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UNIVERSITY OF AMSTERDAM

SELF-REFERRALS AS AN INDICATION OF THE  
INABILITY OF STATES TO COPE WITH NON-STATE ACTORS

Harmen van der Wilt

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## **‘Self-referrals as an indication of the inability of states to cope with non-state actors’**

Harmen van der Wilt<sup>1</sup>

### 1) Introduction

On 13 July 2012, Mali’s Minister of Justice referred the situation in the Republic of Mali for further investigation to the Prosecutor of the International Criminal Court, asserting that grave and massive violations of human rights and of international humanitarian law had been committed, especially in the northern parts of its territory. Mali’s domestic jurisdiction would not be capable of prosecuting and judging the culprits.<sup>2</sup>

Mali’s initiative is the fourth example of a somewhat curious phenomenon, dubbed as ‘self-referrals’, in which states invoke Article 14 of the Rome Statute in order to tender the prosecution and trial of perpetrators of international crimes to the International Criminal Court. Uganda’s president Museveni was the one who set the trend in motion by referring the situation concerning the Lord’s Resistance Army to the ICC.<sup>3</sup> The DRC soon followed suit.<sup>4</sup> And the Central African Republic also took the opportunity to release itself from a highly complicated task, exceeding its capacities.<sup>5</sup> It took the Prosecutor some time to decide whether he should comply with the latter request, but two years later he announced to open an investigation which resulted in the arrest and subsequent surrender to the Court of Jean-Pierre Bemba.<sup>6</sup>

While the Prosecutor has welcomed the initiatives of African governments as a golden opportunity to engage in fruitful cooperation with willing authorities, the practice of ‘self-

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<sup>1</sup> Professor of international criminal law, University of Amsterdam. The author is much obliged to his Master students, Miss Inez Braber and Mr Ben Stanford, whose excellent theses inspired him to write this piece.

<sup>2</sup> République du Mali, Renvoi de la situation au Mali, 13 July 2012, No. 0076/MJ-SG, at <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf> (visited on 15 July 2013).

<sup>3</sup> Press Release ‘President of Uganda refers situation concerning the Lord’s resistance Army to the ICC’, ICC-20040129-44-En, 29 January 2004. The Prosecutor subsequently decided to open an investigation: Press Release, ‘Prosecutor of the International Criminal Court opens an investigation into Northern Uganda’, ICC-OTP-20040729-65, 29 July 2004. For a seminal analysis of the conflict and the demarches of the Ugandan government, see Mohammed El Zeidy, ‘The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC’, 5 *International Criminal Law Review* (2005), 83-120.

<sup>4</sup> Press Release, ‘Prosecutor receives referral of the situation in the Democratic Republic of Congo’, ICC-OTP-20040419-50-EN, 19 April 2004, resulting in the first investigation: Press Release, ‘The Office of the International Criminal Court opens its first investigation’, ICC-OTP-20040623-59-EN, 23 June 2004.

<sup>5</sup> Press Release, ‘Prosecutor receives referral concerning Central African Republic’, ICC-OTP=20050107-86-En, 7 January 2005.

<sup>6</sup> Press Release, ‘Prosecutor opens an investigation in the Central African Republic’, ICC-OTP-20070522-220, 22 May 2007; *Prosecutor v. Jean-Pierre Bemba Gombo*, Warrant of Arrest issued by Pre-Trial Chamber III, ICC-01/05-01/08, 23 May 2008.

referrals' has not been spared its share of sharp criticism.<sup>7</sup> Some authors hold that 'self-referrals' have never been seriously contemplated by the drafters of the Rome Statute, adding that they are a 'creative interpretation' of Article 14.<sup>8</sup> Others have questioned the compatibility of self-referrals with the legal architecture of the Rome Statute, arguing that an auto-referral does not preclude the Court from addressing the admissibility of a case and pointing out that such referrals are not easy to reconcile with the state's positive obligations in the realm of prosecution and trial of international crimes.<sup>9</sup> Such objections of a legal nature are often supplemented by grave concerns that the practice of self-referrals is conducive of political manipulation. Governments will try to entice the Court to focus its attention on their political foes, while staying themselves aloof of any international scrutiny.<sup>10</sup> In a refreshing rebuttal of the mainstream criticism, Darryl Robinson has taken stock of the arguments.<sup>11</sup> He carefully demonstrates that, contrary to most assertions, the referral of a situation by a state on whose territory international crimes were committed, *has* been anticipated and discussed during the drafting procedure. And he adds that, while the concern about 'selective externalization' is compelling, political manoeuvring by states is nothing new. Self-referrals may aggravate the risk of political manipulation, but this should only make the Court more vigilant against being abused as a tool to serve the interests of states.

I will not involve myself in all these sophisticated legal arguments, but rather aim to ponder on the phenomenon of self-referrals against the backdrop of a confusing and rapidly changing world order, characterized by dwindling state authority. This essay starts from the premise that self-referrals reflect convoluted situations in which state sponsored groups and non-state actors contend for power and resources, usually to the detriment of the civilian population. In other words: they defy the state-centred paradigm of international

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<sup>7</sup> The first commentators on 'self-referrals' were rather mild in their judgments, but pointed at possible political repercussions, see Claus Kress, ' "Self-Referrals" and "Waivers of Complementarity" ' ; Some Considerations in Law and Practice', 2 *Journal of International Criminal Justice* (2004), 944-948 and Paola Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?' 2 *Journal of International Criminal Justice* (2004), 949-952.

<sup>8</sup> The most pronounced advocate of this point of view is W. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', 6 *Journal of International Criminal Justice* (2009), 751; *ibidem*, *The International Criminal Court; A Commentary on the Rome Statute*, Oxford University Press: Oxford 2010, 309. Similar objections have been voiced by M. Arsanjani and W. Reisman, 'Law-in-Action of the International Criminal Court', 99 *American Journal of International Law* (2005), 385, 389-390: '(...) before and during the Rome negotiations, no one assumed that governments would want to invite the future court to investigate and prosecute crimes that occurred in their territory'. In a similar vein A.Th. Müller and I. Stegmüller, 'Self-referrals on Trial: From Panacea to Patient', 8 *Journal of International Criminal Justice* (2010), 1267, 1269.

<sup>9</sup> See in particular Jann K. Kleffner, 'Auto-referrals and the complementary nature of the ICC', in: Carsten Stahn & Göran Sluiter (eds.) *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers: Leiden/ Boston 2009, 41-53.

