

# The Kenyan Cases and the Future of the International Criminal Court's Prosecutorial Policies

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## Abstract

*The Kenyan Situation pending before the International Criminal Court (ICC) is the first situation in which the prosecutor exercised his power to initiate cases "proprio motu" under Article 15 of the Rome Statute. In the wake of the comments from the former Chief Prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, that there was political interference from foreign diplomats during the investigation stage of the cases, it is prudent to re-examine the standards provided under the Rome Statute regarding prosecutorial discretion and evaluate the prosecutorial power and how the Kenyan cases may shape this discretionary power in order to align it with the Preamble of the Rome Statute. The Preamble affirms that the most serious crimes of concern to the international community must not go unpunished. Further, that their effective prosecution must be ensured for the purposes of ending impunity for the perpetrators of international crimes and thus to contribute to the prevention of genocide, crimes against humanity, war crimes, and crimes of aggression.*

**Keywords:** International Criminal Court, proprio motu, prosecutorial discretion.

## 1 Introduction

This article argues that the absence of clear guidelines on how the International Criminal Court (ICC) prosecutor applies the *proprio motu* authority and incomplete and hurriedly investigations are the consequences of the ICC's failure of justice to the victims of the 2007 to 2008 post-election violence in Kenya. The article posits that the cases arising out of the Kenyan situation, which is pending before Trial Chambers V (a), is a test case on the limits of prosecutorial discretion in the

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administration of justice under the Rome Statute of the ICC (Statute). While prosecutorial independence in choosing cases and the selection of evidence is an important feature in the adjudication of criminal cases, it is also a key function of a prosecutor in domestic or national jurisdictions. The exercise of the prosecutor's *proprio motu* authority perpetuates the narrative that international criminal law and the ICC are efforts of the "stable" world to criminalize the "unstable" world through "universal norms of justice." There are three trigger mechanisms in exercising prosecutorial discretion under the Statute.<sup>1</sup> The first is a referral of a situation to the ICC under Article 13;<sup>2</sup> second, a referral through a State Party under Article 14,<sup>3</sup> and third, through the prosecutor's own motion under Article 15.<sup>4</sup> The central argument advanced in this article, though admittedly controversial, is that the third trigger mechanism, the *proprio motu* authority, violates the basic premise by which international law is governed, that is, governing through consent.

The former ICC prosecutor, Luis Moreno-Ocampo, came out of the closet a year ago in an interview that took place on 22 January 2014 in Amsterdam, The Netherlands, and candidly discussed the Kenyan situation, which he investigated and took to trial.<sup>5</sup> In the 25 minutes interview, Ocampo admitted, among other things, that the Kenyan cases show the possibilities and the limits of international justice. He also accepted foreign country officials' interference in the cases, where foreign diplomats requested him to block the candidacy of Uhuru Kenyatta, who was then the Deputy Prime Minister, and William Ruto, who was then the Member of Parliament for Eldoret North constituency, from running for President and Deputy President, respectively, under the flag of the Jubilee Alliance. Although Ocampo made light of these revelations, it is clearly an unescapable truth that the judicial institution (ICC) is operating in a political world.<sup>6</sup> To this end, there are two competing narratives on the allegations of interference in the Kenyan cases.

The first narrative supported by the defense teams in the Kenyan cases argue that foreign countries through their envoys in Kenya have been using money to

- 1 See <[www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)> (last visited 27 February 2014).
- 2 Art. 13(b) reads: The Court may exercise its jurisdiction with respect to a crime referred to in Art. 5 in accordance with the provisions of this Statute if: (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.
- 3 Art. 14 reads: 1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
- 4 Art. 15(1) reads: The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the court.
- 5 See Ocampo Exclusive at <[www.rnw.nl/africa/article/ocampo-exclusive](http://www.rnw.nl/africa/article/ocampo-exclusive)> (last visited 26 February 2014).
- 6 Judge Sang-Hyun Song, the President of the ICC, in remarks given in a seminar on International Criminal Justice: The Role of the International Criminal Court, United Nations, New York, 19 May 2009.

bribe and coach witnesses who provided false testimony before the Trial Chamber. The Nation newspaper reported the unsubstantiated allegation that the former US ambassador to Kenya Michael Ranneberger through USAID took part in recruiting and bribing witnesses to testify against William Ruto. The defense stated that witnesses received thousands of US dollars from the Office of the Prosecutor (OTP). For example, during trial, a witness admitted receiving money amounting to \$20,000 in six months.<sup>7</sup>

The second narrative is supported by the OTP and Western allies who submit that there has been “pure obstructionism” in the Kenyan cases from the Kenyan Government and its agencies. There are allegations of intimidation and uncooperativeness from the Government. On the intimidation sermon, the ICC Prosecutor Fatou Bensouda told the GlobalPost that “the scale of witness interference that the office has seen in the Kenya cases has been unprecedented” she adds, “the challenge we face is that the intimidation and interference goes beyond individual witnesses themselves and extends to pressures on their immediate and extended families, relatives, and loved ones.”<sup>8</sup> The obstructionism, which I deem to be part of the interference narrative perhaps, extends to the actions of the Kenyatta administration. The administration has employed “shuttle” diplomacy maligning the ICC as biased against African leaders. The “shuttle” diplomacy resulted into a resolution from the African Union (AU) condemning the ICC for bias and also an ultimately unsuccessful call in the United Nations Security Council (UNSC) for a UNSC resolution that would suspend the Kenyan cases for one year.<sup>9</sup>

The Kenyan situation is the first case in the ICC's history, where the prosecutor exercised prosecutorial discretion under the *proprio motu* authority under Article 15. The prosecutor's discretion *proprio motu* authorizes him/her to identify crimes under the ICC jurisdiction and propose their investigation. However, he/she has to receive judicial authorization from a Pre-Trial Chamber for a case to proceed to trial. It has to be remembered that the International Law Commission (ILC) draft of the Rome Statute did not include this prosecutorial authority because the ILC envisioned the ICC as “a facility available to States Parties to its Statute, and in certain cases to the Security Council” that could have authority to initiate cases.<sup>10</sup>

7 US Envoy “solicited” witnesses for Hague. *Nation newspaper*, 27 January 2014, available at <[www.nation.co.ke/news/politics/-/1064/2163060/-/x114m4/-/index.html](http://www.nation.co.ke/news/politics/-/1064/2163060/-/x114m4/-/index.html)> (last visited 27 February 2014).

