# REFERRAL OF SITUATIONS TO THE INTERNATIONAL CRIMINAL COURT: TOWARDS AN EFFECTIVE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

BY

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# ABSTRACT

Most State-Parties to the Rome Statute are unaware of the proper process of making a referral to the international criminal court. Non-Party States are all together suspicious of the activities of the Court and as a result would not ratify the Rome Statute at all. As a result of the lack of the proper understanding of the processes involved in the making of a successful referral or the activation of the complementarity principle in favour of the default jurisdiction which lies in a State-Party; preliminary examinations and investigations take a long toll and expend a lot of time, money, energy and resources of all parties involved. The referral of a situation and the activation of the complementarity principle and all the criteria therein are not fully expatiated in the Rome Statute and as a result the bulk of interpretation is left to the Office of the Prosecutor. This research focused on the activities of the Office of the Prosecutor during the Pre-Trial Stages of countries that are in the preliminary examination phase and the investigation phase in order to observe the known and the hidden criteria expected of a State-Party and other stakeholders that are interested or invested in the outcome of a referral. It was discovered that any party making a referral had to determine whether the crimes committed were likely to be under the temporal, material and territorial jurisdiction of the court; whether the referral is likely to be admissible considering the complementarity and the gravity criteria; whether the referral is in the interests of justice and that the State involved was unwilling or unable to investigate and prosecute the crimes. Regarding the activation of the complementarity principle, which gives the default jurisdiction to the State-Party rather than the ICC; such a State-Party that wants to try its own cases should ensure that it has incorporated the Rome Statute into its National Laws in order to be seen as a 'willing and able' government interested in investigating and prosecuting crimes under the Rome Statute. Observing the above stated criteria and proper processes before making a referral guarantees making the work of the Office of the Prosecutor more efficient and helping to ensure a smoother and more effective international criminal justice system.

# ملخص البحث

إن معظم الدول الموقعة على نظام روما الأساسي، وبعض الكيانات ذات الصلة التي لها القدرة على القيام بإحالة وضعٍ ما، ليست مدركة للآلية الملائمة التي تتمّ فيها الإحالة إلى المحكمة الجنائية الدولية. أما الدول غير الأعضاء فهي جميعها تنظر بعين الريبة، والشك إلى نشاطات المحكمة. نتيجة لذلك فهي لا تصادق على نظام روما الأساسي. بسبب النقص الحاصل في الفهم الدقيق للآليات التي تتضمن عملية القيام بإحالة ناجحة، أو تفعيل مبدأ التكامل؛ وهي أمور تصب في مصلحة محكمة الاختصاص الواقعة في دولةٍ طرفٍ في نظام روما، تأخذ الاستجوابات، والتحقيقات الأولية منحى طويلاً، وتكلف الأعضاء المشاركين الكثير من الوقت، والمال، والجهد، والموارد. إن إحالة وضعٍ ما وتفعيل مبدأ التكامل وجميع المعايير المتضمنة، لم يرد فيها نصٌ واضحٌ، ولم تُدمج في نظام روما الأساسي، ونتيجة لذلك كان هناك صدى سيء لنظام القضاء الجنائي الدولي بأسره بشكل عام. ركَّز هذا البحث على نشاطات مكتب المدعي العام أثناء مراحل ما قبل المحاكمة لدولٍ في مرحلة الاستجواب الأولي، ومرحلة التحقيق من أجل مراقبة المعايير الظاهرة، والخفية التي يتوقعها كل من الدولة الطرف، والجهات المعنيّة الأخرى المهتمة أو المستثمرة في نتائج الإحالة. ومما تم التوصل إليه أن أي طرف يقوم بالإحالة كان ينبغي له أن يحدد ما إذا كانت الجرائم المرتكبة من المحتمل أن تندرج تحت إحدى سلطات محاكم الاختصاص الزمنية أو المادية أو المكانية؛ أو ما إذا كانت الإحالة مقبولة بالنظر إلى معايير التكامل والثقل النوعي؛ أو ما إذا كانت الإحالة في مصلحة العدالة وكانت الدولة ذات العلاقة رافضة أو غير قادرة على التحقيق والمقاضاة في الجرائم. أما بالنسبة إلى تفعيل مبدأ التكامل الذي يمنح السلطة لمحكمة الاختصاص للدولة الطرف بدلا من المحكمة الجنائية الدولية؛ فإنّ الدولة الطرف التي تريد أن تجرب الخوض في قضاياها الخاصة يجب أن تضمن إدراجها لنظام روما الأساسي في قوانينها المحلية، لكي يتم النظر إليها على أنها حكومة (عندها النية والقدرة) ومهتمة بالتحقيق، والمقاضاة في الجرائم طبقا لقانون روما الأساسي. إن تطبيق المعايير المذكورة أعلاه قبل القيام بالإحالة، ومراقبة الآليات المناسبة يضمن كفاءة عمل مكتب المدعي العام بشكل أكبر، وهذا يساعد على ضمان وجود نظام قضاء جنائي دولي أكثر سلاسة وفعّالية.

