nature of the UN Security Council referral. On the face of it, the assertion that the African States have been wrongfully targeted seems quite valid considering the fact that the cases and situations that the ICC has considered so far and is still considering are principally from Africa. Currently, the ICC has 11 situations under investigation and all, but the one from Georgia, are from African Countries.[81] That has led some commentators like the former AU Commissioner to claim that "we are not against international justice. It seems that Africa has become a laboratory to test the new international law."[82] Many African leaders have also shared the same sentiment against the Court claiming that the Court is another form of colonial apparatus.[83] For instance, Yoweri Museveni, the first to refer a situation to the ICC and later surrender a suspect[84], has been the "front-man"[85] in criticizing and delegitimizing the function of the Court by running the ill-founded conspiracy that the Court is blackmailing the African States.[86]

The writer believes that although the African states have failed to understand and probably implement other principles of the Court, their major setback comes from the misinformed and ill-handled appreciation of the principle of complementarity and the practice of self-referral. Two impactful decisions of the members would elucidate the concern, the issue of self-referral and the

[81] Situations under investigation, available https://www.icc-cpi.int/pages/situation.aspx
[82] His Excellency Jean Ping, Chairperson, African Union Commission, Interview with the BBC *on Vow to pursue Sudan over 'crimes'* , available at http://news.bbc.co.uk/2/hi/africa/7639046.stm
[83] Manisuli Ssenyonjo, 'The International Criminal Court and the Warrant of Arrest for Sudan's President Al-Bashir: A Crucial Step Towards Challenging Impunity or a Political Decision', *78 Nordic Journal of International Law (2009)*, p. 397
[84] Uganda captured and cooperatively transferred Dominic Ongwen, the suspect against whom an arrest warrant has been issued on January 16, 2015, and provided all the evidentiary materials. See Lino Owor Ogora, "Uganda's Ambiguous Relationship with the ICC Amidst Ongwen's Trial," *International Justice Monitor*, December 11, 2017, available at https://www.ijmonitor.org/2017/12/ugandas-ambiguous-relationship-with-the-icc-amidst-ongwens-trial/ retrieved on September 18, 2018
[85] Mark Kersten, "Between Disdain and Dependency — Uganda's Controversial Place in the ICC-Africa Relationship", *Justice In conflict,* March 29, 2017, available at https://justiceinconflict.org/2017/03/29/between-disdain-and-dependency-ugandas-controversial-place-in-the-icc-africa-relationship/ retrieved on September 14, 2018
[86] Ibid

consequent failure of taking care of criminal activities under their jurisdiction following the Statute`s requirement of *"---that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*" (emphasis added).[87] As will be shown in the following parts of the article, the decision of the self-referring states, in addition to other consequences, has tremendously increased the number of cases that the Court has to consider from Africa. This is because, except for the two of the situations that have been referred by the Security Council, the rest of the Situations have their ways into the Court following this practice.

Coming to the Sudan and the Libyan situations that have been referred to the Court by the UN Security Council, since the Council, based on the Reports available,[88] believed that there are reasonable grounds to believe that heinous crimes have been committed in these Countries with the help of the incumbent governments or at least, the governments are implicated in the commission of the crimes. The Sudan referral was substantial for multitudes of factors. To start with, Sudan was and still is not a party to the Rome Statute. This could come as surprise for many readers, but "---Sudan signed the Rome Statute on 8 September 2000, but has not yet deposited its ratification." [89] And for another, the Arrest Warrant was issued not against low-level military officers or a rebellion as it used to be. It was against a sitting head of state of the Sudanese, Omar Hassan Ahmad Al Bashir.[90] That has created a serious fissure in the relationship between the African States and the ICC, since they felt that the UN Security Council might target authoritarian leaders in Africa.[91] The tension has been compounded considering the fact that many of them are known for their serious violations of the rights of their citizens,[92] either because they could not protect the citizenry or, in the majority of the cases, the leaders are also

[87] Rome Statute, Preamble para. 6

[88] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,* Geneva, 25 January 2005, available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf, retrieved on September 23, 2018, p. 4. The Commission determined that although the crimes of genocide were not committed by the Sudanese Government in Darfur, "international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide."

[89] Manisuli Ssenyonjo, *The International Criminal Court, fn 83*, p. 403

[90] Situation in Darfur, Sudan, *The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09,* available at, https://www.icc-cpi.int/darfur/albashir/Documents/albashirEng.pdf, retrieved on September 23, 2018.

[91] Manisuli Ssenyonjo, *The International Criminal Court, fn 83*, p. 399. In this regard, Ssenyonjo wrote that if the Arrest Warrant is applied as intended it "---is an important signal that everyone including a president can be held accountable for international crimes within the jurisdiction of the ICC"

[92] See generally, Bruce Baker, 'Twilight of Impunity for Africa's Presidential Criminals' *25 Third World Quarterly, (2004).* In describing the situation most African authoritarian leaders have found themselves in relation to the ICC, Baker wrote that because of temporal jurisdiction, "therefore old tyrants may be safe---. It is the present tyrants who should be most worried", p. 1497

implicated in the crimes committed.[93] This relationship is particularly problematized when the veto power of the members represented in the Security Council is at issue. While all the East and West are protected by their proxy veto power holders, Africa has been the only Continent without a representative who can protect them by blocking the Council from referring cases targeting the African States and their leaders.[94]