8 Uhuru Kenyatta's trial: A case study in what's wrong with the ICC, GlobalPost, 6 February 2014, available at <[www.globalpost.com/dispatch/news/regions/africa/kenya/140206/uhuru-kenyattas-trial-case-study-whats-wrong-the-icc](http://www.globalpost.com/dispatch/news/regions/africa/kenya/140206/uhuru-kenyattas-trial-case-study-whats-wrong-the-icc)> (last visited 27 February 2014).

9 African Union accuses ICC of bias, seeks delay of cases against sitting leaders, CNN, 12 October 2013, available at <<http://edition.cnn.com/2013/10/12/world/africa/ethiopia-au-icc-summit/>> (last visited 27 February 2014). See Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia, available at <[www.au.int/en/content/extraordinary-session-assembly-african-union](http://www.au.int/en/content/extraordinary-session-assembly-african-union)> (last visited 27 February 2014). See also AU appalled over UNSC failure to defer ICC cases of Sudan, Kenyan leaders, Sudan Tribune, 4 February 2014, available at <[www.sudantribune.com/spip.php?article49831](http://www.sudantribune.com/spip.php?article49831)> (last visited 27 February 2014).

10 The Report of the International Law Commission on the Work of Its Forty-Sixth Session 2 May to 22 July 1994. UN Doc. A/49/10 at pp. 89-90.

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It was not a coincidence that the violence that ensued after the 2007 presidential and parliamentary general election attracted the international community's attention, especially Western powers. Kenya, a country in East Africa, is home to international organizations and multinational companies. It is also an economic hub for most Western companies, such as Pfizer a US-based pharmaceutical company, PricewaterhouseCoopers, and Posterscope, an outdoor advertising firm. Other service industries such as IBM, Google, PwC, advertising agency WPP, Bharti Airtel, Nokia/Siemens, Huawei, Procter & Gamble, and Biersdoff and banks like Barclays and Standard Chartered, just to name a few, are all located in the capital city Nairobi.<sup>11</sup> The two months violence that started right after the announcement of results of the presidential elections on 28 December 2007 came to an end on 28 February 2008. According to the Kenyan Red Cross, the violence claimed the life of over 1200 people, whereas over 268,300 people were displaced and 41,000 houses destroyed.<sup>12</sup> Although the root causes of the post-election violence is not the scope of this article, it merits to albeit, briefly mention in passing these causes. Compared to other countries in sub-Saharan Africa, Kenya is predominately a peaceful and politically stable country since she gained her independence from Britain on 12 December 1963. Research on Kenya's geopolitical structure posits that the aetiology of the post-election violence is threefold. First, the long-standing conflict over land rights, second, the tolerance of impunity for human rights violations, and third, the inequality coupled with the unfulfilled promised for social and economic rights.<sup>13</sup> The perceived election rigging in favour of president Mwai Kibaki seemed to have reopened the raw wounds (conflict over land rights, human rights violations, and infringement of social and economic rights) in the Kenyan society and hence the violence that ensued. The Commission of Inquiry into Post-Election Violence (CIPEV)<sup>14</sup> in its report concluded that the violence was spontaneous in some locations, and that in some others, it was a result of planning and organization.<sup>15</sup> The Office of the Prosecutor (OTP) relied heavily in the CIPEV findings and other NGO "investigations" and concluded that there was reasonable basis to proceed with investigations and thereafter sought the authorization from the Pre-Trial Chamber (PTC) to proceed with investigations, a request that the PTC granted.<sup>16</sup>

The article proceeds henceforth in three sections. First, I review the literature on the subject to explain the gaps that I intend to fill in the discussion regarding

- 11 Nairobi, Africa's new HQ for multinational firms, available at <[www.nairaland.com/751883/nairobi-kenya-africa-new-hq](http://www.nairaland.com/751883/nairobi-kenya-africa-new-hq)> (last visited 26 February 2014).
- 12 "Report from OHCHR Fact-finding Mission to Kenya", 6-28 February 2008, available at <[www.ohchr.org/Documents/Press/OHCHRKenyaareport.pdf](http://www.ohchr.org/Documents/Press/OHCHRKenyaareport.pdf)> (last visited 27 February 2014).
- 13 T. Yamano, T. Tanaka & R. Gitau, *Haki Yetu (It's Our Right): Determinants of Post-Election Violence in Kenya*, National Graduate Institute for Policy Studies, 2010.
- 14 Also known as the "Waki Commission". Justice Phillip Waki was the Chairman of the CIPEV.
- 15 See p. vii the Commission's report, available at <[http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf)> (last visited 28 February 2014).
- 16 See PTC II's Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, available at <<http://icc-cpi.int/iccdocs/doc/doc854287.pdf>> (last visited 28 February 2014).

prosecutorial discretion as enumerated under the Statute. Second, I discuss the methodology in assessing the basis of prosecutorial discretion under *proprio motu* authority in the Kenyan cases. Of significance is the question whether the prosecution of the Kenyan cases is grounded on law and evidence or influenced by politics and partisanship and/or bias against any interests external to the court. Third, I draw conclusions from the discussion and suggest recommendations on guidelines for prosecutorial discretion under the *proprio motu* authority in line with Article 53 of the Statute.

## 2 Basic Aspects of International Criminal Law and Prosecutorial Discretion

International criminal law is a subset of international law. It is a body of rules prescribing international crimes and regulates principles and procedures that govern the investigations, prosecutions, and punishment of international crimes. The preamble of the Rome Statute of the International Criminal Court emphasizes the duty of every State to exercise criminal jurisdiction over all those who are responsible for international crimes.<sup>17</sup> International criminal law must be based on the consent of States, through treaties, customary international law, and/or general principles of law.<sup>18</sup> Treaties and customary international law are binding on States. General principles of law are those practices that are common in most jurisdictions. Their general and consistent application is evidence of their acceptability and usage. Prosecutorial discretion is among these general principles of law.

Prosecutorial discretion has origins in English common law. Government prosecutors would not only initiate criminal prosecutions but also retain the power and right to decline or end prosecutions. It allowed the prosecutors to choose to file charges, prosecute, decline prosecution, plea bargain, and recommend a sentence to the court. In the common law systems, prosecutorial discretion is broad. The prosecutor's decision as explained *supra* is unchecked. However, in civil law jurisdictions, prosecutorial discretion is subject to judicial review and is not as broad as in common law jurisdictions.

