

‘Complementarity in Practice’: Some Uncomplimentary Thoughts

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IN THE SOLEMN UNDERTAKING HE MADE UPON ASSUMING OFFICE, on 16 June 2003, International Criminal Court Prosecutor Luis Moreno Ocampo said that ‘as a consequence of complementarity’, the number of cases before the Court should not be used as a measure of its efficiency. ‘On the contrary’, he insisted, ‘the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.’ Moreno Ocampo’s remarks were very much in the spirit of the preamble of the Rome Statute, which recalls that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’, and which ‘[e]mphasiz[es] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’.

‘As a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned’ he wrote later.¹ Moreno Ocampo insisted:

The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses.²

Moreover, ‘the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States’.³

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1 ‘Paper on some policy issues before the Office of the Prosecutor’, .p. 2.

2 *Ibid.*

3 *Ibid.*, p. 5.

The concept of complementarity, as formulated by the Prosecutor, seemed to imply an antagonistic relationship between national justice and the International Court. Initiatives by the Prosecutor would be a sign that the national system had failed to do its duty. This was certainly in line with the focus during the negotiations leading to adoption of the Rome Statute. Yet from the beginning of the work of the International Criminal Court, there have been initiatives aimed at attracting cases for prosecution rather than insisting that States fulfil their obligations. They have been unthreatening to the States concerned, because they have targeted rebel groups rather than pro-government militias and others associated with the regimes concerned.

Even before Moreno-Ocampo himself had taken office, the Office of the Prosecutor had commissioned an expert study on what it termed ‘complementarity in practice’. Several prominent authorities on international criminal law, both academics and practitioners, participated in preparing a report, which appeared later that year.⁴ Using terms like ‘partnership’, ‘dialogue with States’ and ‘burden-sharing’, it affirmed the desirability of a benign and constructive relationship between national justice systems and the International Criminal Court.. The expert report emphasised forms of cooperation and assistance. Amongst other things, it contemplated what was labelled ‘uncontested admissibility’. The document set out a rather novel construction of the scope of the duty of States to bring perpetrators to justice:

Article 17 specifies the consequences for admissibility where a state is investigating or prosecuting, but does not expressly oblige states to act. However, paragraph 6 of the preamble refers to the “duty” of States to exercise criminal jurisdiction. While the preamble does not as such create legal obligations, the provisions of the Statute may be interpreted in the light of the preamble. The duty to “exercise criminal jurisdiction” should be read in a manner consistent with the customary obligation *aut dedere aut judicare*, and is therefore satisfied by extradition and surrender, since those are criminal proceedings that result in prosecution. However, as noted above, the reference to a duty also reflects the spirit of the Statute that States are intended to carry the main burden of investigating and prosecuting. This is necessary for the effective operation of the ICC. In the types of situations described here, to decline to exercise jurisdiction in favour of prosecution before the ICC is a step taken to enhance the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes. This is distinguishable from a failure to prosecute out of apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity.⁵

The experts had developed a theory by which a State respected its obligation to prosecute by failing to prosecute.

4 ‘Informal expert paper: The principle of complementarity in practice’.

5 *Ibid.*, p. 19, fn. 24.

The Prosecutor himself began to endorse this philosophy, by which the Court's operations might result from cooperation rather than antipathy:

[T]here may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial.⁶

This new theoretical paradigm set the Prosecutor on a quest whose consequence would be to bring the first situations and cases before the Court.

Although there had never been even the slightest suggestion, in the drafting history of the *Statute*, that a State might refer a case 'against itself', some early documents emerging from the Office of the Prosecutor had begun to hint at such a novel construction. In his September 2003 Policy Paper, the Prosecutor wrote:

Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that that State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses.⁷

Along somewhat the same lines, an expert consultation held by the Office of the Prosecutor in late 2003 said that '[t]here may also be situations where the Office of the Prosecutor (OTP) and the State concerned agree that a consensual division of labour is in the best interests of justice; for example, where a conflict-torn State is unable to carry out effective proceedings against persons most responsible'.⁸ The expert paper did not expressly consider a State party referring a case 'against itself', but it did contemplate what it called 'uncontested admissibility': 'There may even be situations where the admissibility issue is further simplified, because the State in question is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution.'⁹

Two scenarios were considered. In the first, the experts considered the case of a suspect who had fled to a third state: 'All interested parties may agree that the ICC

⁶ 'Paper on some policy issues before the Office of the Prosecutor', p. 5.

⁷ 'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications', September 2003.

⁸ 'Informal expert paper: The principle of complementarity in practice', p. 3.

⁹ *Ibid.*, p. 18. Also: p. 20.

has developed superior evidence, witnesses and expertise relating to that situation, making the ICC the more effective forum. Where the third State has not investigated, there is simply no obstacle to admissibility under Article 17, and no need to label the State as “unwilling” or “unable” before it can co-operate with the Court by surrendering the suspect.’¹⁰ The second scenario envisaged a State ‘incapacitated by mass crimes’ or alternatively ‘groups bitterly divided by conflict’ who feared prosecution at each other’s hands but would ‘agree to leadership prosecution by a Court seen as neutral and impartial. In such cases, declining to exercise primary jurisdiction in order to facilitate international jurisdiction is not a sign of apathy or lack of commitment.’ The experts were evidently troubled by the suggestion that such ‘uncontested admissibility’ might imply that States were shirking their duty to prosecute, which is affirmed in the preamble to the Statute and which the experts recalled was also a requirement under customary international law. They wrote:

In the types of situations described here, to decline to exercise jurisdiction in favour of prosecution before the ICC is a step taken to enhance the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes. This is distinguishable from a failure to prosecute out of apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity.¹¹

This paper will examine the legality and strategic value of the ‘self-referrals, together with the related issue of whether prosecutions should focus on non-state or rebel groups. It will consider whether the Court should proceed, as it has done in the Lubanga case from the Democratic Republic of Congo, given that the accused person is also charged with serious international crimes (although not those with which he is charged in The Hague) in his own country’s justice system. Finally, it will discuss the long-underestimated second prong of the admissibility determination, whether a case is of ‘sufficient gravity to justify further action by the Court’.¹²

Soliciting ‘Self-Referrals’

Within months of taking office, the Prosecutor began to solicit what soon became known as ‘self-referrals’ by States parties to the Rome Statute. He approached certain States in the throes of internal conflict and encouraged them to

10 *Ibid.*, p. 19.

11 *Ibid.*, p. 19, fn. 24.