With regard to the concern over the politicized nature of the UN Security Council, it can safely be said that the procedure of referral of the situation can be selective and political in nature.[95] The Council has shown so far in its practice that some of its decisions are driven by political goals rather than strict legal ones.[96] The Sudanese representative has clearly articulated this politicized and selective nature of the referral by stating that "---this Criminal Court was originally intended for developing and weak States and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority."[97] The concern of this article is in overemphasizing this politicized nature; we have lost sight of the contribution of the African States themselves. The African States, by engaging in self-referral and in the process, undermining the principle of complementarity, have contributed to the problems that we witness in the deterioration of the relationship they have with the Court. The contribution of the self-referral states becomes lucid when we see the situations that the Security Council has referred so far. There are only two situations- Sudan and Libya- that the Court has entertained based on this triggering mechanism compared to the substantial number that has been self-referred from Sub-Saharan Africa. But,

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[93] Everisto Benyerastate, *"Is the International Criminal Court Targeting Africa?"* available at http://paperroom.ipsa.org/papers/paper_46399.pdf, retrieved on September 23, 2018. The writer enlists the consideration of some thought regarding African to be in state "---of nature in which life is brutal, barbaric, short and nasty" p. 3

[94] Philipp Kastner, *Africa- A Fertile Soil for the International, fn 58,* p. 133

[95] See generally, Goran Sluiter, 'Obtaining Cooperation from Sudan – Where is the Law', *6: Journal of International Criminal Justice 1 (2008),* See also Manisuli Ssenyonjo, *The International Criminal Court, fn 83,* p. 403. Ssenyonjo contends that on the insistence of the US Representative, nationality exclusion has been included in the Resolution. He stated that the provision of the resolution is discriminatory by underscoring that "clearly, nationals of other states are excluded from the jurisdiction of the ICC, which is discriminatory."

[96] For a politicized discussion on the UN Security Council`s referral, see generally, F. Berman, The Relationship between the International Criminal Court and the Security Council', in H.A.M. von Hebel, J.G. Lammers and J. Schukking (eds), *Reflections on the International Criminal Court: Essays in Honor of Adriaan Bos* (The Hague: Asser, 1999), 173-180; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005); See Luigi Condorelli and Annalisa Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC', *3 Journal of International Criminal Justice (2005)*

[97] UN Doc. S/PV.5158, p. 12 (Mr Erwa). Mr Erwa continued denouncing the Resolution enunciating that "---this Court is simply a stick used for weak States and that it is an extension of this Council of yours, which has always adopted resolutions and sanctions only against weak countries---"

through all these processes, nobody has refuted the horrendous crimes committed on the African Continent and the need for a prosecutorial approach towards the evils behind the crimes.[98]

As will be elaborated in the following sections of the paper, from legal point of view, the activities of the ICC are legitimate considering the situation of many African countries that are marred by violence and serious human rights abuses and given the fact that the governments are either implicated in the perpetration of the crimes or they did not undertake their responsibilities of protecting the victims and worst of all, they have not brought the perpetrators of the crimes to justice. If we consider the rest of the situations that are under consideration by the ICC coming from Africa, the same outcome is expected. Rather than wasting unnecessary time on each case, after understanding the backgrounds of some of the cases, the appropriate thing to do next is to see how the African States have congested the jurisdiction of the Court by the infamous procedure of self-referral and the attendant discordant ensued from this procedure.

3.1. Self-Referral by the African States

To the complete disbelief and probably shock of the international criminal lawyers, the Ugandan government engaged in a self-referral of its internal conflict with the notorious group called the Lord Resistance Army (LRA).[99] The decision was received by international criminal lawyers half-heartedly because of various reasons.[100] For one thing, this is against the stipulation of the Rome Statute that required states parties to bear the primary responsibility in terms of investigating and prosecuting perpetrators of international crime.[101] And, by so doing, the Statute has made the jurisdiction of the Court on the basis of complementarity principle; yet, the

[98] See *Report of the International Commission of Inquiry on Darfur, fn 78,* p. 158. The Commission in concluding the Report to the UN SC underscored that "thousands were killed, women were raped, villages were burned, homes destroyed, and belongings looted. About 1.8 million were forcibly displaced and became refugees or internally-displaced persons."

[99] *President Of Uganda Refers Situation Concerning Lord's Resistance Army (LRA) To International Criminal Court*, Press release, 29 January 2004, available at https://www.un.org/press/en/2004/afr821.doc.htm retrieved on 18 September 2018

[100] For an excellently captured account of the responses of the community of international criminal lawyers see generally, Mohamed M. El Zeidy, "The Ugandan Government Triggers the First Test Complementarity Principle: An Assessment of the First State`s Party Referral to the ICC," *5 International Criminal Law Review, 2005,* pp. 83-119

[101] Rome Statute, Preamble paragraph 6 stating that "--- it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

decision has made the Court the primary destination[102] for crimes that are committed in the domestic jurisdiction of Uganda. Keller in this regard argued that "the appearance of ICC supremacy may be enhanced, or perhaps explained if not justified, by the unexpected practice of state self-referrals."[103] That is why it can be argued that the practice of self-referral has affected the delicate balance that the Statute wanted to create between the domestic courts and the ICC.

For another thing, because of the wrong relationship that this mutual agreement of referral creates, the Court would be forced to regard the referring authority as a customer. I will elaborate on these concerns in the following parts, first, by situating the practice of self-referral in the principle of complementarity.