# APPROVAL PAGE

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# DECLARATION

I hereby declare that this dissertation is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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*This research is dedicated to my parents and to all the teachers in the world.*

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| CAR | Central African Republic |
| DRC | Democratic Republic of the Congo |
| ECCC | Extraordinary Chambers in the Courts of Cambodia |
| FCA | Forces Combattantes Abacunguzi |
| FNI | Front des Nationalistes et Intégrationnistes |
| FPLC | Forces Patriotiques pour la Libération du Congo [Patriotic Forces for the Liberation of Congo] |
| FRPI | Force de résistance Patriotique en Ituri |
| ICC | International Criminal Court |
| ICTR | International Criminal Tribunal of Rwanda |
| ICTY | International Criminal Tribunal of Yugoslavia |
| IMT | International Military Tribunal |
| IMTFE | International Military Tribunal for the Far East |
| ISIL | The Islamic State of Iraq and the Levant |
| ISIS | Islamic State of Iraq and Syria or Islamic State of Iraq and al-Sham |
| LRA | Lord's Resistance Army |
| OTP | Office of the Prosecutor |
| SCAP | Supreme Commander for the Allied Powers |
| SCSL | Special Court for Sierra Leone |
| UNSC | United Nations Security Council |
| UPC | Union des Patriotes Congolais |
| WA | Warrant of Arrest |

# LIST OF STATUTES

American Service Members' Protection Act (ASPA) 2002
Charter of the International Military Tribunal (Nuremberg Charter 1945)
Elements of Crime 2002 (ICC-PIDS-LT-03-002/11)
Geneva Convention 1864
Geneva Conventions of 12 August 1949
Negotiated Relationship Agreement between the International Criminal Court and the United Nations 2004 (ICC-ASP/3/Res.1)
Regulations of the Court 2007 (ICC-BD/01-02-07)
Regulations of the Office of the Prosecutor 2009 (ICC-BD/05-01-09)
Rome Statute of the International Criminal Court 1998 (*Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.*)
Rules of Procedure and Evidence Official Records 2002 (ICC-ASP/1/3)
United Nations Charter of 1945

# CHAPTER ONE

# INTRODUCTION

## 1.1 BACKGROUND OF THE RESEARCH

The maintenance of peace is the central objective of international order. For, where war is accompanied by massive human rights atrocities, including genocide and war crimes; accountability for those abuses becomes necessary for the reconstruction of a civil society that promotes peace. Accountability for crimes serves as a meaningful commitment and deters future acts that might disturb the peace and, justice of any modern society.[1]

Justice is the first casualty when an individual, a community or a state is overtaken by self-interest, favouritism for their own or by anger, revenge or hate against others. When that happens, the party on the receiving side of injustice reacts with similar attitude, perhaps even more strongly. Each party's effort to get back more forcefully grows into a spiraling cycle of violence and terrorism. This ends up making the peace and security of humanity the ultimate victim of injustice. That is why there can be no peace in this world without justice. As there can be no peace in the world without justice, it is in humanity's own self interest to establish justice so that everyone can live in peace.[2] Fear of the powerful or terror from the powerful can accomplish temporary peace, but sooner or later the pent up feelings of the aggrieved explode shattering the facade of peace out of fear. Permanent peace can be

[1] Margaret Mcguinness, 'Peace v. Justice: The Universal Declaration of Human Rights and the Modern Origins of the Debate', *The Journal for the Society of Historians of American Foreign Relations,* Wiley Periodicals, Inc. at 749 – 768. http://onlinelibrary. wiley.com/doi/10.1111/j.1467-7709.2011.00982.x/abstract. (Accessed 11th January 2013).