12 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, art. 17(1)(d).

refer ‘the situation’ to the Court, in accordance with Article 14 of the Rome Statute. ‘[W]hile *proprio motu* power is a critical aspect of the Office’s independence, the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court’, he said.¹³ Because the States concerned were parties to the Rome Statute, the Prosecutor could well have launched investigations using his *proprio motu* powers, in accordance with Article 15, but he chose to proceed otherwise. It has since been held, by Pre-Trial Chamber I, that self-referral ‘appears consistent with the ultimate purpose of the complementarity regime’.¹⁴

The Government of Uganda was the first. It referred the situation in northern Uganda to the International Criminal Court on 16 December 2003.¹⁵ The letter of referral apparently made reference to the ‘situation concerning the Lord’s Resistance Army in northern and western Uganda’.¹⁶ The press release issued by the Office of the Prosecutor at the time spoke of ‘locating and arresting the LRA leadership’, and made it quite clear that it was the rebel Lord’s Resistance Army rather than the official Ugandan People’s Defence Forces that were targeted,¹⁷ although the Prosecutor later responded to Uganda indicating his interpretation that ‘the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the [Lord’s Resistance Army]’.¹⁸ On 29 January 2004, the Prosecutor made a public announcement of the referral. The Uganda referral resulted in issuance of five arrest warrants later in 2004, directed against leaders of

¹³ Office of the Prosecutor, ‘Report on the Activities Performed During the First Three Years (June 2003-June 2006)’, 12 September 2006, p. 7.

¹⁴ *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para. 35.

¹⁵ For the background to the conflict, see: Mohamed 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 INT’L CRIM. L. REV. 5 (2005).

¹⁶ *Situation in Uganda* (ICC-02/04-01/05), 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, para. 3.

¹⁷ ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’, ICC-20040129-44-En, 29 January 2004.

¹⁸ *Situation in Uganda* (ICC-02/04-01/05), 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, para. 4. Note that he made no similar objection when the Security Council attempted to exclude certain individuals from the scope of the referral concerning Situation in Darfur: UN Doc. S/RES/1593 (2005), para. 6.

the Lord's Resistance Army.¹⁹ In authorising the arrest warrants, the Pre-Trial Chamber assigned to the case invoked a letter of 28 May 2004 from the Government of Uganda stating it had been 'unable to arrest ... persons who may bear the greatest responsibility' for the relevant crimes; that "the ICC is the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility' for those crimes; and that the Government of Uganda 'has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible'.²⁰ Uganda was acknowledging that it had been 'unable' to arrest the individuals concerned, and seemed to be conceding that it was 'unwilling' to prosecute them. None of the suspects has been arrested or surrendered, and there has been no real progress in prosecuting the case for two years. There have been no other arrest warrants applied for with respect to the situation in Uganda.

On 3 March 2004, the Democratic Republic of Congo followed Uganda's example and referred the situation in the Ituri region to the Court. In its letter of referral, the DRC said 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'. Like Uganda, Congo was in effect waiving admissibility although, unlike Uganda, without indicating whether this was because it was unwilling or because it was unable to proceed. In July 2003, the Prosecutor had indicated that the Ituri region of the DRC was his first priority. At the time, he had said it would be a likely target for the first exercise of his *proprio motu* powers, in accordance with article 15 of the *Rome Statute*.²¹ But this became superfluous with the 'self-referral' by the Democratic Republic of Congo. Early in 2006, the Prosecutor identified an individual, Thomas Lubanga, who was already in custody in the Congo awaiting prosecution before national courts on charges of genocide and crimes against humanity. The Prosecutor obtained an arrest warrant against Lubanga for charges concerning enlistment of child

¹⁹ *Situation in Uganda* (ICC-02/04-53), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005; *Situation in Uganda* (ICC-02/04-54), Warrant of Arrest for Vincent Otti, 8 July 2005; *Situation in Uganda* (ICC-02/04-55), Warrant of Arrest for Raska Lukwaya, 8 July 2005; *Situation in Uganda* (ICC-02/04-56), Warrant of Arrest for Okot Odhiambo, 8 July 2005; *Situation in Uganda* (ICC-02/04-57), Warrant of Arrest for Dominic Ongwen, 8 July 2005.

²⁰ *Situation in Uganda* (ICC-02/04-53), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, para. 37.

²¹ 'Communications Received by the Office of the Prosecutor of the ICC', pids.009.2003-EN, 16 July 2003, pp. 2-3.

soldiers, for which he was not charged in the Democratic Republic of Congo,²² and the suspect was quickly brought to The Hague. Given that France has excluded itself from the jurisdiction of the Court with respect to war crimes, pursuant to article 124, it was ironic that Lubanga's transfer was effected by a French military airplane. Charges against Lubanga were confirmed in January 2007,²³ and preparations are now underway for his trial. There is no other indication of prosecutions resulting from the referral by the Democratic Republic of Congo.

Finally, on 21 December 2004, the Prosecutor received a 'self-referral' from the Central African Republic, which he communicated to the President of the Court the following day. The referral was announced publicly on 7 January 2005. On 25 May 2007, some twenty-nine months after the referral, and not without prodding from both the government of the Central African Republic and the Pre-Trial Chamber assigned to the case,²⁴ the Prosecutor announced he had decided to initiate an investigation. He explained that the *Cour de Cassation*, the country's highest judicial body, had confirmed that the national justice system was unable to carry out the complex proceedings necessary to investigate and prosecute the alleged crimes, and that this was important in his own decision to proceed.²⁵

Since December 2004, there have been no further referrals pursuant to Article 14. Nor has there been any exercise of the Prosecutor's *proprio motu* powers, in accordance with Article 15. The only other situation under consideration by the Court is that of Darfur, Sudan, which was referred to the Court by the Security Council in March 2005, in accordance with Article 13.²⁶ Two arrest warrants with respect to the Situation in Darfur were issued by Pre-Trial Chamber I on 27 April 2007.²⁷

²² *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006.

²³ *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06), Décision sur la confirmation des charges, 29 January 2007

²⁴ *Situation in the Central African Republic* (ICC-01/05-1), Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006.

²⁵ 'Prosecutor opens investigation in the Central African Republic', ICC-OTP-PR-20070522-220_EN, 22 May 2007.

²⁶ UN Doc. S/RES/1593 (2005).

²⁷ *Prosecutor v. Harun* (Case No. ICC-02/05-01/07), Warrant of Arrest for Ahmad Harun, 27 April 2007; *Prosecutor v. Kushayb* (Case No. ICC-02/05-01/07), Warrant of Arrest for Ali Kushayb, 27 April 2007.

Is Self-referral Authorised by the Rome Statute?

‘Self-referral’ flows from a creative interpretation of Article 14 of the Rome Statute that was not seriously contemplated by the 1998 Diplomatic Conference and during the prior negotiations. The 1994 draft statute submitted to the General Assembly by the International Law Commission included the concept of ‘state-party referral’, but described the source of the referral as a ‘complainant state’.²⁸ A State party could lodge a ‘complaint’.²⁹ The court was authorized to exercise its jurisdiction with respect to genocide if a State party to the statute that was also a contracting party to the 1948 *Genocide Convention* took the initiative to ‘lodge a complaint’ that genocide had been committed.³⁰ In the case of aggression, war crimes and crimes against humanity, the court could proceed if a ‘complaint’ was lodged by the ‘custodial state’ (*i.e.*, the state which had ‘custody of the suspect with respect to the crime’ and by ‘the State on the territory of which the act or omission in question occurred’).³¹ The language makes it clear enough that what was contemplated was a ‘complainant State’ ‘lodg[ing] a complaint’ against *another* state.