3.1.1. Complementarity Principle and the Issue of Self-Referral

The Rome Statute is pretty clear about the complementarity role the Court has to play in relation to fighting impunity. As we have discussed in the preceding parts, the role of the Court comes into play when the member state is unable or unwilling to shoulder the responsibilities of investigating and prosecuting the perpetrators. Although almost all the states have claimed that the reason behind their referral is their inability to undertake the criminal process,[104] this is blatantly against the purpose of the complementarity principle and has also created more confusion in the practice of the ICC. We will come back to the problems that have been created by voluntary self-referral and how it fares in the application of the principle of complementarity later on, but how was the state referral envisaged in the beginning, if it was in the mind of the drafters at all?

State referral as a triggering mechanism of the ICC investigation and prosecution was considered to have the least effect in bringing situations before the Court.[105] This can be because of many reasons but the experience from the state complaint procedure from other human instruments has been the instructing practice for expecting the least in this regard, where states have not used this

[102] Linda M. Keller, "The Practice of the International Criminal Court: "The Complementarity Conundrum", 8 *Santa Clara Journal Of International Law 1 (2010),* p. 221
[103] Ibid
[104] Philipp Kastner, *Africa- A Fertile Soil for the International, fn 58,*145. The writer underscores that by citing the press releases that DRC and the CAR submitted in these cases "--- arguing that [they] lacked the capacity to investigate and prosecute the crimes being committed."
[105] Andreas Th. Muller and Ignaz Stegmiller 'Self-referral on Trial: From Panacea to Patient', *8 Journal of International Criminal Justice (2010),* p. 1269

approach principally for political reasons.[106] However, the practice of self-referral has arrived at the door of the Court almost out of nowhere.[107] The state referral that was supposed to play a very limited role was conceived to have that minimal role to play against another state, not a referral of one's own situation. Muller and Stegmiller capitalizing on this idea wrote that "the self-referral mechanism as it has turned out was, to a large extent, not anticipated by the framers of the Rome Statute."[108] What was on the mind of the framers, as it is logically expected, is that the national governments will selfishly guard the sovereign power of investigation and prosecution. Arsanjani and Reisman emphasizing the above argument wrote that "there is no indication that the drafters ever contemplated that the Statute would include voluntary state referrals to the Court of difficult cases arising in their own territory."[109] In conclusion, the practice of self-referral is a strange introduction into the activities of the Court by the African States, to say the least.

That being said, the next issue is the consideration of the problems that are created by the practice of self-referral. For that purpose, the common-sense starting point is how the complementarity principle has been envisaged and how it has been applied by the African States. The Rome Statute, as we have indicated in the first part of the Article, elaborates when the unwillingness or inability of a member state can be invoked. Since the states, by referring the matter to the ICC for investigation and prosecution, have shown their willingness[110] to have the situation considered by the Court for prosecutorial purposes, the problem of willingness is irrelevant here.[111] So the next important issue is inability. When is it that a state can be

[106] Payan Akhavan, 'Enforcement of the Genocide Convention: A Challenge to Civilization' *8 Harvard Human Rights Journal, (1995)* p. 237. Akhavan argued that "---inter-state human rights mechanisms are generally effective only to the extent that geopolitical or other interests are at stake." see also Caus Kress, '''Self-Referrals'' and ''Waivers of Complementarity''', *2 Journal of International Criminal Justice, (2004),* p. 944,

[107] Andreas Th. Muller and Ignaz Stegmiller *Self-referral on Trial, fn 105,* p. 1269

[108] Ibid

[109]Mahnoush H. Arsanjani and W. Michael Reisman, *The Law-In-Action of the International Criminal Court, fn 32,* p. 386

[110] Sascha Dominik Dov Bachmann and Eda Luke Nwibo, 'Pull and Push'- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges,' *43 Brooklyn Journal of International Law, (2018),* p. 489, the writers underscored in establishing the willingness on the Part of Uganda stated that "from the facts and circumstances of the case, it appears that while State self-referrals may indicate their willingness to uphold justice---"

[111] Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship, (International and Comparative Criminal Justice)* (1st ed, Routledge, 2011), pp. 169-170

considered to be unable to investigate and prosecute a situation in her jurisdiction? The Rome Statute has succinctly underlined the ground when the state can be considered unable.[112]

The Statute establishes that the jurisdiction of the Court can be activated when the state is unable to live up to what is expected of her under the obligation of the membership. This is true when there is "--- a *total or substantial collapse or unavailability* of its national judicial system---" (emphasis mine). [113] And the claims of the African States to be unable to carry out their duty of bringing the suspects to justice has not been corroborated with the requirement of *a total or substantial collapse of their judicial systems*. Despite the problem of weakness that the African judicial system has been affected by,[114] none of the countries that have participated in the self-referrals have suspended the operation of maintaining law and order in their respective jurisdictions.[115] In determining the inability of the referral states Cryer argued that "---the Chambers of the Court have been willing to accept at face value statements by states that they are unable to act on the relevant cases or are not doing so."[116]

In explaining the level of devastation that the national judicial system has to be subjected to, writers compare the situation of a state to the post genocidal state of Rwanda where the judicial system was completely wiped out.[117] In a post-conflict situation of the Rwandan magnitude, Bachmann and Nwibo wrote that "in such extreme circumstances, national courts will invariably fall short of ideal expectations of expeditious and fair trials."[118] While there is a serious challenge to many of the African states, however, the majority of the self-referring states, at least, have not experienced the decimation that the Rwandan judicial system has been subjected to.