<sup>10</sup> Schabas argues that 'self-referral, far from being an expedient to provide a fledgling institution with some cases, is actually a trap. If a State refers a situation against itself, that is, against its rebels, it is doing so with a result in mind.' W. Schabas, ' "Complementarity in Practice": Some Uncomplimentary Thoughts'. 19 *Criminal Law Forum* (2008), 5, 22.

<sup>11</sup> Darryl Robinson, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse', 9 *Journal of International Criminal Justice* (2011), 355-384.

criminal justice.<sup>12</sup> What all self-referrals have in common is that governments contend that they are unable to conduct fair and effective criminal proceedings against non-state actors over whom they do not wield control and that they therefore seek the assistance of the International Criminal Court. The main objective of this article is to investigate how the ICC has reacted on such claims of 'inability'. I will demonstrate that the ICC has largely side-stepped the issue by holding that a state's inactivity renders a situation admissible and precludes any assessment of its '(un)willingness' or '(in)ability'. Only recently – in a decision on Libya's challenge of the Court's jurisdiction, claiming that it *was* able to dispense criminal justice – the ICC shed more light on 'inability' and its parameters.

In my opinion, a thorough discussion of the concept of 'inability' is crucial, because it may expose the embarrassing conclusion that international criminal justice is ill-equipped to cope with fragile states and powerful non-state actors. After all, if a state is considered 'unable', the logical next question is whether the ICC is likely to perform better. We may have serious reasons to doubt this, not only because the ICC is highly dependent on the cooperation of states – the prospects thereof being dire in case of failed states – but also in view of the fact that the ICC lacks the proper legal tools to prosecute and try non-state actors. In order to buttress this final point, I will show that the ICC has no jurisdiction over terrorism and has – outside the scope of armed conflict - hardly any other options to charge non-state actors who engage in heinous crimes. The disconcerting conclusion may therefore well be that the odium of 'inability' does not only apply to states.

This essay is structured as follows. Section 2 starts by scrutinizing the self-referrals in order to find out what moved the states in question to seize the Court. Section 3 proceeds by investigating the reaction of the ICC on the claims of the referring states that they were incapable of enforcing criminal law in respect of non-state adversaries. In section 4 the focus shifts to the ICC's possibilities to offer relieve. I will demonstrate that terrorism is outside the jurisdictional scope of the International Criminal Court, leaving the Court virtually powerless to address international crimes committed by non-state actors, beyond the realm of armed conflict. In section 5 I will reflect on the state centred focus of international criminal justice, which explains the scepticism towards self-referrals and which may be in need of amendment in view of the proliferation of non-state actors, responsible for international crimes. And Section 6 closes with some final observations.

## 2) Self-referrals: genuine 'inability' or insidious attempt to frame one's enemies?

When studying the language of self-referrals, one will soon observe that they all share an air of helplessness. In view of protracted civil strife or other political and social tensions, the official authorities claim that they are not able to take legal action against perpetrators of

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<sup>12</sup> For a similar point of view, see Payam Akhavan, 'Self-referrals before the International Criminal Court: Are states the villains or the victims of atrocities?', 21 *Criminal Law Forum* (2010), 103-120.

international crimes.<sup>13</sup> In its letter of jurisdiction, the Government of Uganda avowed that it ‘had been unable to arrest (...) persons who may bear the greatest responsibility for the crimes within the referred situation’, adding that ‘the ICC is the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility’; and that the Government of Uganda ‘has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible’.<sup>14</sup>

Even more explicit and general in the acknowledgement of its own limited capacity to engage in criminal law enforcement, the Democratic Republic of Congo admitted in its letter of referral that *‘les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d’engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale’*.<sup>15</sup> In a similar exhibition of modesty the *Cour de Cassation* of the Central African Republic expressed its opinion that ‘the national justice system was unable to carry out the complex proceedings necessary to investigate and prosecute the alleged crimes.’<sup>16</sup> And Mali’s government echoed its colleagues by proclaiming the honour to defer the gravest crimes to the OTP *‘dans la mesure où les juridictions maliennes sont dans l’impossibilité de poursuivre ou juger les auteurs’*.<sup>17</sup>

These claims of inability need not surprise us, as they will often at least partially reflect reality and they are facilitated by the admissibility regime itself, as will be demonstrated in the next section. What is perhaps slightly more puzzling is that two governments have attempted to reconcile this humble attitude with efforts to steer the attention of the ICC’s Prosecutor exclusively in the direction of crimes committed by rebel enemies. In the case of Uganda, President Museveni clarified that a key issue of the investigation should be ‘locating and arresting the LRA leadership’, adding that he intended to exclude the leadership of the LRA from a proposed amnesty, in order to ensure that those bearing the greatest responsibility for the crimes committed in Northern Uganda were brought to justice. No mention was made of any crimes committed by the official Ugandan People’s Defence Forces (UPDF).<sup>18</sup> Mali’s Minister of Justice was perhaps less explicit, but nonetheless clear, when he addressed the letter of self-referral to the Prosecutor’s Office:

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<sup>13</sup> Müller and Stegmiller (footnote 8, at 1280) have correctly criticized the ICC’s practice of issuing only press releases in which the original declarations are paraphrased, hampering a more thorough comparison of the texts. The authors suggest the Court to put the full texts on the web site. Apparently, the ICC has taken this advice to heart, witness the availability of Mali’s original letter on the web site of the ICC.

<sup>14</sup> Situation in Uganda, *Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005*, Case No.: ICC-02/04-01/05-53, 27 September 2005, § 37.

<sup>15</sup> Lettre de M. Joseph Kabila, dated 3 March 2004 – Reclassified as public pursuant to Decision ICC-01/04-01/06, ICC-01/04-01/06-39-AnxB1.

<sup>16</sup> Press Release, footnote 5.

<sup>17</sup> Lettre de Renvoi de la situation au Mali, footnote 2.

<sup>18</sup> Press Release, footnote 3.

‘Il s’agit de violations graves et massives des droits de l’Homme et du Droit International Humanitaire commises notamment dans la partie Nord du territoire: *les exécutions sommaires des soldats de l’armée malienne*, les viols des femmes et jeunes filles, les massacres des populations civiles, l’enrôlement d’enfants soldats, les tortures, les pillages generalises des biens appartenant *aussi bien à l’Etat* qu’aux particuliers, les disparitions forces, *la destruction des Symboles de l’Etat*, des Edifices, des Hôpitaux, *des Tribunaux*, *des Mairies*, des Ecoles, du Siège d’ONG et d’Organisme Internationaux d’aide, la Destruction des Eglises, des Mausolées et des Mosquées.’<sup>19</sup>

The emphasized parts suggest that assets of the state – human resources, property, state symbols - had been targeted by the enemy and the letter is silent on any atrocities that may have been committed by the governmental forces.