The reference to ‘complaint’ continued through the early drafts, and was still being used in the so-called ‘Zutphen draft’³² and in the final draft adopted by the Preparatory Committee that formed the basis of negotiations at the Rome Conference.³³ The nomenclature, though not the substance, was changed in a ‘discussion paper’ issued by the Bureau of the Rome Conference on 6 July 1998.³⁴ The title ‘Complaint’ was changed to ‘Referral of a situation by a State’, and the triggering of the jurisdiction of the Court by either the Security Council or a State party was described as ‘referral’. Probably, the change in terminology was related to the fact that a complainant state was being prevented from submitting a specific case

28 ‘Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July 1994’, Chapter II, UN Doc. A/49/10, para. 25(5).

29 *Ibid.*

30 *Ibid.*, para. 21(1)(a).

31 *Ibid.*, para. 21(1)(b).

32 ‘Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands’, UN Doc. A/AC.249/1998/L.13, art. 45[25], p. 85.

33 ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’, ‘Draft Statute for the International Criminal Court’, UN Doc. A/CONF.183/2/Add.1, art. 11, pp. 35-36.

34 ‘Discussion Paper, Bureau, Part 2. Jurisdiction, Admissibility and Applicable Law’, UN Doc. A/CONF.183/C.1/L.53, p. 16.

or crime to the Court. It could only refer a ‘situation’. According to Philippe Kirsch, who chaired the Bureau at the Conference, ‘the general approach of referring “situations” rather than “cases” seems a prudent one. This helps reduce the arguably unseemly prospect of States Parties referring complaints against specific individuals, which might create a perception of using the Court to “settle scores”.’³⁵

There is not a trace in the *travaux préparatoires* or in the various commentaries by participants in the drafting process to suggest that a state referring a case *against itself* was ever contemplated by this change in terminology. When the chair of the Committee of the whole, Philippe Kirsch, presented the Bureau draft for discussion, he did not draw the attention of delegates to the change from ‘complaint’ to ‘referral’, as he would have been expected to do were some important change being implied.³⁶ When the coordinator responsible for the Bureau draft, Erkki Kourula, introduced the debate, he said that ‘[a]rticle 11, entitled “Referral of a situation by a State”, was a technical issue’,³⁷ thereby confirming that a substantive modification was not intended. The change in terminology did not provoke a single comment, further confirming that the delegates to the Rome Conference considered ‘referral’ to be a synonym for ‘complaint’.³⁸ The absence of any reference to self-referral in the main commentaries on the Rome Statute, which were generally authored by participants in the negotiations, further bolsters this observation.³⁹ In other words, the drafting history of article 14 of the *Rome Statute* leaves little doubt that what was considered was a ‘complaint’ by a State party against another State.

It has been suggested that something akin to ‘self-referral’ was actually considered during the drafting of the Rome Statute in the concept of ‘waiver’. There is a reference in the report of the *ad hoc* committee, which met during 1995, to a scenario whereby a State might ‘voluntarily decide to relinquish its jurisdiction in

35 Philippe Kirsch & Darryl Robinson, *Referral by States Parties*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY* 623 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones, eds., 2002).

36 UN Doc. A/CONF.183/C.1/SR.25, para. 3.

37 UN Doc. A/CONF.183/C.1/SR.29, para. 6..

38 UN Doc. A/CONF.183/C.1/SR.29, paras. 11-187; UN Doc. A/CONF.183/C.1/SR.30, paras. 7-133; UN Doc. A/CONF.183/C.1/SR.31, paras. 1-44.

39 Philippe Kirsch & Darryl Robinson, *Referral by States Parties*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY* 619-625 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones, eds., 2002); Antonio Archesi, *Referral of a situation by a State Party*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OBSERVERS’ NOTES, ARTICLE BY ARTICLE* 353-358 (Otto Triffterer, ed., 1999).

favour of the ICC'.⁴⁰ The Report notes that others said such an approach was inconsistent with the principle of complementarity, because the Court 'should in no way undermine the effectiveness of national justice systems and should only be resorted to in exceptional cases'.⁴¹ That the discussion continued until the Rome Conference itself can be seen in the official records. For example, the draft provision on admissibility in the draft statute submitted by the Preparatory Committee contained a footnote: 'The present text of article 15 is without prejudice to the question of whether complementarity-related admissibility requirements of this article may be waived by the State or States concerned.'⁴² No concrete proposal appears to have been presented in order to reflect the issue, however. What the record shows, then, is that the issue of waiver was present but that it was never of any significance in the drafting history. The final text of the relevant provisions, authorising the Court to declare a case inadmissible even when the parties do not raise the matter, confirms that waiver is not contemplated by the Statute.⁴³ The argument that the possibility of waiver in some way reinforces the concept of self-referral is therefore not a particularly strong one.

But even if waiver was a live issue, it should not be completely confounded with 'self-referral', of which there is no evidence in the *travaux préparatoires*. Referral is described in the Rome Statute as a 'precondition for the exercise of jurisdiction' and, more colloquially, as one of the instrument's three 'trigger mechanisms'. It defines how cases begin their journey to the docket of the Court. This is not the same thing as a State deciding not to argue whether or not it is willing and able to investigate or prosecute. A State may waive the debate about admissibility no matter how a case is triggered. In any event, evidence of discussion by the drafters about the possibility of waiver cannot support the argument that 'self-referral' is implicit, because the Rome Statute unequivocally rejects the idea that a State can waive admissibility. Article 19(1) of the Rome Statute states that '[t]he Court may, on its own motion, determine the admissibility of a case in accordance

40 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, para. 47.

41 *Ibid.*

42 UN Doc. A/CONF.183/2, p. 27, fn. 43.

43 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, art. 19(1).

with article 17'. Thus, the Court can declare a case inadmissible even if the State itself remains silent, and this means there can be no 'waiver' of admissibility.