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[112] An elaborated discussion on the substantive issue on this subject can be found in section 2.4.3.

[113] Rome Statute, art. 17 (3)

[114] Several writers on international criminal law have underlined that the simple weakness of the judiciary of a state cannot be a reason for the involvement of the Court. See for instance, Rolf Einar Fife, "The International Criminal Court Whence It Came, Where It Goes," *69 Nordic Journal of International Law, (*87–113, 2000), the writer correctly underscores that "with the proviso that *bona fide* investigations and prosecutions are carried out by States, the basic message of the Statute is a confirmation of the key role of States in international criminal law." P.72, see also Charles Chernor Jalloh, *Regionalizing International Criminal Law, fn 59, pp 446-7,* see also Francois-Xavier Bangamwabo*, International criminal justice and the protection of human, fn 62, p. 128*

[115] Robert Cryer, 'Darfur: complementarity as the Drafters Intended?' in Carsten Stahn and Mohamed El Zeidy, (ed), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011), p. 1106

[116] Ibid

[117] See for instance, Payam Akhavan, "Complementarity Conundrums Debate, The ICC Clock in Transitional Times," *14 Journal International Criminal Justice, (2016),* p. 1051, see also Sascha Dominik Dov Bachmann and Eda Luke Nwibo, *Pull and Push' fn 110,* p. 487

[118] Sascha Dominik Dov Bachmann and Eda Luke Nwibo, Pull and Push' fn 110, p. 487

And as we have stated in the preceding parts, the strength of a legal system does not serve as a ground for the purpose of referring a situation to the ICC.[119] Accordingly, the African states, by referring cases that they can entertain using their own domestic courts have gone against the principle of complementarity. And in the process, they have significantly prejudiced the *raison d`être* of the principle which are protecting the sovereignty of state jurisdiction over criminal matters[120] and reasonably limiting the cases that can be bought before the ICC.[121] Burke-White captured the above relevant concerns in the creation of the international criminal legal system in stating that it is, "neither the legal mandate of the ICC nor the resources available to it are sufficient to allow the Court to fulfill the world's high expectations."[122] Akhavan shares the same worrisome practice of self-referral writing that "---the reality is that [national Courts] must eventually become involved and share the burden of accountability because of the scarce resources of international criminal jurisdictions."[123] That truth of self-referral has rendered the principle of complementarity practically irrelevant, in this sense. This is the case since the Court now involves in the criminal process of a state so long as the state has asked for the involvement without the need to determine whether the states are capable of dealing with a criminal matter by the use of their own institutions. Schabas summarizes this fact stating that "the complementarity assessment has not proven to be very significant in the work of the Court to date."[124]

The serious discussion that was taking place in Rome during the adoption of the Statute, making sure that the Court would not take over the role of the national courts in the investigation and

[119] See, for instance, Kevin J. Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process", *17 Criminal Law Forum, (2006),* p. 260. See also Philipp Kastner, *Africa- A Fertile Soil for the International, fn 58,* p. 136, and *Informal expert paper, fn* 19, p. 8. The Paper emphasizing on the consideration of the level of criminal proceeding underscored that "it was extremely important to many States that proceedings cannot be found "non-genuine" simply because of a comparative lack of resources or because of a lack of full compliance with all human rights standards."

[120] Morten Bergsmo, "Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council," 69 *Nordic Journal of International Law*, (2000), p. 99, Outlining the importance attached to the principle Bergsmo wrote that "complementarity adds no new element of compulsion; rather, it was a necessary concession to the prevailing doctrine of State sovereignty"

[121] William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice", *Harvard International Law Journal, (Vol. 49 No.1, 2008).* p.56

[122] Ibid

[123] Payam Akhavan, *Complementarity Conundrums Debate, fn 117,* pp. 1046-47

[124] William A. Schabas, *An Introduction To The International Criminal Court*, (4th edition, Cambridge University Press, Cambridge 2011), p. 192

prosecution[125] has no role now in playing its intended purpose, thanks to the practice of self-referral. The assumption that the "states would resist the Court`s involvement, arguing the merit of their own justice system,"[126] has not worked in the African context, where more than 60% of the Court`s work has been contributed voluntarily by the States themselves. In the presence of these facts, it is against any logic, to say the least, to accuse the Court of selective justice and racism without the necessary inward-looking by the Africa states.

3.1.2. Dependency Relationship between the Referral State and the OTP

The second important consideration that needs elaboration with regard to the referral of African States is the unnecessary dependency relationship that the referral has created between the African states and the OTP.[127] As it is well recognized, the effective operation of the ICC and by a logical extension, the OTP depends on the willingness and positive collaboration of the state in whose territory the investigation is to be conducted.[128] Because of this fact, although the OTP has a legitimate jurisdictional authority to investigate and prosecute cases in a member state due to membership, the Office is advised to maintain a collaborative relationship with these states.[129]

This collaborative relationship, nevertheless, should not be at the expense of the impartiality of the Office in terms of prosecuting the suspects on both sides of the aisles, i. e. the crimes that are committed by both the rebellions and the government militias should be brought before the

[125] Mahnoush H. Arsanjani and W. Michael Reisman, *The Law-In-Action of the International Criminal Court, fn 32,* p. 386. Arsanjani and Reisman wrote that "if any of the crimes listed in the Statute were committed in their respective territories or by any of their citizens, governments were presumed to prefer to prosecute the perpetrators themselves and, by effectively applying their police powers, demonstrate to their constituents (and their opponents) their ability to defend their citizens."