The exercise of prosecutorial discretion in the ICC takes a "mixed" approach. It has combined prosecutorial discretion practices from both the common and civil law jurisdictions. Under the mixed approach, "the prosecutor acts as an 'administrator of justice', in that he (she) acts in the interest of international justice pursuing the goal of identifying, investigating, and prosecuting the most serious international crimes and, as in common law legal orders, as a party in an adversarial system."<sup>19</sup>

In most common law jurisdictions, the prosecutor in the international criminal justice system has been widely discussed ever since the Statute came into force in 2002. The ICC Prosecutor's authority to initiate prosecutions is a point of

17 Par. 6 of the Preamble of the Rome Statute of the International Criminal Court.

18 See the Statute of International Court of Justice, Art. 38(1) on the general sources of international law.

19 A. Cassese, *Realizing Utopia: The Future of International Law*, OUP, Oxford, 2012, p. 163.

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contention for some States which have refrained from signing and eventually ratifying the Statute. Most notably, among these States, perhaps, is the United States (US). US administrations since Bill Clinton, while in his second term as president signed the Statute, had reservations about the ICC's jurisdiction including the power of the ICC Prosecutor. The Clinton Administration advised the next US president to refrain from submitting the Statute for the US Senate's ratification unless significant revisions are made.<sup>20</sup>

Robinson wrote his article one year after the entry into force of the Statute on 1 July 2002.<sup>21</sup> The author focuses on the discussion of the relationship between the ICC and national jurisdictions based on the complementarity doctrine.<sup>22</sup> Specifically, the author seeks to review the point in which the ICC determines whether to defer to national jurisdiction when it is assessed not to be in the interest of justice to pursue prosecutions. The author argues that prosecutorial discretion guides the said assessment and decision thereafter. He argues that "there may be exceptional circumstances where it would not be in the interest of justice to interfere with a reconciliation mechanism, even though that mechanism falls short of prosecution of all offenders".<sup>23</sup> As such, where other alternatives to ICC prosecutions are available, they should be best preferred because criminal trials may not be appropriate as a remedy as a form of response to the root causes of conflict and violence resulting from deep-seated societal mistrust and grievances.<sup>24</sup> According to Robinson, the ICC Prosecutor ought to use her prosecutorial discretion not to proceed with an investigation and/or prosecution when it is apparent that her intervention is against the interest of justice.<sup>25</sup>

- 20 President Clinton did not anticipate the "unsigned" of the Statute, which was purportedly done by his successor President George W. Bush. The unsigned of the Statute, according to the Bush administration, was a reflection of the wishes of the American people (reflected in the US Senate) that they could not be subjected to a "foreign" court that contradicted the Constitution of the United States. See E.T. Swaine, 'Unsigned', *Stanford Law Review*, Vol. 55, 2003, pp. 2061-2089.
- 21 D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', *European Journal of International Law*, Vol. 14, 2003, pp. 481-505.
- 22 The complementarity doctrine posits that the ICC could only exercise jurisdiction if domestic courts were unwilling or unable to prosecute. This concept is imbedded under Art. 17 of the Statute, which states that a case is inadmissible when it is being investigated or prosecuted by a State that has jurisdiction over it or when the case has already been investigated and the State has decided not to prosecute.
- 23 Robinson 2003, p. 483.
- 24 Criminal trials are highly formal processes that determine the culpability of an accused person guided by rules of procedure and evidence that may not serve the purposes of peace and reconciliation. In-depth discussions on the subject, see S.P. Sungi, *Dealing with International Crimes in Africa: When Are Indigenous Justice Systems Better than Criminal Trials?* Edwin Mellen Press, New York, 2015.
- 25 Art. 17(1)(d) of the Statute provides that the Court must declare a case inadmissible if it is not of "sufficient gravity." The Prosecutor, in exercising her discretion as to whether to proceed with a case, is instructed to refrain prosecution when "(a) a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of all the alleged perpetrator, and his or her role in the alleged crime." See also Art. 53 of the Statute <[www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)> (last visited 28 February 2014).

In his article published in 2004, Brubacher revisits the discussions during the Preparatory Committees (PC) of the Statute.<sup>26</sup> The members of the PC fell into two main categories in these deliberations: liberalists and realists. The liberalist group was mainly made up of NGOs who promoted the idea of building a judicial institution capable of trying individuals who violated norms of international human rights law and mass atrocity crimes. On the other hand, the second group comprised of the realists. This group advocated limiting the scope of the independent prosecutor to give deference to State interests. Realists have the view that international law regulates relations among sovereign States and serves the interests of their citizens. The author restates the rationale for prosecutorial discretion within the international criminal justice system starting with the Second World War tribunals of Nuremberg and Tokyo (the International Military Tribunals – IMT). The IMT Chief Prosecutors were responsible for the “final designation of major war criminals to be tried at the Tribunal.”<sup>27</sup> They, however, exercised their prosecutorial discretion guided by the principles of the selection agreed upon by the Allies. The scope of prosecutorial discretion was revamped in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) where prosecutors were able to initiate investigations on their own authority and determine the charges to be included in the indictment without any oversight from the Trial Chamber.<sup>28</sup> The author argues that prosecutorial discretion in the ICC is necessary and serves both practical and legal purposes. The international criminal justice system, by its nature, deals with cases that potentially involve hundreds of suspects and perhaps hundreds of cases. Prosecutorial discretion, therefore, is essential to assist the prosecutor to select cases and investigate the same based on priority. In this case, prosecutorial discretion “is expected to be highly selective both in launching an investigation against only those individuals liable for the most serious offenses ...”<sup>29</sup>

Absence of guidelines on prosecutorial discretion in the international criminal justice system is because of the newness and that less precedents exist in this judicial system.<sup>30</sup> Jallow, who is the Chief Prosecutor of the International Criminal Tribunal for Rwanda (ICTR), posits that discretion is a significant authority in any judicial system, because it allows cases to be processed in a speedy fashion, which avoids clogging and/or slowing down a judicial system. The author in his article focuses his discussion on prosecutorial discretion in the ICTR and the influence that the Completion Strategy of the Tribunal, which was revised in 2004, had in devising the criteria that the OTP should use in selecting cases. The first step in exercising his prosecutorial discretion, the prosecutor has to weigh

26 M.R. Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’, *Journal of International Criminal Justice*, Vol. 2, 2004, pp. 71-95.

27 Art. 14(b) of the Charter of the Nuremberg Tribunal and Art. 8(a) of the Charter of the Tokyo Tribunal.

28 See Art. 18(1) of the ICTY Statute and Art. 17(1) of the ICTR Statute.

29 Brubacher 2004, p. 76.

30 H.B. Jallow, ‘Prosecutorial Discretion and International Criminal Justice’, *Journal of International Criminal Justice*, Vol. 3, 2005, pp. 145-161.