How did the ICC-Prosecutor react on these one-sided accusations? In the case of Uganda, Prosecutor Ocampo had made it clear to President Museveni that the ICC would interpret the referral as concerning all crimes under the Rome Statute committed in northern Uganda, obviously alluding to the possibility that atrocities committed by government forces would be investigated too.<sup>20</sup> However, Ocampo has been criticized for not living up to this firm position, as he has only issued indictments against members of the rebel Lord Resistance Army.<sup>21</sup> The Prosecutor tried to counter the criticism by invoking the gravity principle:

‘The criteria for selection of the first case was gravity. We analysed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA’.<sup>22</sup>

In spite of promises made by President Museveni, none of the representatives of the official authorities have to date been brought to justice.

While such demarches may be expected, they give cause to great concern, as self-referrals are not only a formal triggering mechanism, but may also serve as an important source of information. Any attempt to influence the prosecutorial policy should bolster the OTP in its resolve to maintain its independence and seek information from all different sources. Although political realities will undoubtedly determine the degree to which the Prosecutor will be under the sway of states, his or her independence towards the state making a self-referral can at least be buttressed by legal arguments. A self-referral basically entails a transfer of criminal proceedings and marks a highly important change in the sovereign authority of a state to define its legal position *vis à vis* power contenders. As long as a sitting

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<sup>19</sup> Lettre de Renvoi de la situation au Mali, footnote 2. (Italics added).

<sup>20</sup> Pre-Trial Chamber II, Decision to Convene a status Conference on the Investigation in the Situation in Uganda in relation to the Application of Article 53, 2 December 2005, ICC-02/04-01/05,

<sup>21</sup> See for instance Amnesty International, ‘Uganda: First ever arrest warrants by International Criminal Court – a first step towards addressing impunity’, 14 October 2005, AI Index: AFR 59/008/2005.

<sup>22</sup> ‘Statement by the Chief Prosecutor on the Uganda Arrest Warrants’, The Hague, 14 October 2005, 2.3.



government is 'in charge' of criminal law enforcement, it has the legitimate power to disqualify any violent challenge of its authority as 'criminal' or 'terrorism'. Of course, states that are committed to the rule of law will investigate and, if necessary, prosecute violations of human rights committed by their own agents. But they have the edge over any contender that challenges their power position by violent means. By referring a situation to the ICC, governments at least partially forfeit this definitional advantage over their adversaries. States that refer a situation to the Court, acknowledging that they are not capable to deal with the conflict themselves, while insisting that they should have some say in the choice of accused, try to have their cake and eat it too.<sup>23</sup> They attempt to occupy the moral high ground, whereas the very act of surrendering their adjudicative prerogatives suggests that they have left that lofty place. A strong awareness of this inconsistency will assist the Court in asserting its independence towards the state of referral and help the Court reminding that it is expected to judge the criminal nature of the conduct, irrespective of the status of the perpetrator. In short, while I share the concern of those who consider self-referrals as a potential instrument to steer the policy of the OTP, it is rather easy, at least not from a legal point of view, to reject any claim of states that they still have a voice in the selection of cases. Arguably more difficult is the assessment of the plea of 'inability'.

### 3) Puzzled Trial Chambers struggling with the concepts of 'inactivity' and 'inability'

Obviously, the arguments advanced by the states that have engaged in self-referrals allude to the second prong of the complementarity principle which renders priority to domestic jurisdictions and only allows the ICC to intervene when the former prove to be 'unwilling' or 'unable' to genuinely carry out investigations or prosecutions. In an attempt to further define 'inability', Article 17, section 3 of the Rome Statute tells the Court to consider 'whether, due to a total or substantial collapse or unavailability of its national system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to start proceedings.' The threshold is rather high, as the provision requires the legal and factual incapacities to be caused by the demise of the legal and political infrastructure. Apparently, the definition does not cover incidental failures to obtain custody over the suspect or evidence. Moreover, the criteria have become even more rigid by the replacement of the initial adjective 'partial' with 'substantial'[collapse].<sup>24</sup>

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<sup>23</sup> In this respect an interesting article of Mohamed El Zeidy deserves to be mentioned. El Zeidy carefully investigates whether State Parties are allowed to withdraw previously made referrals and concludes that they have no control over the termination of the proceedings before the ICC. This conclusion suggests a partial surrender of sovereignty in the realm of criminal law enforcement. Mohamed El Zeidy, 'The legitimacy of withdrawing State party referrals and ad hoc declarations under the Statute of the International Criminal Court', in: Carsten Stahn and Göran Sluiter (eds.) *The Emerging Practice of the International Criminal Court*, Koninklijke Brill: The Hague 2009, 55-78.

<sup>24</sup> On this issue and its background, see Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law; Origin, Development and Practice*, Martinus Nijhoff Publishers: Leiden/ Boston 2008, 224-226.

In the Lubanga case, Pre Trial Chamber I addressed the admissibility of the case which had been submitted by the DRC.<sup>25</sup> Referring to the letter of the DRC's President, the Chamber confirmed Congo's negative assessment of its own capabilities:

'In the Chamber's view (...) it appears that the DRC was indeed unable to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the Court committed in the situation in the territory of DRC since 1 July 2002. In the Chamber's view, this is why the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime, according to which the court by no means replaces national criminal jurisdictions, but it is complementary to them'.<sup>26</sup>

The Pre Trial Chamber seems to deduce the admissibility of the case directly from the fact that the DRC had proved to be unable to start criminal proceedings against Lubanga. However, the Chamber observed some progress, finding that

'(...) the DRC national judicial system has undergone certain changes, particularly in the region of Ituri where a *Tribunal de Grande Instance* has been re-opened in Bunia. This has resulted inter alia in the issuance of two warrants of arrest by the competent DRC authorities for Thomas Lubanga Dyilo in March 2005 for several crimes, some possibly within the jurisdiction of the Court, committed in connection with military attacks from May 2003 onwards and during the so-called Ndoki incident in February 2005. Moreover as a result of the DRC proceedings against Mr Thomas Lubanga Dyilo, he has been held in the *Centre Pénitentiaire et de Rééducation* de Kinshasa since 19 March 2005. Therefore, in the Chamber's view, the Prosecution's general statement that the DRC national judicial system continues to be unable in the sense of article 17(1) (a) to (c) and (3) of the Statute does not wholly correspond to the reality any longer.'<sup>27</sup>

Did these improvements prompt the Court to change its mind and leave the prosecution and trial of Mr Lubanga to the authorities of the DRC? Not at all. The Chamber applied a rigid test and inquired whether the national proceedings encompassed the conduct that constituted the basis for the ICC Prosecutor's charges, to wit the conscription, enlistment and use of child soldiers. Denying that this was the case, the Chamber concluded that the DRC had remained 'inactive' in respect of the specific case before the Court, adding that '(...) in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability'.<sup>28</sup> This final sentence is slightly spurious as the Chamber had shortly before concurred with the DRC that the latter was unable to pursue criminal proceedings.