Certainly, there are examples of States triggering international justice with respect to crimes committed on their territory. The United Nations criminal tribunals for Rwanda, Sierra Leone and Lebanon have all been created as a result of initiatives from the States on whose territory the crimes were perpetrated, and before whose courts the offenders would normally be prosecuted.⁴⁴ Although Rwanda ultimately quarrelled about several issues in the configuration that the Security Council gave to the International Criminal Tribunal for Rwanda, it did not question the concept as a whole. It seems highly doubtful that the Tribunal would have been established in the absence of Rwandan support. As for the Special Court for Sierra Leone, it is a creature of treaty; the government's consent is a *sine qua non* of its existence. The Special Tribunal for Lebanon is being created at the request of the Prime Minister, but over the objections of a significant segment of the political forces in the country, including the President. Although it was hoped it would be established by treaty, similar to the case in Sierra Leone, political obstacles forced the Security Council to proceed by resolution, acting pursuant to chapter VII of the Charter of the United Nations.⁴⁵

While these institutions show that international justice is not necessarily incompatible with a consensual relationship between the State of territorial jurisdiction and the international body, they do not directly answer the argument that such a paradigm was not what was contemplated when the Rome Statute was drafted. By ratifying or acceding to the Rome Statute, States do much the same thing that Rwanda, Sierra Leone and Lebanon did in consenting to the creation of the relevant institutions. Rwanda, Sierra Leone and Lebanon have no say in what cases actually come before the Court. But if the doctrine of 'self-referral' is accepted, it seems to indicate that States parties to the Rome Statute have done more than simply consent to the exercise of jurisdiction, and that they have reserved the right to put specific situations before the Court for prosecution.

44 'Letter Dated 28 September 1994 From the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council', UN Doc. S/1994/1115; 'Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council', UN Doc. S/2000/786, annex; 'Letter Dated 13 December 2005 From the Prime Minister of Lebanon to the Secretary-General of the United Nations', UN Doc. S/2005/783, annex.

45 UN Doc. S/RES/1757 (2007).

Obviously, ‘self-referral’ and waiver of admissibility are not entirely unrelated notions. In both cases, the State agrees to cooperate with international justice, rather than to resist it. But when a State is actively engaged in initiation of the process, there is potential for manipulation. In effect, the State quite predictably uses the international institution to pursue its enemies. When the Special Court for Sierra Leone was being established, President Kabba wrote the United Nations asking that it unleash international justice against the Revolutionary United Front, just as President Museveni did against the Lord’s Resistance Army when referring the ‘situation in Uganda’ to the International Criminal Court. Likewise, Rwanda intended for the *ad hoc* Tribunal to be aimed at the *génocidaires* of the previous regime, and not at atrocities committed by those now in power in the country. And the Lebanese government expects the new Tribunal to attack its adversaries, in particular those aligned with Syria and perhaps Syria itself.

The argument that ‘self-referral’ is compatible with Article 14 may not be supported by the drafting history of the Rome Statute. But legal instruments take on a life of their own, and creative interpretation of their provisions is usually desirable. Certainly, ‘self-referral’ is not explicitly prohibited by the text. Pre-Trial Chamber I, in *Lubanga*, said that in the Democratic Republic of Congo situation, self-referral ‘appears consistent with the ultimate purpose of the complementarity regime’.⁴⁶ This is a somewhat different argument, of course, in that it attempts to harness ‘self-referral’ to the ‘ultimate purpose of the complementarity regime’ rather than what was intended by the Rome Conference. The Pre-Trial Chamber provided little to indicate what this ‘ultimate purpose’ actually was, aside from the rather simplistic observation that ‘the Court by no means replaces national jurisdictions, but is complementary to them’.⁴⁷

The least one can say is that Pre-Trial Chamber I has not provided a very convincing explanation for the relationship between ‘self-referral’ and the ‘ultimate purpose’ of complementarity. In fact, from a purely logical standpoint, the opposite seems just as plausible, indeed perhaps more so. A State that refers a case to the International Criminal Court is indirectly answering one of the prongs of the

⁴⁶ *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para. 35.

⁴⁷ *Ibid.*, citing the leading insider account on the drafting of article 17: John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 41-78 (Roy Lee, ed., 1999).

complementarity text, namely, that it is ‘willing’ to prosecute, at least in the sense that it is willing to see the alleged perpetrators brought to justice. It may, on the other hand, find itself ‘unable’ to proceed because of a breakdown in its own justice system or possibly a serious legal impediment, such as an amnesty. In the two cases of State-encouraged international tribunals, those of Sierra Leone and Rwanda, the initiatives are explained by inability, not unwillingness. Sierra Leone was legally bound by an amnesty in the peace agreement; Rwanda’s courts following the genocide were in a state of total disarray. Neither country was in a situation where it could undertake the prosecutions but chose to do so. The materials relating to the Special Tribunal for Lebanon provide little in the way of explanation of the need of an international tribunal, aside from a perfunctory reference in a report from the Secretary General speaking of a ‘shared assumption that a purely national tribunal would not be able to effectively fulfil the task of trying those accused of the crime’.⁴⁸

Self-referral: Expedient or Trap?

With respect to the Uganda and Democratic Republic of Congo situations resulting from ‘self-referral’ now pending before the International Criminal Court, the issue is actually unwillingness, not inability. Uganda, in particular, has simply preferred to hand the prosecutions over to the Court. Its referral did not allege that the national courts were unable to prosecute. Everything would indicate, in fact, that Uganda has one of Africa’s better criminal justice systems, and that its courts are more than able to prosecute the leaders of the Lord’s Resistance Army.⁴⁹ With respect to the Democratic Republic of Congo, it may well have been unable to undertake prosecution when the self-referral was submitted to the Court, in early 2004. But in the *Lubanga* decision, the above-cited sentence of the Pre-Trial Chamber invoking the compatibility of complementarity with the self-referral is accompanied by a another sentence explaining that this was the case *at the time* of the self-referral and that it was a result of inability, not unwillingness. The Pre-Trial Chamber went on to note that the situation in the national justice system had evolved

⁴⁸ ‘Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005)’, S/2006/176, para. 5.

⁴⁹ In June 2005, for example, the Constitutional Court of Uganda declared the country’s capital punishment statute to be unconstitutional: *Susan Kigula and 416 Others v. Attorney General*, Constitutional Petition No. 6 of 2003, 5 June 2005.

in the nearly two years since the self-referral, and that Congolese courts might well now be in a position to undertake prosecution.⁵⁰

As for Central African Republic, perhaps less is known about this situation, and there has not yet been any meaningful judicial activity of the Court. It is curious, to say the least, that the prosecutor would rely upon the decision of the *Cour de cassation* as authority for the inability of the country's judicial system to proceed with the prosecutions. After all, if the *Cour de cassation* is a source of reliable judicial determination, doesn't that tend to prove the opposite, that is, that the courts of the country are functional?