[2] 'We do not work probably for ourselves, but the work will be for all those who come after us, our children, our grandchildren, and we all know and have in our minds one word and that is 'Peace.' - Sir Alexander Wood Renton from The Report of the Thirty-Fourth Conference Held At The Imperial Palace and at the Chamber Of Commerce, Vienna, August 5th to August 11th, 1926.

accomplished only through justice. That is why justice and due process have to be given crucial attention in order to peacefully resolve today's armed conflicts.[3]

In the resolution of most armed conflicts, the issue of justice is a major cause for further conflict. There is no doubt that justice is indeed a foundation for peace. Justice is required and essential for any peace process. Peace cannot be discussed without reference to justice. Peace cannot be achieved without justice. Justice includes procedural and substantive tangibles and both should be included in peace making and in a peace-agreement. In the same light, the interest of peace must be considered in any adjudication of disputes. When peace is perceived as just only for one side such peace will not sustain for a long time and justice requires just laws, of course, and just administration of those laws; but it also requires factual truth.[4]

Under the criminal justice system of any nation, it is the state's responsibility, as an essential part of their sovereignty, to prevent and subdue criminal conducts in order to ensure peace and security in the society. In doing so according to the rule of law, the State upholds justice on behalf of its citizens. At the end of a dictatorship or a conflict, countless political reasons and gimmicks will normally hinder and bring delay or a complete denial of an effective punitive justice to make perpetrators answerable for their horrendous crimes. Domestic political reasons sometimes include the need to attain stability through alternative dispute mechanisms such as reconciliation or the establishment of truth commissions and the granting of amnesties. International factors could be related to peace and include unsettled relationships at the national borders, the wider context of international agreements, or interests reaching beyond the crisis area. It has been contended that the punishment of

[3] Huda TV, 'What is Islam: Justice (Adl')'. http://www.huda.tv/articles/what-is-islam/427-justice-adl- (Accessed July 30, 2012).
[4] Susan Haack, 'Ratio, Truth and Justice: Inquiry and Advocacy, *Science and Law' Juris*. Vol. 17 No. 1 (March 2004), at 15 – 26.

genocide, crimes against humanity and war crimes, when left to the action of states, often results in the impunity of those most responsible for their commission, because of the absence or weakness of the rule of law, or for domestic political reasons of the territorial or national state, or because they are exempted from national justice in order to maintain occasional international compromises or, finally, because of the lack of judicial cooperation in the investigation and extradition of suspects.[5]

Nation states have the obligation to prosecute these international crimes especially since the Rome Statute covers them. However, all too often they have failed to meet this obligation allowing those who commit genocide, war crimes and crimes against humanity to avoid justice altogether. The failure of states to prosecute these crimes was a driving force behind the establishment of the ICC. Accordingly, the Rome Statute gives the ICC jurisdiction over these crimes when states fail to act.[6]

In the 6th paragraph of the preamble of the Rome Statute, it is stated that it is a duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. This concept is called the principle of complementarity in the Rome statute, whereby it is mandatory on states to suppress crimes under the statute, while the Court would be called in only as a last option.[7] Complementarity is a

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[5] Roberto Bellelli, *International Criminal Justice law and Practice from the Rome Statute to its Review',* Ashgate Publishing London, 2010, at 6.

[6] International Criminal Court - Making The International Criminal Court Work: A Handbook for Implementing the Rome Statute, *Human Rights Watch*, September 2001, Vol. 13, No. 4(G). http://www.hrw.org/legacy/campaigns/icc/docs/handbook_e.pdf. (Accessed September 17, 2011).

[7] This is why the United States of America enacted several legislations reminding itself of the importance of protecting its citizens from being charged before the International Criminal Court. Just a month after the International Criminal Court (ICC) started its operations in July 2002, the US President signed the American Service Members' Protection Act (ASPA), which limits U.S. government support and assistance to the ICC. This Act also restricts certain military assistance to many countries that have ratified the Rome Statute establishing the ICC. It also regulates U.S. participation in United Nations (U.N.) peacekeeping missions and authorises the President to use "all means necessary and appropriate to bring about the release" of certain U.S. and allied persons who may be detained or tried by the ICC. This is all in the name of an independent prosecutor in the International Criminal Court. Manuela Melandri, '*The Relationship between State Sovereignty and the Enforcement of International Criminal Law under the Rome Statute* (1998): A Complex Interplay', *International Criminal Law Review*, Vol. 9 (2009), at 531–545.

principle that represents the idea that States, rather than the International Criminal Court (ICC), will have priority in proceeding with cases within their jurisdiction.[8] This principle means that the Court will assist, but not supersede, national jurisdiction. National courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the International Criminal Court will act when national courts are 'unable or unwilling' to perform their duties.[9]

The Prosecutor of the ICC reporting on the OTP's activities in Libya made the following statement:

> Complementarity and cooperation define the relationship between the Court and national justice systems. Both are thus essential for the implementation of international justice and the punishment of crimes under the Rome Statute. Above all, both are essential for ensuring that prosecution of the few does not result in impunity for the many. It is for this reason that my Office continues to explore possibilities for mutually reinforcing judicial activities with the Government of Libya in fostering complementarity.[10]