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<sup>25</sup> *Situation in the Democratic Republic of the Congo in the case of Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, No.: ICC-01/04-01/06, 10 February 2006.

<sup>26</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, § 35.

<sup>27</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, § 36.

<sup>28</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, § 40.

The decision of the Pre Trial Chamber in *Lubanga* has been censured for conflating ‘inactivity’ and ‘inability’.<sup>29</sup> After all, the assessment of ‘unwillingness’ and ‘inability’ presupposes activities that can sustain such a judgment. As long as a state does not move at all, issues of admissibility do not arise. This is borne out by the literal interpretation of the text of Article 17 of the Rome Statute that requires a current investigation or prosecution, an investigation that has ended in a decision to drop the case or a previous trial of the person for conduct which is the subject of the complaint.

In the Katanga case, the Appeals Chamber corrected the inconsistencies which surfaced in *Lubanga*.<sup>30</sup> The Trial Chamber had introduced, perhaps somewhat artificially, a second form of unwillingness which came to the fore in the aim to see the persons brought to justice, but not before national courts. Possibly, the Trial Chamber harboured the conviction that the complementarity principle should be literally interpreted, entailing an obligation for domestic jurisdictions to investigate and prosecute and that each and every default on this obligation would automatically imply unwillingness. The Appeals Chamber managed to circumvent the question whether the Trial Chamber’s interpretation of ‘unwillingness’ was correct or not. The Appeals Chamber concurred with the Prosecutor’s submission, holding that ‘(...) the question of unwillingness or inability of a State having jurisdiction over the case becomes relevant only where, due to ongoing or past investigations or prosecutions in that State, the case appears to be inadmissible.’<sup>31</sup> The Chamber drew the logical conclusion that inaction of the state rendered an inquiry into these difficult and sensitive issues redundant:

‘Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraph (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (...) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.’<sup>32</sup>

The Appeals Chamber fully subscribed to the opinion of scholars who were acknowledged in a footnote. Meanwhile, the Appeals Chamber sanctioned the practice of self-referrals, thereby indirectly distancing itself from the opinion of the Trial Chamber: ‘(...) there may be merit in the argument that the sovereign decision of a State to relinquish jurisdiction in

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<sup>29</sup> Compare El Zeidy, footnote 24, 228-232.

<sup>30</sup> *Situation in the Democratic Republic of the Congo; the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, No.: ICC-01/04-01/07 OA 8, 25 September 2009.

<sup>31</sup> *Prosecutor v. Katanga*, footnote 30, § 75.

<sup>32</sup> *Prosecutor v. Katanga*, footnote 30, § 78.

favour of the Court may well be seen as complying with the “duty to exercise its criminal jurisdiction”, as envisaged in the sixth paragraph of the Preamble.<sup>33</sup>

The approach of the Appeals Chamber in *Katanga* has the obvious merit that it is consistent with the object and purpose of the Rome Statute.<sup>34</sup> But the drawback of this interpretation is that it pre-empts a serious scrutiny of any claims of ‘inability’. If a state proposes to refer the situation to the ICC and remains inactive, the Court can suffice to accept the offer, without having to inquire whether the state has good reasons to outsource its primary obligation. Perhaps this was at the back of the Trial Chamber’s mind when it decided to dedicate an *obiter dictum* to the issues of ‘unwillingness’ and ‘inability’ in the Bemba case.<sup>35</sup> As briefly mentioned previously, the *Cour de Cassation* itself had indicated that the prosecution and trial of Mr Bemba would exceed the powers and resources of the CAR. Defence counsel had challenged this ‘inability’, suggesting that the self-referral was inspired by political motives. After the Trial Chamber had concluded that the courts had dismissed the charges, without deciding ‘not to prosecute Mr Bemba’, it reiterated the findings of the Appeals Chamber in *Katanga* that it was not required to examine unwillingness and inability.<sup>36</sup> Nonetheless and ‘for the sake of completeness’, the Trial Chamber added some considerations on both the concepts of ‘unwillingness’ and ‘inability’. In respect of ‘inability’, the Chamber first emphasized that, while the opinions of the judges of the national courts might be of relevance, it was the State’s (unwillingness or) inability that counted. The Trial Chamber noticed the continued operations of the rebel faction MLC and the consequent instability of the region as factors affecting the quality of the judicial system. It observed that the complex case would inevitably last for several months and would require extensive protective measures for witnesses which would be extremely difficult or impossible for the CAR authorities to implement. In view of all these considerations, the Trial Chamber concluded that

‘Given the relative complexity and extent of the prosecution case against the accused for crimes alleged committed in 2002-2003, the Chamber accepts that the prosecuting authorities and the national courts in the CAR would be unable to handle the case against this accused nationally.’<sup>37</sup>

It is remarkable that the Trial Chamber in *Bemba* concentrates its inquiry of the CAR’s ability to genuinely prosecute perpetrators of international crimes on the question whether it has the powers to do so in the specific case, rather than engaging in a more general assessment

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<sup>33</sup> *Prosecutor v. Katanga*, footnote 30, § 85.

<sup>34</sup> For an exhaustive analysis of the two pronged admissibility test, see D. Robinson, ‘The Mysterious Mysteriousness of Complementarity’, 21 *Criminal Law Forum* (2010), 67-102.

<sup>35</sup> *Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, Case No. ICC-01/05-01/08, 24 June 2010.

<sup>36</sup> *Prosecutor v. Bemba*, footnote 35, § 243.

<sup>37</sup> *Prosecutor v. Bemba*, footnote 35, § 246.

of the quality of the legal system. That seems a sensible way to proceed. After all, the pertinent issue is whether the state has the capacity to accomplish this particular trial.