[126] William A. Schabas, *An Introduction To The International Criminal Court, fn 124,* p.192

[127] Sarah M. H, Nouwen & Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *21 European Journal of International Law, No. 4, (2010),* p. 943.

[128] The OTP has made it clear this logistical or the otherwise dependency on the domestic apparatus in its policy document by stating that "where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that the State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute." ICC-OTP, *Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications,* (Policy Paper, September 2003), available at https://www.icc-cpi.int/NR/rdonlyres/278614ED.../policy_annex_final_210404.pdf. Accessed on 05 of August 2019, p. 5

[129] David Bosco, "Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations," *111 The American Society of International Law*, 2 (2017), P. 407. The writer states the factors forcing the OTP writing that "practical and procedural factors may also run together; if the OTP cannot secure cooperation from key states during a preliminary examination, it may lack the information necessary to satisfy the pretrial chamber's standards for a full investigation. Absent state support for an investigation, the prosecutor faces a difficult choice."

Court. However, because of the self-referral and the concomitant client-like relationship[130] between the governments and the ICC, so far, it is only the crimes that are committed by the parties the referral has been lodged against has been investigated, an arrest warrant has been issued for[131] and the prosecution has been conducted.[132]

The referral has put the Court squarely in the hands of the referring states like Uganda, politically and logistically for its dependence on the goodwill and material support of the government.[133] This has significantly affected the impartiality of the Court as an independent umpire in investigating and prosecuting international criminal activities of a very serious nature.[134] In an indirect way, the Court has also been used for the purpose of boosting the international standing of the states "politicizing"[135] the role they are playing in bringing the perpetrators of crimes of international nature to the Court and in so doing, upholding international law.[136] The same act has also played an intimidating role on their opponents.[137] This

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[130] Linda M. Keller, *The Practice of the International Criminal Court, fn 102, p. 219.* Keller wrote explaining this undesirable relationship stated that "the Prosecutor was criticized for appearing to endorse Ugandan wishes that the ICC investigate the LRA, but not Ugandan forces."

[131] Rod Rastan, 'Testing Co-Operation: The International Criminal Court and National Authorities', 21 *Leiden Journal of International Law (2008),* p. 431

[132] Human Rights Watch, 2008, "*Courting History The Landmark International Criminal Court's First Years*", available at https://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf retrieved on September 22, 2018, pp. 40-42, the Report underscores the perception on the ground in Rwanda in a contemporaneous manner stating that "---the prosecutor's work in Uganda is perceived by many of those in affected communities as one-sided and biased.", see also Philipp Kastner, *Africa- A Fertile Soil for the International, fn 58,* pp. 141-142, see also Mark Kersten, *Between Disdain and Dependency, fun 85,* who wrote that "every investigation that has been opened following a self-referral has resulted in only government adversaries being targeted by the ICC."

[133]Tim Allen, *Trial Justice*: *The International Criminal Court and the Lord's Resistance Army,* (David Philip Press, South Africa 2006), P. 97. The writer criticizes the decision of the Court to concentrate on one party writing that "while there is widespread acceptance that these people are responsible for appalling acts, several commentators take the view that to focus on them alone cannot lead to a just outcome." P.98

[134] Kenneth A. Rodman, 'Justice as a Dialogue Between Law and Politics Embedding the International Criminal Court within Conflict Management and Peace-building,' *12 Journal of International Criminal Justice (2014),* p. 452. Rodman, in this relation writes that "controversies surrounding instrumentalization have been most acute in the ICC's first investigation when Ugandan President Yoweri Museveni asked the Court to investigate crimes committed in northern Uganda by the Lord's Resistance Army (LRA)---" see also Parvathi Menon, 'Self-Referring to the International Criminal Court: A Continuation of War by Other Means, *109, American Journal International Law, (2016),* p. 260

[135] See, Sarah M. H, Nouwen & Wouter G. Werner, '*Doing Justice to the Political*: *fn 127,* pp. 951-953

[136] Parvathi Menon, *Self-Referring to the International Criminal Court, fn, 134,* p. 260-261. The writer captures the phenomenon by stating that the Countries "---in Sub-Saharan Africa have used the triggering mechanism of "self-referral" to the ICC to induce judicial recourse against their "enemies" –opposition/leader groups-in an effort to increase the state`s international reputation and the legitimacy of its military operation." Quotations are in the original text.

[137] See Mark Kersten, *Between Disdain and Dependency, fn 85*. The writer correctly identified the consequences of self-referral in stating that "by helping to demonize their adversaries and boosting their legitimacy, self-referrals are remarkably beneficial to referring governments." See also Sarah M. H, Nouwen & Wouter G. Werner, *Doing Justice*

is because, in the new normal, the final fate of anyone seriously challenging the office of the African leaders is to face The Hague, according to Yoweri Museveni.[138]

What are the consequences of all these? Meaning, the fact that the African States have failed to undertake what is expected of them under the Rome Statute, to investigate and prosecute crimes committed in their jurisdiction. This, as has been stated above, is the primary right and duty of any state party to the Rome Statute. The consequence, as we have seen in the foregoing discussion, is that the number of cases that the ICC has to consider from Africa is quite substantial compared to any other region in the globe.[139] Is that the only the fault of the Court? The answer to this question is, despite the appearance on the face of it, is an emphatic no. It is the position of this writer that although the Court has contributed partly towards the worsening of the relationship it has with Africa, the overwhelming proportion of the problem is created by the African states themselves. We will now consider the role of each party and determine how the two parties have played their fair share in the deterioration of their optimistically started relationship.