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the chances of conviction rather than merely establishing a *prima facie* case and second is the seriousness of the violations of international humanitarian law. ICTR is tasked to adjudicate crimes under the ICTR jurisdiction that were committed in the Territory of Rwanda between 1 January and 31 December 2004. In assessing the seriousness of the crimes, the OTP was guided by the nature of crimes committed in Rwanda, which according to the evidence was a consequence of a well-planned conspiracy by the members of the government in power at the time and the ruling party, *Mouvement Révolutionnaire National pour le Développement* (MRND). With this in mind, the OTP formulated policy to target governmental, political, and military leadership who were alleged to plan the genocide. Third, the OTP was guided by the nature and gravity of the offences. This requirement resembles the ICC's gravity requirement under Article 53 of the Statute. In assessing gravity, the ICTR OTP examines the extent of non-loss of life cases involving homicide, the killing of children and the widespread sexual offences, the extermination of a particular ethnic group, the destruction of pregnant women, and the killing of infants. The OTP in some cases assessed the role of the media in promoting ethnic hatred and inciting people to acts of violence, murder, and destruction. To this end, the author reflects on prosecutorial discretion and states that every exercise of authority has to be subject to certain restraints. He suggests that discretion ought to be judiciously exercised. However, he argues that a prosecutor in the international criminal justice system must enjoy a wide discretion without judicial interference. According to Jallow, it is important to maintain wide prosecutorial discretion because it assists the prosecutor to be fair, incorruptible, free from outside influences, to decide selection of cases based on evidence that is objectively assessed, and it is compatible with public interest principles. Citing Judge Shahabuddeen in the *Barayagwiza* case on the point of prosecutorial fairness:

The Prosecutor of the ICTR is not required to be neutral in a case; she is a party. But she is not of course a partisan. This is why, for example, the Rules of the Tribunal require the Prosecutor to disclose to the defense all exculpatory material. The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice.<sup>31</sup>

Danner continues Jallow's discussion on the legitimacy of prosecutorial discretion by asking two important questions. First, the author poses to what extent does the prosecutor expect to function as an accountable political actor and second is to what extent the prosecutor will be able to claim legitimacy.<sup>32</sup> Danner revisits the negotiations in the Preparatory Committee on the issue regarding the

31 Separate Opinion of Judge Shahabuddeen, Decision, *Barayagwiza* (ICTR-97-19-AR72). Appeals Chamber, 31 March 2000. ¶68.

32 A.M. Danner, 'Prosecutorial Discretion and Legitimacy', *The American Journal of International Law*, Vol. 97, 2005, pp. 510-552.

prosecutor's *proprio motu* authority. The author recalls both the supporters and opponents of the said prosecutor's authority arguing on fears of the politicizing of the power on the ICC. Opponents argued that *proprio motu* authority could make the prosecutor become either a "lone ranger running wild" around the world targeting highly sensitive political situations or a weak prosecutor who would be subject to manipulation by states, NGOs, and other groups who would seek to use power of the ICC as a bargaining chip in political negotiations.<sup>33</sup> The proponents of the *proprio motu* authority supported its inclusion in the Statute arguing that it was necessary to give the prosecutor independence from State Parties and the United Nations Security Council (Security Council). The United States ambassador-at-large for war crimes, David Scheffer, stating the US position on the inclusion of the *proprio motu* authority in the Statute, cautioned on the inclusion. He argued that allowing the prosecutor to initiate investigations based on information on non-state actors would deluge her with frivolous complaints. Although the US position failed, many other members acknowledged the danger posed by arming the prosecutor with unregulated discretion.

Prosecutor's independence via the *proprio motu* authority was envisioned as a necessary step in removing direct political control in prosecutorial decisions in the ICC. The view was that for an institution that promises more muscular enforcement of human rights of individuals, making the ICC prosecutor to be subject to direct political control, would have constituted a betrayal of fundamental ethical principles under contemporary international law.<sup>34</sup> According to the author, the independent prosecutor brings the ICC closer to the best practices of national criminal justice systems. However, as most scholars have cautioned, an independent prosecutor may use the court's jurisdiction as a political weapon to accuse political and military leaders and convict them of serious crimes under the court's jurisdiction. For these reasons, such power cannot be delivered without any restraints.

The absence of clear guidelines for the ICC prosecutor's exercise of discretion does not inform how the selections of cases are conducted in the OTP. According to current practice, the criteria purportedly used is that of assessing "gravity" and whether prosecutions are in the "interests of justice" under Articles 17 and 53 of the Statute. Schabas<sup>35</sup> recalls a publication by the ICC Prosecutor titled "Prosecutorial Strategy".<sup>36</sup> The policy reflected the nature of the selection of Situations to be those that bear the greatest responsibility for crimes under the jurisdiction of the ICC. Additional criteria in the selection of cases would be gravity. Gravity

33 *Id.*, pp. 514-515.

34 For detailed discussions about "fundamental ethical principles", see B.D. Leppard, 'How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles', *The John Marshall Law Review*, Vol. 43, 2010, pp. 553-567 and B.D. Leppard, *Customary International Law: A New Theory with Practical Applications*, Cambridge, Cambridge University Press, 2010.

35 W. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', *Journal of International Criminal Justice*, Vol. 6, 2008, pp. 731-761.

36 The Office of the Prosecutor Report on Prosecutorial Strategy, September 2006, available at <[www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf)> (last visited 5 March 2014).

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would be assessed based on three prongs, the nature of crimes, the manner of commission of the crimes, and the impact of the crimes. The author argues that despite the Prosecutor's attempts to illustrate the criteria used in selection cases, the Prosecutor has not been consistent with his assessment.<sup>37</sup> He reviews the Situations before the ICC and the stated reasons for investigation and eventually prosecutions. The Ugandan Situation was referred to the ICC under Article 13(a) of the Statute. In this Situation, the Prosecutor stated that his selection was based on gravity. He analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces (UPDF) and concluded that the decision to indict the LRA principals was because they committed much more numerous and much higher gravity of the alleged crimes compared to those committed by the UPDF.<sup>38</sup> However, in February 2006, the Prosecutor explained his decision not to proceed with investigations on British troops in 2003 during the Iraq invasion to be, *inter alia*, the number of victims of crimes within the jurisdiction of the ICC, whereby 4 to 12 victims of wilful killing were alleged to occur and an alleged limited number of victims of inhuman treatment were recorded.<sup>39</sup> The Prosecutor, in the case, was reluctant to exercise his *proprio motu* authority stating that gravity was not so much a justification for the selection of cases, but rather a quantitative approach to a number of victims recorded. In the *Lubanga* case, the Prosecutor's assessment of gravity and the Pre-Trial Chamber's decision on his Warrant of Arrest, the assessment of gravity was not based on the quantitative approach of the number of victims but extended to a different criteria, which was the due to the "social alarm in the international community caused by the extent of the practice of enlisting into armed groups, conscripting into armed groups and using to participate actively in hostilities children under the age of fifteen."<sup>40</sup>