In the Al-Senussi case the Pre Trial Chamber exhibited a similar approach.<sup>38</sup> The PTC emphasized that its analysis was limited to the determination of whether Libya was unwilling or unable genuinely to carry out its proceedings against Al-Senussi for the same case that was before the Court, adding that its performance had to be assessed in the light of the relevant law and proceedings applicable to domestic proceedings in Libya.<sup>39</sup> In other words: the criminal law system served as a normative framework, indicating both the limitations and possibilities of the proceedings against Al-Senussi. Defence counsel had pointed at the precarious security situation in Libya, including the authorities' defective control over detention facilities and the state's incapacity to provide sufficient protection for witnesses and victims involved in the case against Al-Senussi. Moreover, the Defence asserted that a local lawyer who could represent Al-Senussi in the domestic proceedings had not yet been appointed.<sup>40</sup>

Addressing the question whether these security concerns and deficiencies of the legal system prejudiced the proceedings against Al-Senussi, the PTC took a very practical approach. It observed that, in view of the fact that Mr Al-Senussi was already in custody of the Libyan authorities, these problems apparently had not affected the ability to obtain the accused.<sup>41</sup> And while the gathering of evidence might suffer from absence of effective protection programmes for witnesses and lack of control over detention facilities, barring access to potential witnesses, in the case at hand this was out of the question. The Chamber held that: '(...) at least some of the evidence and testimony that (*sic*) necessary to carry out the proceedings against Mr Al Senussi (...) has therefore already been collected, and there is no indication that collection of evidence and testimony has ceased or will cease because of unaddressed security concerns for witnesses against Mr Al-Senussi or due to the absence of governmental control over certain detention facilities.'<sup>42</sup>

In respect of the Defence's claim that Al-Senussi would lack legal representation, the Chamber observed that this would potentially become a fatal obstacle to the progress of the case, but contrasted Al-Senussi's situation to the one facing Gaddafi. Whereas Gaddafi was not under control of the Libyan authorities and attempts to secure legal representation had repeatedly failed, Al-Senussi was imprisoned in Tripoli, local lawyers of his tribe had indicated their willingness to represent him and the delay in their appointment had been

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<sup>38</sup> *Situation in Libya in the case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, Case No. ICC-01/11-01/11, 11 October 2013.

<sup>39</sup> *Prosecutor v. Al-Senussi*, footnote 38, §§ 202/203.

<sup>40</sup> *Prosecutor v. Al-Senussi*, footnote 38, § 230.

<sup>41</sup> *Prosecutor v. Al-Senussi*, footnote 38, § 294.

<sup>42</sup> *Prosecutor v. Al-Senussi*, footnote 38, § 298.

caused by security problems which could be overcome.<sup>43</sup> In conclusion, the PTC did not find Libya unable due to a total or substantial collapse or unavailability of its national system.

Gradually, the parameters of 'inability' are taking shape. Whereas the decision of the Appeals Chamber in Katanga appeared to cut off any further discussion on 'unwillingness' and 'inability' in the context of self-referrals, the Trial Chamber in Bemba detected some space to pay attention to these issues. Moreover, a further elucidation can be expected from Trial Chambers assessing the reverse situation, to wit, states positively asserting their right and power to conduct national proceedings and challenging the admissibility of the situation before the ICC, as was demonstrated in the Al-Senussi case. Two aspects in these recent developments are worth emphasizing. First of all, Trial Chambers tend to focus their attention on the capacity of the national state to proceed with the particular case under scrutiny and do not content themselves with a more global assessment of the political and legal infrastructure. This approach works both ways. On the one hand, the formal availability of an at first sight functioning court and police system does not imply that a state has the real power and resources to accomplish proceedings against a mighty adversary who is suspected of international crimes, witness the Bemba case. On the other hand, the security problems and lack of control, faced by a state in transition after civil armed conflict, will not trigger the verdict of 'inability' if they are of temporal nature and do not affect the state's capacity to obtain essential evidence and custody over the accused. Secondly, Trial Chambers show some understanding and sensitivity for the predicament of 'fragile' states, recovering from civil strife, when they pay attention to unstable security situations and insufficient territorial control as indicators of 'inability'. These factors may in particular hamper any efforts of criminal law enforcement against non-state actors challenging the state's power monopoly. Whether the ICC is capable of assisting states to overcome such precarious situations is the topic of the next section.

#### 4) The ICC and non-state 'terrorists'

If a case is held admissible, either as a consequence of the state's inaction, or after the ICC's finding that the state is unwilling or unable, the Court has to decide whether it will pursue the criminal proceedings itself.<sup>44</sup> In view of the fact that governments in particular encounter problems of law enforcement in respect of rebels, allegedly engaging in international crimes, the question arises whether the ICC has sufficient tools to prosecute and try non-state actors. As the proposed targets of ICC investigations have frequently been

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<sup>43</sup> *Prosecutor v. Al-Senussi*, footnote 38, §§ 307/ 308, referring to the Admissibility Decision, § 213 in *Gaddafi*.

<sup>44</sup> It is important to emphasize that a state, by refraining from taking action, can never *force* the Court to exercise jurisdiction, as this decision belongs to the exclusive competence of the Court itself, compare Article 13 of the Rome Statute which provides that the Court *may* exercise its jurisdiction. See also Akhavan, footnote 12, 112.

disqualified as terrorists<sup>45</sup>), it makes for a good start to investigate whether the ICC has jurisdiction over this crime.

The political enemies of the African governments that have referred the situation to the International Criminal Court are subject to its jurisdiction if they have committed one of the core crimes – genocide, war crimes, crimes against humanity. In the Statutes of both the International Criminal Tribunal for Rwanda (Article 4, sub d) and the Statute of the Special Court for Sierra Leone (Article 3, sub d) ‘acts of terrorism’ feature as a war crime. Moreover, in *Galić* the Appeals Chamber of the ICTY has concluded that terrorisation of the civilian population, committed during an armed conflict, has crystallized into a war crime under customary international law.<sup>46</sup> The Appeals Chamber confirmed the ruling of the Trial Chamber that terrorization of the civilian population constituted a serious infringement of a rule of international humanitarian law, to wit Article 51(2) of the First Additional Protocol that prohibits ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population.’<sup>47</sup> The Trial Chamber had already clarified that the relevant provisions in the Additional Protocols purported to extend the protection of civilians from terror, as Article 33 of Geneva Convention IV had only a limited scope, protecting a subset of civilians in the hands of the Occupied Power.<sup>48</sup> Consequently, Articles 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II are addressing all persons – belligerents, civilians and organized groups alike – imploring them to renounce from terrorism in the territory of the party to a conflict.<sup>49</sup> Whether the violation of these essential rules of international humanitarian law also entailed criminal responsibility could, in the opinion of the Appeals Chamber, be inferred from ‘state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals.’<sup>50</sup> After a comprehensive scrutiny of these instruments and decisions, the Appeals Chamber concluded that customary international law indeed imposed individual criminal liability for violations of the prohibition of terror against the civilian population.