3.1.3. The ICC`s Misguided Relationship with Africa

The ICC, to prove its vitality, has to in a big way turn to Africa, for case referral and cooperation in the investigation and prosecution of cases.[140] With this purpose in view, Muller and Stegmiller have argued that the Prosecutor has co-sponsored the creation of the practice of self-referral because "---he favored voluntary referrals by states and expressly endorsed the sovereignty-friendly policy of encouraging self-referrals in the first phase of the Court's existence."[141] In the same vein of encouragement on the part of the Prosecutor, Happold also argued that "it appears that the Prosecutor has pursued a policy of encouraging states to self-refer situations."[142] This

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to the Political fn 127, arguing that "while branding the LRA as humanity's enemy, the referral portrayed the Ugandan government as a defender and friend of mankind. The Ugandan government calculated that as a result of the ICC's investigations into the LRA, ICC supporters would no longer treat the LRA and the government as equals." P. 950

[138] See, for instance, Reuters, *Uganda's President Hopes Rebels Choose Soft Landing*, (2007), available at https://www.reuters.com/article/idUSL04425927. Accessed on September 22, 2018

[139] Rowland J V Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal,' *14 Melbourne Journal of International Law, 2013,* P. 679. Cole emphasizing this point wrote that "first, only Africans and situations in Africa have been referred to and brought before the ICC. All persons brought before the Court are Africans." With a very limited change, the reality is still the same at the Court.

[140] Andreas Th. Muller and Ignaz Stegmiller, *Self-referral on Trial, fn 105*, p. 1270,

[141] Ibid

[142] see also Matthew Happold, The International Criminal Court and The Lord's Resistance Army, *8 Melbourne Journal of International Law*, (2007), p. 8

was done at the backdrop of the US persistent opposition to the ICC following what had transpired in Iraq, where various reports surfaced implicating the US and its allies in the invasion of Iraq.[143] Because of this pressure, the Court has been totally under the control of some African States for case referral which, as we have seen above, is against the principal purpose of the Court. The blinded desire of survival has forced the Court to wash aside the principle of complementarity in favor of a vague and repetitive concept of the gravity of crimes.[144] The gravity of crimes is repetitive because the Statute, from the very beginning, deals only with serious crimes of international nature.[145] This gravity issue has also been the most contentious subject matter because it is based on this principle that the Court rejected the consideration of the crimes that were committed in Iraq during the US invasion by the UK nationals.[146]

This, as we have seen in the preceding part, has created a politicized picture among many observers and African leaders, who use the Court as a means of creating legitimacy and intimidating their opponents. It has, in turn, crippled the role of the Court in terms of claiming that states undertake their responsibilities under the Statute because of their membership not because of the client relationship we have discussed above. And following this relationship, what has happened in Africa is what some term as an association of mutual benefit,[147] the states cooperating with the Court when it is in their interest and turning their back to the Court once it

[143] Adam Branch, "The ICC Can't Live With Africa, But It Can't Live Without It Either," *The Conversation,* March 14, 2017, available at http://theconversation.com/the-icc-cant-live-with-africa-but-it-cant-live-without-it-either-74210, retrieved on September 18, 2018

[144] *Prosecutor v. Lubanga* (ICC-01/04–01/06–8), *Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006*, paras. 29. The Court considered that admissibility should be seen on two separate tracks, as has been laid down under article 17 and in addition as "a second part the test refers to the gravity threshold which any case must meet to be admissible before the Court." And as such, the court created gravity requirement out of nowhere.

[145] See Rome Statute article 17 (1), (d), which states in a clear manner that a case is inadmissible when "the case is not of sufficient gravity to justify further action by the Court."

[146] *Letter of Prosecutor* dated 9 February 2006 (Iraq), p. 8. OTP argued in this relation that since the number of victims is not more than 20, the gravity requirement is not fulfilled, available at https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf . The Iraq/UK situation has been reopened now, and it is under preliminary investigation since 3 May 2014 upon receipt of new information, available at https://www.icc-cpi.int/iraq

[147] See for the discussion of beneficial arrangement the referral states have expected for the intervention of the ICC in their domestic criminal investigation, William W. Burke- White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo, *18 Leiden Journal of International Law*, (2005), p. 559.

starts to prosecute their elite or when the Court could not stop investigating cases when they want to.[148]

3.1.4. The African States Flip-Flop Position on ICC

The African States as we have seen in the foregoing parts had a cozy relationship with a lot of optimistic future engagements. Because of this optimism on the parts of the States, an unparalleled number of African States have become members of the ICC after ratifying the Rome Statute in a span of a very short period of time. But their relationship has been bruised and battered as time marches on. The same leaders, who have hailed the very existence and performance of the Court,[149] now regard it as a neocolonialist,[150] a "bunch of useless people"[151], giving it all sort of negative characterizations.