Uganda has offered the Prosecutor what has appeared to be a fairly simple prosecution on which to cut his teeth. He could be relatively sure of the cooperation of the Ugandan authorities in apprehending those who might be charged, something that was not so obvious in other possible targets of the Office of the Prosecutor, such as Colombia. That is because those he was investigating were the enemies of the Ugandan state. President Museveni was, in effect, asking the Prosecutor to help him investigate rebels within the country. After the referral, the Prosecutor promptly reminded the Ugandan government that the referral could not be focussed in such a manner, and that he could not limit his investigation to only one side of the conflict. But in practice, this is what he has done. It is completely consistent with the self-referral strategy of the Office of the Prosecutor, of course, because the moment he seeks charges against pro-government forces, cooperation from the Government side is likely to become less obvious. Moreover, it would seem unlikely that any other States would then follow the Ugandan example, in the hopes that the Prosecutor's attention might be aimed at their own rebels. In other words, if the Prosecutor hopes the self-referral approach to continue to interest States, it seems he must reassure them that in practice he is interested in the rebels, and not the government forces.

When the Ugandan arrest warrants were made public, the Prosecutor was sharply criticised by international non-governmental organisations for being one-sided.⁵¹ He responded by attempting to explain that the rebel crimes were more serious than any committed by pro-government forces. Along with complementarity,

⁵⁰ *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06-8), Prosecutor's Application for Warrant of Arrest, para. 35.

⁵¹ 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; Human Rights Watch, 'ICC Takes Decisive Step for Justice in Uganda', 14 October 2005.

the issue of ‘gravity’ is the other prong in the admissibility determination. We shall return to the debate about gravity later in this essay.

The motivation of the Government of Uganda in making the ‘self-referral’ was obvious enough. The Court amounted to a further source of pressure that Uganda could bring to bear on rebels whom it had been impossible to defeat on the battlefield. President Museveni must have calculated that the threat of prosecution might compel the leaders of the Lord’s Resistance Army to negotiate a peaceful settlement to the two-decade long war. He is a shrewd and skilled operator, and on this point he judged correctly. It is widely acknowledged that the threat of prosecution by the International Criminal Court has helped to bring the Lord’s Resistance Army to the negotiating table. On a visit to the Court, the Ugandan Minister for Security, Amama Mbabazi, noted that the issuance of warrants had contributed to driving the Lord’s Resistance Army leaders to the negotiating table. In September 2006, Jan Egelund, the United Nations Under-Secretary-General for Humanitarian Affairs and Emergency Relief, made similar observations in a briefing to the Security Council.⁵² Speaking to the Assembly of States Parties in November 2006, Prosecutor Ocampo said:

The Court’s intervention has galvanized the activities of the states concerned. [...] Thanks to the unity of purpose of these states, the LRA has been forced to flee its safe haven in southern Sudan and has moved its headquarters to the DRC border. As a consequence, crimes allegedly committed by the LRA in Northern Uganda have drastically decreased. People are leaving the camps for displaced persons and the night commuter shelters which protected tens of thousands of children are now in the process of closing. The loss of their safe haven led the LRA commanders to engage in negotiations, resulting in a cessation of hostilities agreement in August 2006.⁵³

In other words, issuance of the arrest warrants had contributed to conflict resolution in Northern Uganda. Hostilities came to an end in August 2006. In May 2006, new efforts to mediate an end to the civil war gained momentum.

The situation was somewhat reminiscent of the situation faced by Richard Goldstone, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, in July 1995. While the war in Bosnia and Herzegovina was still raging, he obtained indictments against Serb leaders Radovan Karadžić and Ratko Mladić. Goldstone was later chastised by United Nations Secretary-General Boutros Boutros-Ghali for failing to consult at a political level. He replied that as a prosecutor it was

⁵² UN Doc. S/PV.5525, p. 4.

⁵³ ‘Opening Remarks, Luis Moreno Ocampo, Fifth Session of the Assembly of States Parties’, 23 November 2006.

not his job to take political factors into account.⁵⁴ Nevertheless, the charges helped to isolate Karadžić and Mladić, and may well have contributed to the successful outcome of peace negotiations at Dayton later that same year.

But if the charges against the Lord's Resistance Army might have helped to provoke peace negotiations, they also soon proved to be a potential obstacle to their successful completion.⁵⁵ Jan Egelund reported to the Security Council that in meetings with internally displaced persons, civil society and the parties themselves, the 'International Criminal Court indictments were the number one subject of discussion [...] All expressed a strong concern that if the indictments were not lifted, they could threaten the progress in these most promising talks ever for northern Uganda.'⁵⁶ The rebel leaders quite predictably insisted that the arrest warrants be withdrawn as a condition for the peace settlement. President Yoveri Museveni of Uganda, who had triggered the prosecutions two years earlier when he referred the situation in northern Uganda to the Court, asked the Prosecutor to withdraw the warrants. He promised those who had been charged that they would have immunity from arrest in Uganda.⁵⁷ Richard Goldstone remarked:

It would be fatally damaging to the credibility of the international court if Museveni was allowed to get away with granting amnesty. I just don't accept the Museveni has the right to use the International Criminal Court like this.⁵⁸

But what if failure to withdraw the charges eventually provoked a return to hostilities? In other words, instead of contributing to peace the International Criminal Court might actually prolong a conflict, with the result that hundreds or thousands of innocent victims could suffer. This was certainly not the intention of those who set up the institution.

54 RICHARD J. GOLDSTONE, FOR HUMANITY. REFLECTIONS OF A WAR CRIMES INVESTIGATOR 102-103 (2000).

55 This is discussed by Kasaija Phillip Apuuli, *The International Criminal Court (ICC) and the Lord's Resistance Army(LRA) Insurgency in Northern Uganda*, 15 CRIM. L. FORUM 408 (2005); Kasaija Phillip Apuuli, *The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda*, 4 J. INT'L CRIM. JUSTICE 179 (2006); Manisuli Ssenyonjo, *Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, 10 J. CONFLICT & SECURITY L. 405 (2005).

56 UN Doc. S/PV.5525, p. 4.

57 Chris McGreal, *African Search for Peace Throws Court into Crisis*, THE GUARDIAN, 9 January 2007.

58 *Ibid.*

If international justice is brought to bear on situations like that of northern Uganda because it can help to bring peace when there is conflict, then it should probably be prepared to stand down when criminal prosecution becomes an obstacle to peace. To the extent that the leaders of the Lord's Resistance Army came to the negotiating table *because* of the threat of prosecution, then their withdrawal would seem to be necessary in order to complete the process. Otherwise, the threat of criminal prosecution only does half the job, and the boast that the Court has helped to promote peace is ultimately a hollow one. On this point, however, there is great resistance, not from the Ugandan authorities but rather from the Prosecutor himself and the various players in the international criminal justice community who surround him. They argue that to attempt to withdraw the charges would betray the search for justice and discredit the Court.

This position seems too extreme. Those who argue that prosecution should not be sacrificed in a peace bargain should be prepared to answer for the alternative, which can never be ruled out, namely a return to conflict *because* of the inability of negotiators to be able to promise the rebel leaders that if they lay down their arms they will not be prosecuted. Are those who argue that the arrest warrants cannot be dropped as a matter of principle truly prepared for a resumption of hostilities, with all of the terrible human suffering that may involve?

