

“The Pre-Investigation Stage of the ICC – The Criteria for Situation Selection”

Supervisor: Prof. Dr. Kai Ambos

Author: Ignaz Stegmiller

The interplay between the PTC and the Prosecutor at the early stages of the proceedings constitutes the most striking example of the uniqueness of the ICC’s procedural law. One norm dealing with this interplay is article 53. This article entails three principal criteria: jurisdiction, admissibility, and the “interests of justice.” Article 53 (3) provides for checks and balances through a review power that is allocated to the PTC. However, the review mechanism has remained a dead letter in early practice of the ICC. For this reason, the vague criteria of “gravity” and “interests of justice” have been analyzed in detail.

This study consists of six parts. Part I provides for an introduction to the problem of pre-investigations. Part II gives an overview of the OTP’s structure. Since the aim of the research was an outline of the pre-investigation stage in its entirety, two most important questions had to be addressed: How is the selection process performed? According to which criteria are situations selected? Part III accordingly addresses the first question, while Part IV deals with the second question. Part V summarizes the most important results of this study and so does Part VI for the German speaking community.

In the third part, the complexity of pre-investigations is revealed. The three trigger mechanisms - State referrals, SC referrals, and the *proprio motu* mechanism – are illustrated. Self-referrals are critically analyzed and I hold the opinion that the Prosecutor should use his *proprio motu* power more frequently. Negative perceptions of the OTP’s independence must be rebutted. The *proprio motu* tool could have a great share in that, while the self-referral practice is associated with nepotism.

The fourth part focuses on article 53’s criteria. As regards admissibility, the two notions of complementarity and gravity can be distinguished. Bearing in mind the inactivity criterion, complementarity is basically analyzed in a threefold manner: (1) as a rule, situations and cases are admissible if the State remains inactive; (2) exceptions can be found in articles 17 (1) (a)–(c), 20 (3), which can lead to inadmissibility; (3) in turn, article 17 (2), (3) mentions “exceptions to the exceptions” if a State is unwilling or unable to genuinely carry out proceedings. The notion of gravity is very complex. I argue that two concepts of legal and

relative gravity should be clearly differentiated. Legal gravity must then be linked to article 53 (1) (b) and relative gravity is part of article 53 (1) (c)'s assessment of the "interest of justice." The "interests of justice" clause must be applied by the Prosecutor in a meaningful manner. In my view, only a broad application of the "interest of justice" gives the OTP the flexibility that it needs and, in the same vein, restricts its discretion to the application of said clause. The Prosecutor can then consider a variety of factors under the opening clause, yet within the procedural setting of article 53 (1) (c) and (2) (c), in other words, under the abuse control by the PTC pursuant to article 53 (3).