The African States in search of legitimacy and international acceptance have *en masse* signed and ratified the Rome Statute.[152] They, as has been extensively discussed in the preceding parts, have politicized the investigation and prosecution of the Court by the use of self-referral.[153] In support of the above politicization and the unexpected nature of states invitation of the Court to their domestic jurisdiction, Bocchese writes that there is a wide difference between the theory how the ICC was conceive to operate and the actual practice where "the Statute has actually been *co-opted* by national governments since it began its operations" (emphasis added).[154] Nouwen and Werner also argue in this relation that the intervention of the Court on the invitation of state parties would inevitably create an "ally" between the inviting state and the Court, rendering the practice political in nature not only legal.[155] And, in characterizing this relationship, they wrote

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[148] Adam Branch, *The ICC can't live with Africa, fn 143.* The writer argued that "for their part, while many African states were happy to cooperate with the ICC when it served their interests, when the Court turned against them, accusations of neocolonialism were soon heard."

[149] *See Dakar Declaration, fn 61*

[150] Paul Kagame has joined Yuweri Museveni in similar characterization of the Court by describing "the ICC as a fraudulent institution created for poor African states as a form of colonialism and imperialism aimed at control." Rowland J V Cole, *Africa's Relationship with the International Criminal Court, fn 139,* P. 684.

[151] Yuweri Museveni addressing the crowd in his fifth term presidency inaugural speech, *New Vision,* May 2016, available at *https://www.newvision.co.ug/new_vision/news/1424384/icc-bunch-useless-people-museveni* , accessed on September 24, 2018

[152] Dutton, *Explaining State Commitment to the International Criminal Court, fn 54,* p. 449

[153] Marco Bocchese, 'Odd Friends: Rethinking the Relationship between the ICC and State Sovereignty,' *40 International Law and Politics (2017),* p. 340.

[154] Ibid,

[155] Sarah M. H, Nouwen & Wouter G. Werner, '*Doing Justice to the Political*: *fn 104,* p. 945, see also Kenneth A. Rodman & Petie Booth, *Manipulated Commitments, fn 60,* p. 272. Rodman & Booth concurring with the

that "the ally is important because he can provide not merely material support but also recognition and legitimacy.[156] This is exactly what has happened concerning self-referral.

Self-referral, by isolating the other parties in the conflict,[157] has boosted their international standing[158] and intimidated their opponents and the rebellions.[159] Self-referral was not made to vindicate the rights of the victims but with the view of silencing dissidents at home and abroad.[160] But once these purposes have been served and the move of the Court has started to have a semblance of balancing the crimes that are committed by the government militias,[161] now the Court is a neocolonialist.[162] The governments in Africa are equally blameworthy in terms of violating the rights of their citizens, for not preventing the commission of the crimes in the first place and principally for failing to prosecute the perpetrators, whoever that might be, on equal footing. By surrendering the right and the corollary duty freely to the Court, they have undermined the complementarity principle of the ICC and their inherent sovereignty[163] over crimes that are committed in their jurisdictions or by their nationals.[164]

Finally, the African States have also placed unwarranted hope on the Court in terms of bringing peace into the violence badgered Continent. With that hope in mind, Countries like Uganda have referred their cases to the ICC, but when the Court failed to do so, they wanted to engage in traditional rules of conflict resolutions.[165] After a decision of that type has been reached, the

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politicization of self-referral wrote that "---the ICC has been co-opted by a rights-abusive government as a means of criminalizing its enemies without improving its own human rights and accountability practices."

[156] Marco Bocchese, *Odd Friends, fn 153,* p.340

[157] Sascha Dominik Dov Bachmann and Eda Luke Nwibo, *Pull and Push' fn 110,* p. 521. The writers in support of this idea wrote that "The ICC's intervention, with active support from the Ugandan government, along with the blacklisting of the LRA rebels as enemies of not only the Ugandan government, but also the international community, will favor Museveni`s bloc." For the same political goal that has been pursued in Democratic Republic of Congo see for instance William W. Burke- White, *Complementarity in Practice, fn 147,* p. 559

[158] Marco Bocchese, *Odd Friends, fn 153,* p. 352

[159] William W. Burke- White, *Complementarity in Practice, fn 147,* p. 559

[160] Valerie Freeland, 'Rebranding the State: Uganda's Strategic Use of the International Criminal Court', 46 *Development and Change (2) (2015),* p. 293

[161] Caus Kress, *Self-Referrals, fn 106,* P.946

[162] Manisuli Ssenyonjo, *The International Criminal Court, fn 83,* p. 397

[163] Valerie Freeland, *Rebranding the State, fn 160,* p. 294, See also Ian Brownlie, *Principles of Public International Law, fn 18, p.* 301

[164] Dov Jacobs, "Puzzling Over Amnesties: Defragmenting the Debate for International Criminal Tribunals" (2010), *Electronic copy available at http://ssrn.com/abstract=1562088,* p. 20