This principle would ordinarily be against the principle of the sovereignty of state. However, it is pertinent to note that the debate on the principle of sovereignty of states has in recent times developed the concept of a link between the right of non-intervention in internal affairs, based on the principle of equal status (sovereign equality) of states, and juxtaposed it with the obligation of states to protect civilians from gross violations of international humanitarian law and human rights law. In which case there will only be a right of humanitarian intervention by the international community when a state fails to act in compliance with their primary obligation because they are unwilling or unable to implement it. Some will say; rather than as a

[8] Jennifer K. Elsea, 'U.S. Policy regarding the International Criminal Court', *CRS Report for Congress,* (2006), at 1-29.
[9] Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court', *International Criminal Law Review*, Vol. 8, (2008), at 229–272; Linda E. Charter, "The principle of complementarity and the International Criminal Court: the role of ne bis in idem", *Santa Clara Journal of International Law*, (2010), at 1-26.
[10] Mrs Fatou Bensouda, Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), 08 May 2013, Para. 8.

right of intervention, it is properly termed the responsibility to protect (r2P) civilians from the commission of genocide, crimes against humanity (ethnic cleansing) and war crimes. So that nonfulfillment of this primary obligation of the territorial state would engage its international responsibility and shift the duty to the international community, which would be called upon to intervene with collective actions on the basis of a collective complementary obligation binding all states. Such measures may be implemented either upon decisions of the Security Council (UNSEC) based on its primary responsibility for the maintenance of international peace and security, or through treaty-based institutions.[11]

The Rome Statute balances the primary duty of states to prosecute these crimes with the need for an alternative judicial mechanism to ensure that those who commit serious international crimes face justice. It does this by making the jurisdiction of the ICC complementary to national jurisdictions. This means that the ICC can exercise its jurisdiction only after it is established that there is no state with jurisdiction that is able or willing to pursue a bona fide investigation or prosecution. This approach is the basis of the ICC's jurisdiction and the regime for investigations and prosecutions in the Rome Statute.

International criminal law has been described as a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, terrorism) and to make those persons who engage in such conduct criminally liable. They consequently either authorise states, or impose upon them the obligation, to prosecute and punish such criminal conducts. International criminal law also regulates international proceedings before international

[11] Roberto Bellelli, *International Criminal Justice law and Practice from the Rome Statute to its Review',* Ashgate Publishing London, 2010, at 8 – 9.

courts and tribunals, for prosecuting and trying persons accused of such crimes.[12] International criminal law constitutes the unity of international law and domestic criminal law. Though, there are elements of criminal law in International law, it is not the same totality of such elements that can be found in International criminal law.[13] Though international criminal law concerns individuals while international law typically concerns inter-state relations, international criminal law is without doubt a subset of public international law.

Specifically, international criminal law places responsibility on individual persons rather than states or organisations and it also prohibits and punishes acts that are defined as crimes by international law. International criminal law is a relatively new body of law, and aspects of it are neither uniform nor universal. For example, some aspects of the law of the ICTY are unique to that jurisdiction, do not reflect customary international law and also differ from the law of the ICC. Although there are various interpretations of the categories of international crimes, most legal texts deal with crimes falling within the jurisdiction of international and hybrid courts, including the ICTY, ICTR, SCSL, ECCC, and the ICC. These crimes comprise genocide, crimes against humanity, war crimes and the crime of aggression. They do not include piracy, terrorism, slavery, drug trafficking, or other international crimes that do not amount to genocide, crimes against humanity, or war crimes. International criminal law also includes laws, procedures and principles relating to modes of

[12] Fundamentals of International Criminal Law, http://fds.oup.com/ www.oup.com/pdf/13/978 0199203109 _chapter1.pdf, (accessed August 15, 2015).
[13] Ilias Bentekas & Susan Nash, *'International Criminal Law'*, 3rd Edition, Routledge and Cavenish 2007, at 1.

liability, defences, evidence, court procedure, sentencing, victim participation, witness protection, mutual legal assistance and cooperation issues.[14]

Despite this definition, International law in general is still questioned on its strategy for enforcement. Some positivists are of the opinion that it cannot be said to be a true law since it is almost impossible to enforce. The question that is asked is: "how do you enforce a rule of law against an entire nation, especially a superpower such as the United States or the Chinese? Is International law, the weapon used by developed countries or the world powers to check or oppress the countries without military intelligence and economic prudence? The *locus classicus* for the view that international law is not law is John Austin's The Province of Jurisprudence Determined. He contended that the law obtaining between nations (international law) is not positive law. He argued that a particular sovereign makes every positive law to be obeyed by a person or persons in a state of subjection to its maker and that the law obtaining between nations is therefore improperly being called law at all. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.[15]