For these reasons Goldston demands more candour about criteria in the exercise of discretion by the Prosecutor of the ICC.<sup>41</sup> Goldston points out the need for the prosecutorial discretion in the ICC not only to be grounded in law and evidence but also necessity, providing the Prosecutor with broad prosecutorial powers, while refraining from partisanship in selecting cases to investigate.<sup>42</sup> The author posits that if the OTP wants to regain its credibility in the eyes of the world, it must consider developing guidelines that will assist the Prosecutor in exercising her discretion. Comparing prosecutorial discretion exercised in national jurisdictions, Goldston states that it is imperative for the OTP to develop

37 Schabas 2008, p. 32.

38 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants', The Hague, 14 October 2005, at 2-3. <[www.icc-cpi.int/NR/rdonlyres/AF169689-AFC9-41B9-8A3E-222F07DA42AD/143834/LMO\\_20051014\\_English1.pdf](http://www.icc-cpi.int/NR/rdonlyres/AF169689-AFC9-41B9-8A3E-222F07DA42AD/143834/LMO_20051014_English1.pdf)> (last visited 5 March 2014).

39 'Statement on Communications Concerning Iraq', The Hague, 9 February 2006, at 8-9. <[www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2007.pdf](http://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2007.pdf)> (last visited 5 March 2014).

40 Decision on the Prosecutor's Application for a Warrant of Arrest, *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Pre-Trial Chamber I, 10 February 2006, available at <[www.icc-cpi.int/iccdocs/doc/doc191959.PDF](http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF)> (last visited 5 March 2014).

41 J.A. Goldston, 'More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court', *Journal of International Criminal Justice*, Vol. 8, 2010, pp. 383-406.

42 *Id.*

clear guidelines because its jurisprudence is still undeveloped, and there is less precedence for the Prosecutor to refer to in reaching a charging decision. The author cautions, however, that the OTP ought to develop these guidelines and not the Assembly of Parties, NGOs, and other interested parties.

While this article joins singing the anthem for the OTP to develop guidelines for exercising the Prosecutorial discretion through her *proprio motu* authority, I go further is recommending the guidelines that may be adopted in exercising the said discretion.

### 3 Methodology

This article adopts a focused comparative framework in examining the selection of cases admissible for investigation and later prosecution in the ICC. A focused comparative analysis enables a comparison on the similarities and differences among the Situations in the ICC. Such a comparison generalizes the findings in concluding whether gravity is assessed equitably among the Situations (standard). Currently, there are 8 Situations (21 cases) pending before the Court. Although these situations were not all referred by means of the *proprio motu* authority, they had to satisfy a critical requirement known as “gravity,” which is imbedded under Article 53 so as to become admissible under Article 17 of the Statute.<sup>43</sup> A basic research design is used to match key explanatory factors that enable Situations to become candidates for ICC investigations. In the ICC Situations, these factors include allegations that crimes under the jurisdiction of the ICC have been committed in order to satisfy the gravity requirement.

### 4 Cases as Candidature for ICC Intervention

As a matter of law, situations become admissible before the ICC when they satisfy the requirements under Part II of the Rome Statute. There are presently 21 Cases in 8 Situations pending before the ICC Trial Chambers. Nearly all the Situations are from the African Continent. These are the Situations in Uganda, Democratic Republic of Congo (DRC), Darfur (Sudan), Central African Republic (CAR), Kenya, Libya, Côte d'Ivoire, Mali.

In this section, I will discuss each Situation examining nature of the investigations and thereafter prosecutions. Significantly is the examination of the present OTP practice on prosecutorial discretion. This assessment is imperative in order to examine whether the Prosecutor's discretion is consistent in all situations and hence equitable as required by present practice. Even though there are two other ways in which situations are referred to the ICC, that is by a state party to the Statute and the United Nations (UN) Security Council, once situations are

43 Art. 53(1)(c) states that “[I]n deciding whether to initiate an investigation, the Prosecutor shall consider whether Taking into account *the gravity of the crime* and interest of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interest of justice” [Emphasis mine]. *Also see* Art. 17 of the Rome Statute.

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referred as such, the Prosecutor must satisfy herself that there is reasonable basis to commence investigations.<sup>44</sup> Referrals by State Parties and the United Nations Security Council are not in the scope of this article's discussion.

The eight situations listed in Table 1 enables a comparative analysis on the use of prosecutorial discretion as exercised by the ICC Prosecutor. The listed situations, however, are not all referred to the ICC using the same exercise of jurisdiction.<sup>45</sup> Of significance in this article is the examination of Prosecutor's present practice on discretion. According to the present practice, the Prosecutor selects cases based on two criteria. First, the Prosecutor assesses gravity of the allegations as provided under Article 53 of the Statute. Article 53 directs the Prosecutor to assess the information available to determine whether there is reasonable basis to believe that crimes within the jurisdiction of the ICC have been committed. Second, the case is admissible under Article 17;<sup>46</sup> third is the requirement that the gravity of the crimes and the interests of victims. The Prosecutor also evaluates whether an investigation would serve the interests of justice. In the passages that follow, I will discuss all the situations described in Table 1 to examine the three prosecutorial criteria in admitting cases before the ICC.

44 See Art. 18 of the Statute.

45 See Art. 17 of the Statute.

46 Art. 17 deals with issues of admissibility. The provision provides a three-pronged evaluation for a case to be admissible. First, the State must be unwilling or unable genuinely to carry out an investigation or prosecution of the case. Second, when a State that has jurisdiction over a case is unwilling or unable to prosecute a person concerned. Third, the person concerned has not been tried by the Court, and fourth is the gravity of the case.