These findings of the ICTY, important as they may be, are of no avail for the assessment of the jurisdiction *ratione materiae* of the International Court, because Article 8 of the Rome statute does not include terror as a war crime. Assaults by rebel armed groups on civilians

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<sup>45</sup> The New Times, June 30th 2012: African Union urges the UN Security Council to declare Joseph Kony’s Lord’s Resistance Army a terrorist organization’, <http://www.newtimes.co.rw/news/index.php?!=150398.&a=5542>. ‘U.S. labels Mali rebel group a terrorist organization’ (21 March 2013);

<http://www.usatoday.com/story/news/nation/2013/03/21/terror-group-mali/2005799>. (visited 22 July 2013)

<sup>46</sup> *Prosecutor v. Galić*, Judgement, IT-98-29-A, 30 November 2006, §§ 91 -98. The Trial Chamber, while recognizing that the ICTY had jurisdiction over terror as a war crime under Article 3 of its Statute, had still left the question of the customary international law nature of the crime of terror in abeyance, *Prosecutor v. Galić*. Judgment and Opinion. IT-98-29-T, 5 December 2003, § 138.

<sup>47</sup> Article 13(2) of Additional Protocol (II) reads exactly the same.

<sup>48</sup> *Prosecutor v. Galić*, Trial Chamber, § 120

<sup>49</sup> Compare also Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, 4 *Journal of International Criminal Justice* (2006), 944.

<sup>50</sup> *Prosecutor v. Galić*, Appeals Chamber, § 92.

could be classified as ‘intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities’ which qualifies as a war crime both in international armed conflicts (Article 8 (2), b, i) Rome Statute) and in non-international armed conflicts (Article 8 (2), e, i) Rome Statute. However, the conspicuous and aggravating mental element of special intent to intimidate the civilian population is lacking in these definitions. The closest offence to terrorism in the Rome Statute is the war crime of hostage-taking, which requires an intention ‘to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.’<sup>51</sup> This is strongly reminiscent of one of the *mens rea* elements of terrorism as a crime under customary international law, as defined by the Special Tribunal for Lebanon.<sup>52</sup>

Beyond the realm of armed conflict the prospects of the ICC exercising jurisdiction over terrorism are even worse. The Special Tribunal for Lebanon has acknowledged that terrorism is a crime under customary international law, but the Tribunal explicitly excluded the application of the norm during armed conflict.<sup>53</sup> These findings create the rather peculiar situation of two separate regimes - one of the war crime of terror during armed conflict, one of terrorism in peace time. Both are apparently crimes under customary international law, but none are subject to the jurisdiction of the International Criminal Court.<sup>54</sup> After all, during the conference preceding the drafting of the Rome Statute terrorism in peace time, as a separate crime under the jurisdiction of the ICC, was left out on purpose.<sup>55</sup> The only possibility of the ICC seizing jurisdiction over (an) act(s) of terrorism would be if those acts were to qualify as a crime against humanity. In the wake of 9/11, several distinguished lawyers and politicians defended this position, pointing at the magnitude and extreme gravity of the attack.<sup>56</sup> However, this was obviously an exceptional

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<sup>51</sup> Elements of Crimes – International Criminal Court, New York, 30 June 2000, Article 8 (2) c) (iii).

<sup>52</sup> Compare the *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1, Appeals Chamber, 16 February 2011, § 85, in which the Appeals Chamber of the Special Tribunal for Lebanon advanced an authoritative definition of terrorism under customary international law. See also EU Council Framework Decision 2002/475/JHA on Combatting Terrorism, Luxemburg, 13 June 2002, Official Journal of the European Commission, No. L 164, 22 June 2002, p. 3, article 1; s. 1 : Each member state shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- Seriously intimidating a population, or
- Unduly compelling a Government or international organisation to perform or abstain from performing any act; (...)

See also Johan D. Van den Vijver, ‘Prosecuting Terrorism in International Tribunals’, 24 *Emory International Law Review* (2010), 541.

<sup>53</sup> Decision on the Applicable Law, footnote 52, §§ 107/108.

<sup>54</sup> For a critical assessment of this ‘underinclusive approach’ of the Special Tribunal, see Matthew Gillett and Matthias Schuster, ‘Fast-track Justice; The Special tribunal for Lebanon Defines Terrorism’, 9 *Journal of International Criminal Justice* (2011), 1011-1014.

<sup>55</sup> For an excellent analysis of the negotiations, see Van den Vijver, footnote 52, 534-541.

<sup>56</sup> See Antonio Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’, *European Journal of International Law* (2001), Vol. 12 No. 5, 994-995.



case, in which the demanding requirements of the concept were occasionally met. In the Kenya decision, a Pre-Trial Chamber of the ICC explored the limits of crimes against humanity, shedding in particular some light on the requirements of organisations that would be capable of committing crimes against humanity.<sup>57</sup> Rejecting the position that only State-like organizations might qualify, the Majority advanced the capacity of groups to perform acts which infringe human rights as point of reference. Considerations that would help the Court to assess the issue included

‘(i) whether the group is under a responsible command, or has an established hierarchy; ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against the civilian population; iii) whether the group exercises control over part of the territory of a State; iv) whether the group has criminal activities against the civilian population as a primary purpose; v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; vi) whether the group is part of a larger group, which fulfils some or all of the aforementioned criteria.’<sup>58</sup>

This somewhat more lenient interpretation of one of the crucial elements of crimes against humanity opens the door for broadening the scope of jurisdiction in respect of rebel armed groups which engage in terrorist offences. However, in view of the still exacting requirements of the element of ‘organization’ and the prerequisite that the attack should be ‘widespread or systematic’, virtually excluding an incidental and improvised terrorist assault, the threshold is still rather high. Moreover, even this far from stunning decision has been sharply censured for its departing from customary international law.<sup>59</sup>

#### 5) Self-referrals and the state-centred paradigm of international criminal justice

The previous section has demonstrated that the denunciation of rebel groups as ‘terrorists’ does not add the ICC an inch forward in its endeavours to dispense fair and effective justice over non-state actors. On the contrary: it rather serves to rub it in that the ICC has no jurisdiction over terrorism, not in armed conflict, nor in peace time.