The peace vs. justice conundrum was debated at length during the Rome Conference, but it was never resolved. This was because there was no consensus on the subject. South Africa's delegation, for example, regularly reminded the drafters of their country's national approach to post-conflict justice, which was predicated upon a renunciation of criminal prosecution for the crime against humanity of apartheid, and an amnesty mechanism in the event of specific atrocities where the offender acknowledged the crimes committed. In the Uganda situation, the problem has come back to haunt the Court, and show 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, in the context of a conflict, it is doing so with a result in mind. And that result may well involve, as it does in Uganda, withdrawing the threat of prosecution in exchange for something. Put another way, over the medium to long term, self-referral will only work if it can be followed by self-deferral. But there is great political opposition within the Court

and among its strongest supporters to any suggestion that justice might be sacrificed at the altar of peace.

Encouraging States to Assume their Obligations

The preamble of the Rome Statute recalls that ‘effective prosecution must be ensured by taking measures at the national level’ and that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’. Pronouncements of the Prosecutor indicating his commitment to these principles have already been cited earlier in this essay. In practice, however, the Prosecutor’s actions seem inconsistent with his profession of faith in the importance of national justice.

In the situation in northern Uganda, for example, it has never been suggested that the Ugandan courts are unable to conduct prosecutions. Indeed, Uganda’s courts are among the best in sub-Saharan Africa. Nothing in the Court’s discussion of the five arrest warrants suggests that the matter has arisen. Rather, the Prosecutor and the Government of Uganda have simply decided it would be more convenient to hold trials in The Hague before the International Criminal Court. This is a case where the State that would normally exercise jurisdiction has indeed waived any contestation based upon complementarity, and where the Court has not, at least so far, shown any inclination to raise the matter of its own motion.

It seems preposterous to argue that Uganda is ‘unable’ to proceed against the Lord’s Resistance Army leaders. Perhaps it might be said it is ‘unable’ in the sense that it cannot apprehend the accused, something that it alleged in its ‘Letter on Jurisdiction’ of 28 May 2004, but the same can be said of the International Criminal Court. As for whether Uganda is ‘unwilling’, article 17(2) of the Rome Statute provides a formula for assessing this:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

None of these factors seems applicable to Uganda at present. All that Uganda has said is that it ‘has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible’. The whole idea of ‘unwillingness’ was built around the concept of a State that did not want to see the offender brought to justice, and not the State that merely chose, in agreement with the Prosecutor of the International Criminal Court, to defer prosecution.

The situation in the Democratic Republic of Congo is closer to the classic paradigm of a state whose failing justice system renders it ‘unable’ to prosecute. Here, too, article 17 provides guidelines for determining inability:

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

In the letter of referral to the Court, the Government of the Democratic Republic of Congo stated that ‘...les autorités compétences 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’.⁵⁹ In applying for the arrest warrant, the Office of the Prosecutor told the Court that since the referral, ‘the Government of the DRC, being well aware of the investigations of the OTP, has not informed the OTP otherwise’.⁶⁰ But the Pre-Trial Chamber did not consider that these elements were adequate to dispose of the ‘inability’ question. In issuing the arrest warrant, it wrote:

In the Chamber’s view, when the President of the DRC sent the letter of referral to the Office of the Prosecutor on 3 March 2004, 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... However, for the purpose of the admissibility analysis of the case against Mr Thomas Lubanga Dyilo, the Chamber observes that since March 2004 the DRC national justice 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 Mr 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

59 ‘Letter of Joseph Kabila to the Prosecutor’, 3 March 2004.

60 *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06-8), Prosecutor’s Application for Warrant of Arrest, para. 186.

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.⁶¹

In other words, Pre-Trial Chamber I considered that the Congolese justice system was not suffering from ‘a total or substantial collapse or unavailability of its national judicial system’, to borrow the words of article 17.

The fact that Lubanga was in custody in Congo at the time the Prosecutor took an interest in him might suggest that the national justice system was actual working, and that the State was meeting its international obligations in terms of addressing impunity. There is, in fact, a passing reference to this when the Pre-Trial Chamber cited the Prosecutor’s submission: Lubanga was being prosecuted in Congo for genocide and crimes against humanity! But the Democratic Republic of Congo had another problem, according to the Pre-Trial Chamber. Proceedings in Congo were not based upon the policy or practice of enlisting, conscripting and active use of children under the age of fifteen in armed conflict.⁶² As a result, wrote the Pre-Trial Chamber, ‘the DRC cannot be considered to be acting in relation to the specific case before the Court...’⁶³ And therefore it held that the complementarity test was satisfied.

Commenting on the Lubanga arrest warrant in a press statement, Prosecutor Moreno Ocampo said ‘[f]orcing children to be killers jeopardises the future of mankind’.⁶⁴ But arguably, the justice system of the Democratic Republic of Congo was doing a *better* job than the Court itself, because it was addressing crimes of greater gravity. Certainly genocide and crimes against humanity might also be said to ‘jeopardise the future of mankind’. There is no attempt within the Statute itself to rank crimes based on gravity, and it might be claimed, as judges have done at the International Criminal Tribunal for the former Yugoslavia,⁶⁵ that there is no objective distinction between war crimes, crimes against humanity and genocide in terms of seriousness. They don’t always act as if they believe this however. It is common practice, in plea bargaining, to withdraw charges of genocide but maintain those of

61 *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, paras. 35-36.

62 *Ibid.* para. 38.

63 *Ibid.*, para. 39.

64 ‘Statement by Luis Moreno-Ocampo, Press Conference in relation with the surrender to the Court of Mr. Thomas Lubanga Dyilo’, 18 March 2006.

65 *Prosecutor v. Furundžija* (Case No. IT-95-17/1-A), Judgment, 21 July 2000, para. 247; *Prosecutor v. Tadić* (Case No. IT-94-1-Abis), Judgment in Sentencing Appeals, 26 January 2000, para. 69

crimes against humanity, and it seems absurd that this would take place if the two crimes were objectively of equal gravity. With respect to the Rome Statute, it contains certain indicators suggesting a hierarchy in crimes. For example, article 124 allows States to opt out of jurisdiction over war crimes, but not crimes against humanity and genocide. Similarly, the Statute is more tolerant of the defences of superior orders⁶⁶ and defence of property⁶⁷ when only war crimes are involved. These are small signs in and of themselves, but they tend to confirm that there is indeed a hierarchy of crimes, and that war crimes follow genocide and crimes against humanity.