The most recognised opposition to John Austin position on International Law is in H.L.A. Hart's *The Concept of Law, which* contended that Austin's assessment of international law is utterly inconsistent. As Hart pointed out, the fact that norms of international law are not enacted by commands does not challenge their status of

[14] International Criminal Law & Practice Training Materials, What is International Criminal Law? Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions, funded by the European Union Developed by International Criminal Law Services. wcjp.unicri.it/.../Module_2_What_is_international_criminal_law.pdf (Accessed March 4, 2013).

[15] John Austin, The Province of Jurisprudence Determined 5-8 (1832); Oona Hathaway & Scott J. Shapiro, 'Outcasting: Enforcement in Domestic and International Law', Hauser Globalization Colloquium Fall 2010; at 8–9. http://www.iilj.org/courses/documents/HC2010Nov10.Hathaway Shapiro.pdf (Accessed November 12, 2012).

being law; especially since most of the norms of domestic legal systems are not all necessarily commands. Customs are recognised as a source of law despite being set by mere general opinion and action. While some legislation may express the legislators' wishes, and hence be commands in Austin's sense, others may not.[16]

For many years, international law was deficient of sufficient mechanisms to hold individuals accountable for the most serious international crimes. Logically, like any other crimes, punishment for grave breaches of the Geneva Conventions or for violations of the Genocide Convention or the customary law of war crimes and crimes against humanity depended primarily on national courts. The setback being that it was exactly when the most serious crimes were committed that national courts were least interested or able to act because of widespread or systematic violence or because of involvement of agents of the State in the commission of crimes. Historical events resulting into grave war crimes such as it was in Nazi-Germany, Rwanda, the former Yugoslavia, Cambodia had the governments themselves or their agents involved in the commission of those crimes. And so the failures of national courts in these contexts protected perpetrators with impunity. To prevent impunity in those situations, it became necessary to establish an international criminal court that will stand in lieu when national systems were unwilling or unable to act.[17]

The development of international criminal law is closely connected to the establishment of international criminal courts, i.e. the punishment of crimes under international law by international courts. In the process, the establishment of individual criminal responsibility under international law faced two main problems:

[16] H.L.A Hart, The Concept of Law (2nd ed. 1997); Oona Hathaway & Scott J. Shapiro, 'Outcasting: Enforcement in Domestic and International Law', *Hauser Globalization Colloquium* Fall 2010; at 10, http://www.iilj.org/courses/documents/HC2010Nov10.HathawayShapiro.pdf (Accessed November 12, 2012).

[17] Philippe Kirsch, 'The Role of The International Criminal Court in Enforcing International Criminal Law', *American University International Law Review* Vol. 22, (2007), at 539 – 547.

first, in classical international law, states, not individuals, were the exclusive subjects. Therefore, establishment of criminal norms in international law first required the recognition of the individual as a subject of international law. Second, it was necessary to overcome states' defensive attitude towards outside interference, which was rooted in the concept of sovereignty.[18]

Modern conflicts are increasingly intra-state struggles, rather than clearly defined international conflicts. Even when violence spills over borders, guerrilla and terror tactics predominate. Civilians frequently bear the burden of the fighting, as direct victims of atrocities or indirect victims of displacement and deprivation. Insurgencies often use hit and run tactics and attacks against civilians to undermine the dominant power rather than attempt to hold substantial territory. As a result, a military solution to conflict is less likely. It is probable that many current armed conflicts will end not with unconditional surrender, but with peace deals containing compromises over accountability, despite the international community's rejection of impunity in principle. Thus, international criminals gain a seat at the negotiating table rather than in the dock of a criminal court, whether domestic or international. Although it seems that the immediate need for peace will often outweigh calls for justice, the International Criminal Court can try to further both goals in all circumstances.[19]

International crimes are breaches of international rules, which involve the personal criminal liability of the individuals concerned (as opposed to the

[18] Gerhard Werle, 'The Evolution of International Criminal Law', Summary (Historical Evolution) International Criminal Justice Summer Semester, 2010; Gerhard Werle, Principles of International Criminal (2005), Part One (A); Antonio Cassese, From Nuremberg to Rome: International Military Tribunals to the International Criminal Court, in: Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of an International Criminal Court: A Commentary*, Vol. 1 (2002), at 23.
[19] Linda M. Keller, 'Achieving Peace With Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms', *23 Connecticut Journal of International Law* 209 (2008).