Table 1 Summary of Situations in the ICC

Situation	Length and nature of conflict	Type of referral	Crimes alleged committed	Status of conflict
<b>Uganda</b>	The LRA has been fighting the central government in Kampala since 1987. The allegations from the Acholi that they suffered abuses at the hands of successive Ugandan governments in the 1970s and 1980s are alleged to be the aetiology of the violence in northern Uganda.	State referral	There are four defendants in the Situation; <b>Joseph Kony</b> , the LRA leader accused of twelve counts of crimes against humanity – murder, enslavement, sexual enslavement, rape, and inhumane acts of inflicting serious bodily injury and suffering, and twenty-one counts of war crimes – murder, cruel treatment of civilian population, pillaging, inducing rape, and forced enlistment of children; <b>Vincent Otti</b> , LRA vice-chairman is accused eleven counts of crimes against humanity – murder, sexual enslavement, and inhumane acts of inflicting serious bodily injury and suffering, and twenty-one counts of war crimes – inducing rape, intentionally directing an attack against a civilian population, forced enlistment of children, cruel treatment of civilians, pillaging, and murder; <b>Okot Odhiambo</b> , LRA deputy army commander is accused of two counts of crimes against humanity – murder and enslavement, and eight counts of war crimes – intentionally directing an attack against a civilian population, pillaging, and forced enlisting of children; <b>Dominic Ongwen</b> , LRA brigade commander is accused of three counts of crimes against humanity – murder, enslavement, inhumane acts of inflicting, and serious bodily injury and suffering, and four counts of war crimes – murder, cruel treatment of civilians, and intentionally directing an attack against a civilian population; <b>Raska Lukwiya's</b> case abated because the defendant is deceased.	Ongoing

Table 1 (continued)

Situation	Length and nature of conflict	Type of referral	Crimes alleged committed	Status of conflict
<b>Democratic Republic of the Congo (DRC)</b>	Although the DRC has been in on-going civil war, specifically in this situation against the FDLR/FPL was in eastern DRC between 2002 and 2003 where at least 60,000 people were killed.	State referral	There are currently four accused persons in the DRC situation and one conviction. <b>Thomas Lubanga</b> was found guilty of war crimes – enlisting and conscripting of children under the age of 15 and using them to participate actively in hostilities. He was sentenced to 14 years in prison. <sup>a</sup> <b>Germain Katanga</b> was found guilty as an accessory within meaning of Article 23(3)(d) of the Statute of one count of crime against humanity – murder and four counts of war crimes – pillaging. Katanga has yet to be sentenced. <sup>b</sup> Bosco Ntaganda, former Chief of Staff and commander of the <i>Forces Patriotiques pour la Libération</i> of Congo is accused three counts of war crimes in the first warrant of arrest, and four counts of war crimes and three counts of crimes against humanity in the second warrant of arrest. <b>Callixte Mbarushimana</b> , the executive secretary of the <i>Forces Démocratiques pour la Libération</i> du Rwanda (FDLR) is accused of five counts of crimes against humanity and eight counts of war crimes. <b>Sylvestre Mudacumura</b> the supreme commander of the FDLR is accused to committing nine counts of war crimes. Mathieu Chui, former leader of the <i>Front des nationalistes et Inégréationnistes</i> (FNI), is accused of three counts of crimes against humanity and seven counts of war crimes.	Ongoing
<b>Central African Republic (CAR)</b>	The protracted armed conflict in the CAR from about 25 October 2002 to 15 March 2003 where the MLC forces led by Jean-Pierre Bemba carried out widespread and systematic attacks on civilians. The estimates of people killed range from 600 to 1000 deaths. <sup>c</sup>	State referral	There is currently one accused person in this situation. However, other four accused persons: <b>Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido</b> are detained in the ICC detention centre in the Hague. <b>Jean-Pierre Bemba Gombo</b> the former Vice President of the DRC and former commander-in-chief of the <i>Mouvement de libération du Congo</i> (MLC). Bemba is accused of two counts of crimes against humanity – murder, rape and three counts of war crimes – murder, rape, and pillaging.	Ongoing

Table 1 (continued)

Situation	Length and nature of conflict	Type of referral	Crimes alleged committed	Status of conflict
<b>Darfur, Sudan</b>	Conflict began early 2003 between government forces in Khartoum and rebels fighting the government. Estimates of civilians killed range from 200,000 to 400,000 people were displaced. <sup>d</sup>	United Nations Security Council referral	There are six accused persons in this situation. On 8 February 2010, the Pre-Trial Chamber I rejected to confirm charges against <b>Bahar Idriss Abu Garda</b> who was accused of three counts of war crimes. <b>Ahmad Muhammad Harun</b> is accused of twenty counts of crimes against humanity and twenty-two counts of war crimes. <b>Ali Muhammad Ali Abd-Al-Rahman</b> is accused of twenty-two counts of crimes against humanity and twenty-eight counts of war crimes. <b>Omar Hassan Ahmad Al Bashir</b> , President of the Republic of Sudan, is accused of five counts of crimes against humanity at <b>Abdallah Banda Abakaer Nourain</b> is accused of three counts of war crimes and <b>Abdel Reheem Muhammad Hussein</b> is accused of seven counts of crimes against humanity and six counts of war crimes.	Ongoing
<b>Kenya</b>	Post-election violence ensued after the announcement of the winner of the election in 2007. The death toll from the violence is estimated to be between 1000 to 1300 people and up to 60,000 people displaced.	Prosecutor's referral	Initially, the prosecutor indicted six defendants in this situation. The Pre-Trial Chambers rejected to confirm charges against <b>Henry Kosgey</b> , former Minister of Industrialization, and <b>Mohamed Hussein Ali</b> , the former Commissioner of Police. The Prosecutor dropped charges against another individual he indicted <b>Francis Muthaura</b> , the former head of public service citing lack of evidence to satisfy the Statute's evidence threshold. <b>William Samoei Ruto</b> , currently the Deputy President of the Republic of Kenya is accused of three counts of crimes against humanity – murder, deportation, and persecution. <b>Joshua Arap Sang</b> , a journalist is accused of three counts of crimes against humanity – murder, deportation, and persecution. <b>Uhuru Muigai Kenyatta</b> , currently the President of the Republic of Kenya, is accused of four counts of crimes against humanity – murder, deportation, rape, persecution, and other inhumane acts.	In abeyance

Table 1 (continued)