It would appear, then, that the International Criminal Court has removed Thomas Lubanga from jeopardy before the criminal tribunals of his own country for crimes that are more serious than those for which he is being prosecuted in The Hague. To be fair to the Prosecutor, his position was that the courts of the Democratic Republic of Congo were not prosecuting adequately. Although it rejected the Prosecutor's submission on this point, Pre-Trial Chamber I 'note[d] the Prosecution's allegations that the DRC authorities are not pursuing the investigations against Mr. Thomas Lubanga Dyilo'.⁶⁸ But perhaps the Prosecutor would agree that if the Congolese justice system is working, then it would be better for Lubanga to stand trial at home for genocide and crimes against humanity than to stand trial in The Hague for recruitment of child soldiers. As for Lubanga himself, he must be delighted to find himself in The Hague facing prosecution for relatively less important offences concerning child soldiers rather than genocide and crimes against humanity.

Thus, in practice, neither the Uganda nor the Democratic Republic of Congo situations have been addressed by the Court in a manner aimed at best encouraging the national justice system to assume its duties under international law. Of the three situations pending, it is the Darfur referral by the Security Council that best demonstrates how the Court may effectively encourage national justice initiatives. In December 2006, the Prosecutor told the Security Council that he had requested an update from the government of Sudan with respect to its national proceedings, and that he was told that fourteen individuals had been arrested for violations of

⁶⁶ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, art. 33.

⁶⁷ *Ibid.*, art. 31(1)(c).

⁶⁸ *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 36, fn. 32.

international humanitarian law and human rights abuses.⁶⁹ All of his bi-annual reports to the Council have included evidence that the threat of prosecution by the Court had prompted judicial initiatives with Sudan.⁷⁰ When the Prosecutor made his bi-annual report to the Security Council, in June 2006, Sudan took the floor:

Our police and prosecutors are prosecuting the perpetrators of those crimes. The Prosecutor learned about a great many cases that have been decided and about charges and allegations that have been followed up since a special prosecutor was appointed to look into those cases in Darfur. Special courts have been established and have handed down many criminal sentences, including execution and life imprisonment. The Prosecutor also had the opportunity to better understand how best to deal with security and tribal problems and disputes. [...] The Government of the Sudan will continue its efforts to establish the rule of law and justice through the courts and other mechanisms set up in Darfur, to put an end to impunity and to hold accountable all those convicted of violations of human rights and international humanitarian law.⁷¹

Even if Sudan's efforts are inadequate, they are certainly more than any result the Court might claim with respect to Uganda or the Democratic Republic of Congo. All of this suggests that referral in the classic sense, that is, in the sense of a resolution of the Security Council or a 'complaint' by a third State, rather than so-called self-referral, better fulfils the underlying purpose of the Rome Statute than 'self-referral'.

The Numbers Game: The Gravity Threshold and Prosecutorial Discretion

Most of the early writing on the International Criminal Court tended to underestimate the role of 'gravity' in the determination of admissibility. There has been a tendency to conflate 'admissibility' with 'complementarity', as if they are one and the same. But after addressing the issues of inability and unwillingness, article 17(1)(d) says that the Court shall declare a case inadmissible when it 'is not of sufficient gravity to justify further action'. In *Lubanga*, Pre-Trial Chamber I insisted upon the question of 'gravity' in determining whether a case was admissible. In effect, it treated admissibility as a debate involving two dimensions, complementarity and gravity. Its discussion of gravity was interesting and original, introducing a novel criterion of 'social alarm' as a methodology for applying the concept.

69 UN Doc. S/PV.5589, p. 2.

70 UN Doc. S/PV.5450, pp. 3-4; UN Doc. S/PV.5321, p. 3; UN Doc. S/PV.5589, p. 2; UN Doc. S/PV.5450, pp. 5-6.

71 UN Doc. S/PV.5450, pp. 5-6.

‘Gravity’ had already figured in the Prosecutor’s discussion of his priorities in selecting cases. As has already been mentioned, when the Uganda arrest warrants were made public, in October 2005, the Prosecutor was challenged by international non-governmental organisations for dealing with only one side in the conflict.⁷² Answering his critics, in a speech to legal advisors of Ministries of Foreign Affairs, delivered in New York on 24 October 2005, the Prosecutor said:

In Uganda, the criterion for selection of the first case was gravity. We analysed the gravity of all crimes in Northern Uganda committed by all groups -- the LRA, the UPDF and other forces. Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity. We therefore started with an investigation of the LRA. At the same time, we have continued to collect information on allegations concerning all other groups, to determine whether other crimes meet the stringent thresholds of the Statute and our policy are met.⁷³

A month later, in his address to the Assembly of States Parties, the Prosecutor stated:

In Uganda, we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity. Between July 2002 and June 2004, the Lord’s Resistance Army (LRA) was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA.⁷⁴

The Prosecutor returned to this quantitative approach in February 2006, when he issued a public letter explaining his decision not to proceed against British nationals for war crimes committed in Iraq. The Prosecutor explained that during his analysis of the situation in Iraq following the invasion by the United Kingdom and the United States,

allegations came to light in the media concerning incidents of mistreatment of detainees and wilful killing of civilians. General allegations included brutality against persons upon capture and initial custody, causing death or serious injury. In addition, there were incidents in which civilians were killed during policing operations in the occupation phase. After analyzing all the available information, it was concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing and inhuman treatment. The information available at this time supports a reasonable basis for an estimated 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment, totalling in all less than 20 persons.⁷⁵

⁷² 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; Human Rights Watch, ‘ICC Takes Decisive Step for Justice in Uganda’, 14 October 2005.

⁷³ ‘Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal meeting of Legal Advisors of Ministries of Foreign Affairs’, New York, 24 October 2005, p. 7.

⁷⁴ Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties, 28 November – 3 December 2005, The Hague, 28 November 2005, p. 2.

⁷⁵ ‘Letter of Prosecutor dated 9 February 2006’ (Iraq), pp. 7-8.

The Prosecutor went on to consider the ‘gravity’ dimension of the admissibility determination.

The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as wilful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes. Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute.⁷⁶

Although his analysis did not hinge upon this point, the Prosecutor also pointed out that ‘national proceedings had been initiated with respect to each of the relevant incidents’,⁷⁷ thus answering the other prong of the admissibility assessment. It is worth noting, however, that even if British courts were proceeding on these complaints at the time of the Prosecutor’s letter, they do not appear to have been effective and have not resulted in convictions.⁷⁸

The Prosecutor’s letter concerning Iraq was issued on 9 February 2006. A few weeks earlier, he had applied to Pre-Trial Chamber I for issuance of an arrest warrant in the Lubanga case, which involved conscription, enrolment and active use of child soldiers, but no charge involving murder of human beings. One implication seems to be that crimes such as child soldier recruitment that do not necessarily involve homicide are objectively more serious than those of wilful killing, to the extent that the numbers of victims are more substantial. At the very least, such an analysis seems simplistic.