This jurisdictional gap is symptomatic for a wider and profound problem: the ICC is notoriously inapt to prosecute and try non-state actors. In case of armed conflict which is traditionally governed by the international humanitarian law regime of reciprocal rights and obligations of the belligerents, the Court has still sufficient means at its disposal to administer justice in respect of all parties to the conflict. However, the determination of the existence of an armed conflict as a condition for the application of international

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<sup>57</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, §§ 115-128.

<sup>58</sup> *Situation in the Republic of Kenya*, footnote 57, § 93.

<sup>59</sup> See the Dissenting Opinion of Judge Hans-Peter Kaul in the Kenya Decision and Claus Kress, ‘On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision’. 23 *Leiden Journal of International Law* (2010), 855-873.

humanitarian law requires findings of violence of considerable duration and intensity.<sup>60</sup> Moreover, the Trial Chamber of the ICTY in *Čelebići* has explicitly sought to distinguish armed conflict from cases of civil unrest or terrorist activities, emphasizing 'the protracted extent of the armed violence and the extent of organisation of the parties involved.'<sup>61</sup> Beyond the pale of armed conflict, the ICC has virtually no powers to move against non-state perpetrators of international crimes.

Now those scholars, like Schabas, who believe that international crimes are by definition committed by states, or that at least the ICC should focus exclusively on state-crimes, may find no difficulty with this predicament. They argue that the International Criminal Court owes its very existence to the fact that states forsake their primary duty to prosecute very serious crimes, precisely because they are involved in those crimes.<sup>62</sup> Schabas carries his opinion to the logical extreme that the ICC should not bother with 'non-state actors' and terrorism. After he has pointed out that 'international atrocities, and crimes against humanity in particular, were created so that such acts could be punished elsewhere, and therefore so that impunity could be addressed effectively', he seeks to contrast the official crooks with their anti-poles:

'We do not, by and large, have the same problems of impunity with respect to 'non-state actors'. Most states are both willing and able to prosecute the terrorist groups, rebels, mafias, motorcycle gangs, and serial killers who operate within their own borders. At best, international law is mainly of assistance here in the area of mutual legal assistance. For example, *there is little real utility in defining 'terrorism' as an international crime, because as a general rule the states where the crimes are committed are willing and able to prosecute.*'<sup>63</sup>

Schabas' suspicion of the 'self-referral' practice derives directly from this position. He postulates an antagonistic relationship between the Court and states under scrutiny, which is obviously caused by the former's intention to reveal the latter's darkest secrets. And next he presents any change in this relationship as clear evidence of the state's attempts to conceal its own sins and turn the attention of the Court to the crimes of its adversary. The gist of Schabas' discourse is of course that this foul reversal has never been contemplated by the drafters of the Rome Statute:

'Implicit in self-referral is the idea that the Court operates in a benign and cooperative relationship with States. Rather than focus on crimes of State, *which was surely the vision*

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<sup>60</sup> Compare *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No.: IT-94-1-AR72, § 70: 'An armed conflict exists whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'

<sup>61</sup> *Prosecutor v. Delalić and others*, Judgment, Case No. IT-96-21-T, 16 November 1998, § 184.

<sup>62</sup> William Schabas, *Unimaginable Atrocities; Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford: Oxford University Press 2011, 44: '(...) crime is internationalized primarily because of impunity before the national jurisdiction, that is, because national justice fail to prosecute. The reason why they fail is, as a general rule, because the government itself is complicit.'

<sup>63</sup> Schabas, footnote 62, 150. (emphasis added).

when the Court was being established, it has turned its attention to rebel groups. Not only is such a Court not particularly threatening to States, they will call upon its services in pursuit of their own political agendas, as the Uganda situation indicates.<sup>64</sup>

Although not all writers subscribe to the logically coherent but rather extreme conclusions of Schabas, the opinion that states are the principal villains and targets of international criminal justice is pretty pervasive.<sup>65</sup> I must admit that I have adhered to that point of view for a long time myself, but I increasingly tend to wonder whether this position is not obsolete. The commission of international crimes is no longer the prerogative of the state, if it has ever been.<sup>66</sup> The future may witness scores of atrocities which cannot be attributed to repressive and *strong* states, but which are rather the effect of the withering away of *weak* states. On the African continent in particular, social tissues crumble and nation-states, confronted with insurmountable problems of overpopulation, disease, climate change, environmental degradation, soaring crime rates and internecine warfare, fall apart.<sup>67</sup> The institutional voids are occupied by rebel groups, warlords and other power contenders, competing for scarce resources and causing lots of mischief to the population.

Now these are obviously highly complex socio-political phenomena and it would be preposterous to suggest that the International Criminal Court could provide structural solutions. But it may not be too far-fetched to assume that the Court may assist governments in agony by starting prosecutions in high-profile cases, for instance against members of Mali's Ansar al Dine. The pertinent question is whether we are prepared to take the claim of 'inability' seriously. It is my impression that this has not been done sufficiently. The harsh contention that self-referrals are contrary to the duty of the state to prosecute international crimes itself suggests that appeals on the Court's assistance are insincere and

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<sup>64</sup> Schabas, *Complementarity in Practice*, footnote 10, 33 (emphasis added).

<sup>65</sup> Compare M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2<sup>nd</sup> revised edition, The Hague: Kluwer Law International, 1999, 243-246; A. Cassese, *International Criminal Law*, 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2008, 11: 'Strikingly, most of the offences that [international criminal law] proscribes and for the perpetration of which it endeavours to punish the individuals that allegedly committed them, are also regarded by international law as wrongful acts *by states* to the extent that they are large-scale and systematic: they are international delinquencies entailing the 'aggravated responsibility' of the state on whose behalf the perpetrators may have acted. This holds true not only for genocide and crimes against humanity, but also for systematic torture, large-scale terrorism and massive war crimes.' For a slightly different, arguably more nuanced view, see Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2007, 5: '(...) the subject matter of international criminal law, as we use it, deals with the liability of individuals, irrespective of whether or not they are agents of a State.'

<sup>66</sup> For a similar point of view, see Gerhard Werle and Boris Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?' 10 *Journal of International Criminal Justice* (2012), 1167: 'Large-scale violence today is no longer perpetrated only by states or other territorially organized entities. Militias and paramilitary units, terrorist groups and criminal networks have also emerged as important actors in the international arena, along with political parties and private security firms. It has long been clear that this new array of non-state actors is challenging traditional state-centred international law.'