Situation	Length and nature of conflict	Type of referral	Crimes alleged committed	Status of conflict
<b>Libya</b>	The Libya uprising, also known as the Libyan revolution was part of the political wave – Arab spring that toppled the Gaddafi administration. The death toll in the 8 months (15 February to 2 October 2011) civil war is estimated to be between 2,500 and 25,000. <sup>e</sup>	United Nations Security Council referral	The Prosecutor initiated investigations of three individuals in this situation. The former president of Libya <b>Muammar Mohammed Abu Minyar Gaddafi</b> , <b>Abdullah Al-Senussi</b> , the former intelligence chief, and <b>Saif Al-Islam Gaddafi</b> , the influential son of the late Gaddafi. President Gaddafi's case abated after his death and Saif Gaddafi and Al-Senussi's case was rejected by the Pre-Trial Chamber I as inadmissible. <sup>f</sup>	Ongoing
<b>Côte d'Ivoire</b>	The 2010 to 2011 Ivorian violence ensued after Laurent Gbagbo refused to leave office in a lost presidential election in 2010. Some 3,000 people died <sup>g</sup> in the violence.	State referral <sup>h</sup>	There are three defendants in this situation. <b>Laurent Gbagbo</b> , the former president, who is accused of four counts of crimes against humanity – murder, rape, persecution, and other inhuman acts. <b>Simone Gbagbo</b> , Laurent Gbagbo's wife, is accused of four counts of crimes against humanity – murder, rape, persecution, and other inhuman acts. <b>Charles Blé Goudé</b> is accused of four counts of crimes against humanity – murder, rape, persecution, and other inhuman acts.	In abeyance

Table 1  
(continued)

Situation	Length and nature of conflict	Type of referral	Crimes alleged committed	Status of conflict
<b>Mali</b>	The armed conflict that started in January 2012 in northern Mali. The conflict has displaced more than 300,000 people. <sup>1</sup> There are not clear estimates of the number of people killed as yet.	Prosecutor's referral	This situation is still under the Prosecutor's investigation. The Prosecutor believes that the following crimes under the ICC's jurisdiction have been committed: murder, mutilation, cruel treatment and torture, intentionally directing attacks against protected objects, the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, pillaging, and rape. <sup>2</sup>	Ongoing
a	Thomas Dylko Judgement, available at < <a href="http://icc-cpi.int/iccdocs/doc/doc1379838.pdf">http://icc-cpi.int/iccdocs/doc/doc1379838.pdf</a> > (last visited 12 March 2014).			
b	Judgement, <i>The Prosecutor v. Germain Katanga</i> , ICC-01/04-01/07 was read on 7 March 2014.			
c	International Federation for Human Rights report on War Crimes in the Central African Republic, February 2003, available at < <a href="http://www.fidh.org/IMG/pdf/FDH_Report_WarCrimes_in_CAR_English_Feb2003.pdf">www.fidh.org/IMG/pdf/FDH_Report_WarCrimes_in_CAR_English_Feb2003.pdf</a> > (last visited 12 March 2014).			
d	G. Prunier, <i>Darfur: The Ambiguous Genocide</i> , Cornell University Press, Ithaca, New York, 2007. Also see The International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, available at < <a href="http://www.un.org/news/dh/sudan/com_inq_darfur/com_inq_darfur.pdf">www.un.org/news/dh/sudan/com_inq_darfur/com_inq_darfur.pdf</a> > (last visited 12 March 2014).			
e	R. Mulholland & J. Deshmukh, 'Residents Flee Gaddafi Hometown', <i>The Sydney Morning Herald</i> , 3 October 2011, available at < <a href="http://news.smh.com.au/breaking-news-world/residents-flee-gaddafi-hometown-20111003">http://news.smh.com.au/breaking-news-world/residents-flee-gaddafi-hometown-20111003</a> > (last visited 12 March 2014).			
f	Decision on the admissibility, <i>The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi</i> , ICC-01/11-01/11, 11 October 2013.			
g	BBC, 'Ivory Coast dismisses ICC warrant for Simone Gbagbo', 20 September 2013, available at < <a href="http://www.bbc.com/news/world-africa-24179992">www.bbc.com/news/world-africa-24179992</a> > (last visited 12 March 2014).			
h	Côte d'Ivoire signed the Statute on 30 November 1988 but only ratified it in February 2013. In April 2003, it accepted the jurisdiction of the ICC under Art 12(3) of the Statute.			
i	J. Marti, <i>Addressing the Critical Humanitarian Situation in Northern Mali</i> , Humanitarian Practice Network, September 2012, available at < <a href="http://www.odihpn.org/humanitarian-exchange-magazine/issue-55/addressing-the-critical-humanitarian-situation-in-mali">www.odihpn.org/humanitarian-exchange-magazine/issue-55/addressing-the-critical-humanitarian-situation-in-mali</a> > (last visited 12 March 2014).			
j	ICC Prosecutor opens investigations into war crimes in Mali, 'The legal requirements have been met. We will investigate', available at < <a href="http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx">http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx</a> > (last visited 12 March 2014).			

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The Ugandan situation against the Lord's Resistance Army (LRA) is the first to be referred to the ICC. Uganda, which is a State Party to the Statute, referred the situation on 16 December 2003. The violence in northern Uganda is among the oldest civil wars in Africa. Being twenty-eight years old, it has claimed the death of millions and displaced thousands of people in this region. The LRA during this period of time have been alleged to commit widespread civilian atrocities including forcible conscripting thousands of children into child soldiers, sexual enslavement of girls and women, war crimes, and other inhumane treatment. There is no doubt that the alleged crimes fall within the ICC's jurisdiction. The individuals accused are the most senior LRA leaders including Joseph Kony and his commanders who bear the most responsibility in the atrocities committed in the north of Uganda. The indictees, however, are still at large.

The DRC situation is the second state referred to the ICC. Initially, the ICC Prosecutor intended to use the *proprio motu* authority to prosecute atrocities committed in the Ituri region, where he received information that an estimated five thousand civilians had been killed since the entry into force of the Statute in July 2002.<sup>47</sup> Luis Moreno Ocampo, who was then the ICC Prosecutor, said that the OTP "will use all the powers at its disposal to contribute to the prevention of future crimes and the investigation and punishment of the alleged crimes committed in Ituri."<sup>48</sup> On 19 April 2004, the President of the DRC referred the situation, and the OTP began investigations on 23 June 2004. The civil war between the government in Kinshasa and rebel groups is ongoing. The conflict has claimed lives of more than five million people and thousands of people being displaced.<sup>49</sup> Two of the four indicted individuals, who were principal leaders of the FPL, FDLR, and FNI have been found guilty and their cases concluded. Thomas Lubanga was found guilty of war crimes and conscripting children into war, and Germain Katanga was found guilty of crimes against humanity and war crimes.<sup>50</sup>

The CAR situation is the third situation referred to the ICC. CAR is a state party to the Statute and referred the situation in January 2005. Currently, there is one case pending before the ICC Trial Chambers, and four indictees are in remand custody in the ICC detention facilities in The Hague. The ongoing case in this situation is that against the former vice-president and rebel leader, Jean-Pierre Bemba, who is alleged to be the commander of the Movement for the Liberation of Congo (MLC), a group that participated in the DRC civil war between 1998 and 2003. Although Bemba is a DRC national, he is alleged to have been invited by the then CAR president Ange-Félix Patassé to the country to assist in

47 See the ICC Press Communication Received by the Office of the Prosecutor of the ICC 16 July 2003.

48 *Id.*

49 "Forgotten Crisis", available at <[www.rescue.org/special-reports/special-report-congo-y](http://www.rescue.org/special-reports/special-report-congo-y)> (last visited 17 September 2014).