[165] See for instance, M. Cherif Bassiouni, The ICC-Quo Vadis?, *4 Journal of International Criminal Justice (2006),* p. 424, see also Amnesty International, "Uganda: Government cannot prevent the International Criminal Court from investigating crimes," available at https://reliefweb.int/report/uganda/uganda-government-cannot-prevent-international-criminal-court-investigating-crimes. Accessed on 11 August 2019

logical follow up for them will be to request the ICC to drop the case in favor of domestic processes[166] which, considering the independent nature of the Court is totally absurd and unacceptable.[167] This is because withdrawal is supposed to be requested on the assumption that maintenance of peace and stability should be the priority- sacrificing justice in the process.[168] The debate over peace-or-justice first has been raging over a long period of time without a sensible solution in sight;[169] hence dragging the Court into this debate is not prudent, to say the least. Besides, if the states want to honestly deal with the crisis in their domestic jurisdictions through their amnesty laws, they could have done it without the need for referral to the Court.[170] But, once the situation has been referred and the jurisdiction is triggered, there seems on legal ground in the Statute or otherwise, allowing the referral state to withdraw the referral.[171]

To sum up, the argument that amnesty issues are domestic, Ssenyonjo wrote that "from an international law perspective, domestic amnesties are strictly a matter for national authorities and do not act as a bar to an investigation by the ICC."[172] As such, the decision of the Ugandan Government to grant amnesty in favor of the surrender of the notorious rebel leader Joseph Kony[173] is completely out of the concern of the Court and the refusal by the Court to shelf the arrest warrant is within the legal authority of the OTP. The OTP has clearly addressed this issue of its inability to concern itself with broader ranges of principles of international justice in its policy paper underscoring that this is out of its mandate.[174]

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[166] Michael P. Scharf and Patrick Dowd, 'No Way Out? The Question of Unilateral Withdrawals or Referrals to the ICC and Other Human Rights Courts', *9 Chicago Journal of International Law, 2 (2009),* P. 575. Scharf and Dowd reiterate that "Museveni unexpectedly announced in November 2004 that Uganda might "withdraw its case" from the ICC, having recently negotiated a partial ceasefire and the framework for a peace settlement with the LRA leaders."

[167] Rowland J V Cole, *Africa's Relationship with the International Criminal Court, fn 139,* P. 682

[168] Ibid

[169]Mark Kersten, *Justice in Conflict: The ICC in Libya and Northern Uganda, (*A Doctor thesis submitted to the London School of Economics, London, 2014.) p. 44

[170] Ibid

[171] Michael Cherif Bassiouni, *The ICC-Quo Vadis, fn 165,* p. 424. Bassiouni wrote in this relation that since the comment of withdrawal has been made "--- it engendered much concern since the *Rome Statute does not contemplate the retraction of a referral to the Court*" (emphasis added).

[172] M anisuli Ssenyonjo, 'Accountability of Non-State Actors in Uganda for War Crimes And Human Rights Violations: Between Amnesty and The International Criminal Court', *Journal Of Conflict & Security Law* (Vol. 10, No. 3, 2005), P. 426

[173] Michael Cherif Bassiouni, *The ICC-Quo Vadis, fn 165,* p. 424. Bassiouni wrote in this regard that "in November 2004, President Yoweri Museveni proposed that fighters in the Lord's Resistance Army (LRA) who chose to cease fighting could engage in internal reconciliation mechanisms as an alternative to any future investigations and prosecutions by the ICC."

[174] Office of the Prosecutor, *Policy Paper on the Interests of Justice*, September 2007, available at (http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf), p. 8

4. CONCLUSION

Complementarity principle is the cornerstone of the ICC even helping the realization of the Court itself. It allows the balancing of state sovereignty to exercise criminal jurisdiction as the manifestation of its sovereignty and the fight against impunity that the international community has been concerned with for centuries. As such, states are always welcomed to exercise criminal jurisdictions to genuinely investigate and prosecute crimes under the Statute. However, if that cannot be achieved, due to principally unwillingness or inability, the Court steps in to investigate and prosecute individuals who have committed heinous crimes of international nature. Hence, eventually, the room for impunity can be reduced.

This is the nature of the principle and if it is applied properly, it avoids conflict of jurisdictions and case congests at the Court. The African States, nevertheless, by ignoring the application of the principle and engaging in self-referral, have rendered the principle irrelevant. And the consequences of this have been so discomforting because the Court`s field exercise has exclusively focused on the Continent, putting the referral states themselves under a lot of pressure and criticism. The African States, with the available resource and legal infrastructure, should have investigated and prosecuted the crimes that have been committed on their jurisdiction to circumvent the overarching presence of the Court that was trying to assert the very purpose of its own existence, and maintain their inherent sovereignty over the crimes and the individual behind these crimes.

The States chose, however, the easy way out. They embarked on a self-referral, feeding the Court case after case, all the evidentiary materials and logistics that allowed the Court to flex its muscle on the African Continent without any inhibitions. The misguided flirtation with self-referral also allowed the African States to have some leverage with regard to the Court`s focus on the opponents of the referring government. It, ultimately though, is the States that have portrayed themselves to be the victims ending up being one of the loudest voices against the Court as a bloc. The States, as has been elaborated in this paper, cannot have that easy way out of the discordant. First, they did not undertake the usual responsibility of the Statute, investigation and prosecution. Following that they created this mess by referring the cases, cooperating with the Court in the endeavor of persecuting what they believed to be the enemy of the states and finally when the jurisdiction of the Court somehow start to bite, they cannot have

the chance to blame the Court for the problems they have with it. So, it is incumbent upon the States to understand the responsibilities they undertake by becoming members to international obligations, above and beyond the show of solidarity to one another in international diplomacy. Then act upon the responsibilities, meaning keep your house in order, denying access to the ever-present self-preserving desire of the Court.

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