<sup>67</sup> Compare the disconcerting article by Robert D. Kaplan, 'The coming anarchy: how scarcity, crime, overpopulation, tribalism, and disease are rapidly destroying the social fabric of our planet', *The Atlantic Monthly*, February 1994, v273 n2 p 44 (21).

conceal darker motives. Nor am I particularly impressed by Schabas' rash conclusion that the ICC Prosecutor's reliance on the confirmation of the Central African Republic's *Cour de cassation* that the judicial system of the country is incapable of prosecution proves that the courts are functional.<sup>68</sup> After all, the mere existence of a court system does not imply that the judicial authorities are – legally and practically – capable of coping with large-scale atrocities.

In my view the choice between the options is rather clear. One may agree with Schabas that atrocities committed by non-state actors are none of the Court's business, as the ICC is historically and principally predestined to tackle states only. It would in my view imply an institutionalized bias and a callous disregard of current misery, but the choice is defensible in view of the ICC's limited resources and the consideration that structural violence should be remedied by other means. However, if one decides to take that road, it would be more realistic and straightforward to amend the Rome Statute and abolish the 'inability'-prong of the admissibility-test altogether. Alternatively, one might reason that the Court has an important part in ending impunity of the perpetrators of the most serious crimes, irrespective of whether they are committed by state organs or non-state actors. But in that case one must be prepared to go the whole way. This choice entails a serious and careful assessment of a self-referral, including an investigation into the remaining powers of the state to proceed with the situation itself and a preliminary estimation of who bears the greatest responsibility, in view of prosecutorial priorities. Moreover, it presupposes that the Court has the tools to move against non-state actors and it has been one of the objectives of this essay to prove that these are defective, at least outside the scope of armed conflicts.

#### 6) Some final reflections

This essay has sought to discuss the practice of self-referrals against the background of fragile states who are confronted by powerful contenders and are subsequently enmeshed in protracted civil strife. I have argued that self-referrals should not be rejected forthwith, but should be taken seriously, as the call for help may be sincere and may reflect the waning of state power, incapable of reigning in non-state actors that constitute new menaces to human rights. Of course the single self-referral does not relieve the ICC from its obligation to investigate the crimes committed by all parties to the conflict, but I consider this duty to be self-evident, because the self-referral itself entails a renunciation of the state's prerogative to monopolise the definition of criminal conduct. Nor do I suggest that governments are less guilty – they are often seriously to blame for letting things go out of hand –; I merely contend that self-referrals *may* indicate that non-state actors bear the greatest responsibility for the most serious crimes.

The insight that states have no longer the dubious privilege of being the only massive human rights violators is gradually gaining currency. As Akhavan has eloquently put it:

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<sup>68</sup> Schabas, *Complementarity in Practice*, footnote 10, 18.

‘An important aspect of “self-referrals” relates to the mutuality of interests between the Court and States Parties because of the unprecedented capacity of non-State actors to commit large-scale atrocities, combined with the manifest historical failure of inter-State human rights mechanisms’, adding that ‘In the contemporary world (...) an effective and realistic policy cannot disregard the unprecedented incidence of fragile or failed States besieged by powerful insurgencies of criminal organisations.’<sup>69</sup>

And the International Criminal Court has approved the practice of self-referrals, lending a sympathetic ear to the claims of states that they are unable to initiate criminal proceedings themselves, because they are simply no longer in ‘full control’. However, the paradigm of the state as major perpetrator of international crimes still prevails in legal scholarship. This probably accounts for the widespread suspicion against self-referrals, as I have tried to demonstrate in the previous section, but it has wider repercussions, because the state centred paradigm permeates the Rome Statute as well. And that is in my view precisely the reason why the International criminal court is ill-equipped to prosecute and try non-state actors.

Political scientists appear to confirm that the representation of the state as sole perpetrator of international crimes is outdated. In his ground-breaking study ‘The Better Angels of Our Nature’, Steven Pinker advances the consolidation of the state, committed to the rule of law, as an important – and perhaps even one of the main – factor(s) in the reduction of violence.<sup>70</sup> This book offers a powerful challenge to the conventional wisdom that attributes endemic violence mainly to strong repressive states, an opinion that is obviously fuelled by the 20<sup>th</sup> century’s experiences. Pinker draws the attention to the upsurge of so-called ‘anocracies’, ‘a form of rule that is neither fully democratic nor fully autocratic.’<sup>71</sup> These weak and unstable administrations try to survive by selling out ‘patronage jobs to their clansmen, who then extort bribes for police protection, favourable verdicts in court, or access to the endless permits needed to get anything done.’<sup>72</sup> These ‘arrangements’ breed violence, as Pinker observes, quoting, with approval, his colleague Mueller who in *The Remnants of War* notes ‘that most armed conflict in the world today no longer consists of campaigns for territory by professional armies. It consists instead of plunder, intimidation, revenge, and rape by gangs of unemployable youngmen serving as warlords or local politicians, much like the dregs rounded up by medieval barons for their private wars.’<sup>73</sup>

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<sup>69</sup> Payam Akhavan, footnote 12, 104.

<sup>70</sup> Steven Pinker, *The Better Angels of Our Nature; The Decline of Violence in History and Its Causes*, Viking Penguin: London 2011, especially Chapters 2 -7. .

<sup>71</sup> Pinker, footnote 70, 310.

<sup>72</sup> Ibidem.

<sup>73</sup> John Mueller, *The Remnants of War*, Cornell University Press: Ithaca, New York 2004, 1 sketches the scene as follows: ‘Many of these wars have been labelled “new war”, ethnic conflict”, or, most grandly, “clashes of civilizations.” But in fact, most, though not all, are more nearly opportunistic predation by packs, often remarkably small ones, of criminals bandits and thugs. They engage in armed conflict either as mercenaries hired by desperate governments or as independent or semi-independent warlord or brigand bands. The

Such analyses are revealing and should be taken to heart, both by legal scholars and international criminal tribunals. They may prompt a different view on the practice of self-referrals and may invite a reconsideration of substantive parts of the Rome Statute. Any discussions on the extension of the Court's jurisdiction with the crime of terrorism are beyond the scope of this article, but the message is that these debates should continue, if international criminal justice wishes to keep pace with political and social developments.

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damage perpetrated by these entrepreneurs of violence, who commonly apply ethnic, nationalist, civilizational, or religious rhetoric, can be extensive, particularly to the citizens who are their chief prey, but it is scarcely differentiable from crime.'