50 See Table 1.

fighting a rebellion.<sup>51</sup> It is alleged that Bemba oversaw the systematic attacks on civilians in CAR between 2002 and 2003 as he assisted Patassé. An estimated 1000 people lost their lives and thousands were displaced in the civil war that brought François Bozizé into power in 2003. It is the Bozizé administration that initiated the ICC referral.<sup>52</sup>

The situation in Darfur, Sudan, the third situation before the ICC docket is a United Nations Security Council (UNSC) referral. On 31 March 2005, the UNSC acting under the UN Charter adopted resolution 1593, referred the reports on the situation in Darfur, Sudan, to the ICC Prosecutor. The violence ensued in 2003 when the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), rebel groups in the Darfuri region, took up arms to fight the central government in Khartoum because of central government's failure to provide the region with its share of the country's resources. The Khartoum government fought back the rebels in Darfur with the support of the *Janjaweed* militia who attacked villages and putting on fire dwelling places forcing civilians to flee their homes. The violence, which the Report on the International Commission of Inquiry on Darfur to the UN Secretary-General concluded is genocide,<sup>53</sup> has claimed to date more than 400,000 lives and over 2.5 million people have been displaced.

The situations in Libya, Côte d'Ivoire, and Mali as shown in Table 1 are all cases still in their initial stages in the ICC. Their admissibility was also based on the provisions on Part II of the Rome Statute. The Libya situation was referred to the ICC under Article 13(b), whereas the Côte d'Ivoire situation was state referral and the Mali situation, the prosecutor's own motion (*proprio motu*) referral.

## 5 Conclusions and Recommendations

The situation in Kenya, which is a case study in this article, is a test case in the application of the ICC's prosecutor's *proprio motu* power. It is the first case in which the prosecutor exercised discretion *proprio motu* under Article 15 of the Rome Statute. The ICC is not an ordinary court. It is a court that is hope to victims of the most atrocious crimes in humanity. It is the only hope to victims who have not been able to find justice in municipal courts. It is therefore imperative that clear guidelines are set for the prosecutor's use of decision to prosecute *proprio motu*. Absence of clear guidelines to exercise this prosecutorial power in the ICC will result to future injustice to victims of mass atrocity crimes and hence undermine the provisions enshrined in the Rome Statute, which guarantees fight-

51 *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest for Jean-Pierre Bemba Gombo, ICC-01/05-01/08-15-tENG (10 June 2008), para. 15. Similarly, see *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecution's Application for Request for Provisional Arrest of Jean-Pierre Bemba Gombo, ICC-01/05-01/08-1-tENG (23 May 2008), para. 12.

52 Report of the FIDH Legal Action Group (LAG), available at <[www.fidh.org/IMG/pdf/CPiaffbemba502ang2008.pdf](http://www.fidh.org/IMG/pdf/CPiaffbemba502ang2008.pdf)> (last visited 2 September 2014).

53 See <[www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf)> (last visited 16 September 2014).

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ing impunity and justice for victims of international crimes, to just state a few of these guarantees. A wrong decision to prosecute or *vice versa* also undermines the confidence of the international community in the international criminal justice system. Political considerations must not be the criteria in which decisions to exercise prosecutorial discretion *proprio motu* should be based on. As examined above in the Kenyan situation, there is evidence that political consideration played a role in prosecutor Ocampo's decision to use his prosecutorial discretion to initiate investigations in the Kenyan situation. As a result, the Kenyan cases have been a non-starter. We have witnessed prolonged and frequent adjournments, withdrawal of prosecution witnesses and/or recanting of previous statements, and recently, the indefinite postponement of Uhuru Kenyatta's trial.<sup>54</sup>

This article recommends additional provisions under Article 15 prosecutorial discretion powers to guide the use of the *proprio motu* authority. First, what should be the criteria governing the decision to prosecute cases? Whereas, the Pre-Trial Chamber's involvement in granting the prosecutor authority to proceed with cases to trial is an essential check on the possible abuse of prosecutorial discretion *proprio motu*, the issue of sufficiency of evidence and the prospects of securing a conviction are central in this assessment. Only just the establishment of a *prima facie* case is not sufficient, as we have learned from the Kenyan cases. Assessing the prospects of a conviction requires an evaluation of the availability, strength, and credibility of witnesses.

Second, what should be the criteria on evaluation of evidence? In evaluating the evidence, issues regarding the witness credibility are significant. We have witnessed in the Kenyan cases witnesses recanting their statements, alleging coercion and/or undue influence exerted on them by the Office of the Prosecutor (OTP), issues of witness exaggerations, and faulty of memory. Additionally, evaluating whether a witness has any motive in providing an incomplete narrative of their recollection of events is imperative. In reference to the ongoing Kenyan cases, over and over again, we have heard witnesses changing statements and recollection of the events during the post-election violence.

Third, what should be the criteria assessing gravity of crimes to justify ICC intervention? Sufficiency of gravity is the major criteria in assessing the admissibility of cases enumerated under Article 17 of the Rome Statute. Gravity is also mentioned under Article 53 as a requirement in determining whether the initiation of investigations could proceed and that the same would serve the interests of justice. Some factors that may assist the prosecutor to make this assessment could include: (1) the seriousness and/or triviality of the allegations, (2) the weight of the evidence procured, not only from organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate but also from the OTP's own investigations. We know that the prosecutor in the Kenyan situation relied heavily on information gathered by non-governmental organizations and civil society together with the

54 See <[www.enca.com/icc-prosecutor-asks-indefinitely-postpone-kenyatta-trial](http://www.enca.com/icc-prosecutor-asks-indefinitely-postpone-kenyatta-trial)> (last visited 18 September 2014).

Waki Commission report as the basis of his case against the defendants in the post-election violence.

These recommendations may assist the prosecutor to better the chances of success in her case to enable victims of mass atrocity crimes find justice in the aftermath of conflict and violence such as the 2007 to 2008 post-election violence in Kenya. Prosecutorial discretion must never be influenced by personal feelings, political advantage, and/or professional circumstances.