But the fundamentally quantitative approach to gravity suggested by the Prosecutor in the Lord’s Resistance Army arrest warrants and the Iraq situation also seems to neglect another important dimension of the crimes. Even assuming that the Ugandan People’s Defence Forces have killed significantly fewer innocent civilians than the Lord’s Resistance Army, is not the fact that the crimes are attributable to the State germane to the gravity of the case? After all, the only genuine problem of impunity with respect to the Lord’s Resistance Army perpetrators has been the

⁷⁶ *Ibid.*, pp. 8-9.

⁷⁷ *Ibid.*, p. 10.

⁷⁸ Michael Evans, *Case Collapses*, THE TIMES, 15 February 2007.

inability of the Ugandan authorities to apprehend them. With respect to the government forces, on the other hand, we are confronted with the classic impunity paradigm: individuals acting on behalf of a State that shelters them from its own courts. But in a domestic justice setting involving ordinary crime, would we countenance a national prosecutor who ignored clandestine police death squads on the grounds that gangsters were killing more people than the rogue officials? We need not totally dismiss the relevance of the relative numbers of victims in order to appreciate the need to consider other factors, such as the fact that crimes are committed by individuals acting on behalf of the State as contributing to the objective gravity of the crime.

A somewhat similar analysis might be applied to the situation in Iraq. Even if it is admitted that wilful killing attributable to British forces only concerns fifteen or twenty victims, surely the fact that this results from an aggressive war that has resulted in the deaths of hundreds of thousands of Iraqi civilians is germane to the gravity determination. Even if aggression may not yet be prosecuted by the Court, article 5(1) of the Rome Statute declares it to be one of ‘the most serious crimes of concern to the international community as a whole’. Moreover, the preamble to the Rome Statute reminds us that ‘all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations’. Is aggressive war not, at the very least, an aggravating factor of relevance to the assessment of gravity?

Pre-Trial Chamber I, in its discussion of gravity in the *Lubanga* case, did not dwell upon the number of victims. Rather, it took a more qualitative approach, in which it considered such issues as the position and leadership role of the accused, and the organisational involvement including participation of the State.⁷⁹ This was justified with reference to the deterrent effect of prosecution for serious international crimes: ‘In the Chamber’s opinion, only by concentrating on this type of individual can the deterrent effect of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.’⁸⁰

⁷⁹ *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, paras. 51-53.

⁸⁰ *Ibid.*, para. 54.

Obviously, there are significant differences between the approaches to gravity taken by the Prosecutor and the Pre-Trial Chamber. Theoretically, it is possible for the Court's judges to pronounce upon cases when the Prosecutor decides not to proceed. Article 53 of the Statute declares that when a situation or a case has been referred to the Court by a State party or by the Security Council, a prosecutorial decision not to pursue the referral, on grounds of either complementarity or gravity, may be reviewed by the Pre-Trial Chamber. This review must be requested by the State party or the Security Council, as the case may be. In any event, Uganda did not refer crimes committed by its own defence forces to the Court (although the Prosecutor said he would interpret the referral otherwise), and it is surely not going to challenge the Prosecutor should he conclude that crimes committed by government forces are not serious enough to warrant further action.

Conclusions

These are early days yet in the history of the International Criminal Court. It is applying and interpreting provisions for which there is little or no guidance in earlier case law. Moreover, it is navigating through waters that are full of daunting political challenges. When the International Criminal Tribunal for the former Yugoslavia began operations in 1994 and 1995, it took on cases that would be deemed insufficiently serious according to standards of selection adopted when the institution was in a more mature phase. According to the Tribunal's first operational prosecutor, Richard Goldstone, the initial indictee Dragan Nikolić was not 'an appropriate first person for an indictment by the first international war crimes tribunal'. However, governments, the United Nations and international NGOs were impatient for prosecutions to begin, and as a result 'we had to get out an indictment quickly'.⁸¹ Much the same can be said of Duško Tadić, an insignificant thug who serendipitously fell into the sights of the Tribunal when it was starved for cases. His name is destined to resonate through the case law for many years to come. Nor did the first prosecutos

⁸¹ Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE WESTERN RESERVE J. INT'L L. 277, 281 (2002). Nikolić eventually pleaded guilty to the crime against humanity of persecution, and was sentence to twenty-three years in prison: *Prosecutor v. Dragan Nikolić* (Case No. IT-94-2-S), Sentencing Judgment, 18 December 2003. The sentence was reduced to twenty years by the Appeals Chamber: *Prosecutor v. Dragan Nikolić* (Case No. IT-94-2-A), Judgment on Sentencing Appeal, 4 February 2005.

of the International Criminal Tribunal for the former Yugoslavia attempt to tackle Slobodan Milošević, although he was an obvious suspect. Milošević wasn't charged with crimes committed in Croatia and Bosnia and Herzegovina until late 2001,⁸² some eight and a half years after the establishment of the Tribunal, and nearly nine years after the United States Secretary of State had publicly identified him as a prime suspect for prosecution.⁸³ Perhaps in a decade we will look back on Lubanga and the Lord's Resistance Army prosecutions in much the same way as we view Nikolić and Tadić, and the failure to proceed against Museveni's loyal troops and the British soldiers in Iraq as we look at the Tribunal's long silence concerning Milošević.

It is not always easy to discern a logical thread in the decisions on targets of prosecution, either by the Prosecutor or the Pre-Trial Chambers. This results in the nagging suspicion that the decision not to proceed in Iraq, for example, may well have been influenced by political considerations. Uganda and the Democratic Republic of Congo are 'soft targets' for the Prosecutor; Britain is a hard one. Although a resistance to tackle the more difficult situations may be disappointing, it may also reflect a laudable caution in establishing priorities of a still fragile institution.

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 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 domestic political agendas, as the Uganda situation indicates. In some sense, the fundamentally cooperative relationship between the Prosecutor and the Museveni regime is rather galling. Weeks after the arrest warrants were issued by the International Criminal Court against the enemies of the Ugandan government, the International Court of Justice ruled that the very same regime was liable for serious violations of international humanitarian law committed in the territory of another State.⁸⁴ At the same time as the International Court of Justice is condemning Museveni and his regime, the International Criminal Court is cooperating with it. The international legal regime looks incoherent.

⁸² *Prosecutor v. Milošević* (Case No. IT-01-51-I), Indictment, 22 November 2001.

⁸³ Elaine Sciolino, *U.S. Names Figures it Wants Charged with War Crimes*, NEW YORK TIMES, 17 December 1992, p. 1.

⁸⁴ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005.

The situation that better suits the underlying philosophy of the Rome Statute is Darfur. Ironically, it may be the contribution of the United States, which acquiesced in referring Darfur to the Court, that helps to direct the institution's energies to the situations and cases for which it was truly designed. As the Court proceeds, the shortcomings in the earlier cases will probably become increasingly apparent, and they will be looked upon as flawed sophomoric experiments. From its beginnings, the Court has outperformed the expectations of even its keenest supporters. Problems that seem insurmountable eventually find a solution and, inexorably, the institution moves forward to new and greater challenges.