

effective means of redress where breaches of the Convention rights have been found to have occurred”.<sup>161</sup> This is a conclusion that Sir Stephen Sedley has also drawn, and is a consequence, he has argued, of discussing juridical solutions to a political problem, namely the systemic non-implementation of the European Convention.<sup>162</sup> As Sedley has argued, “the necessary – and

admittedly much more difficult – task is to address the causes of overload in the Member States”.<sup>163</sup>

<sup>161</sup> Sir Nicolas Bratza (note 51).

<sup>162</sup> Lord Justice Sedley, “Commentary on the Paper of Professor Florence Benoit-Rohmer” (note 133).

<sup>163</sup> *Ibid.*

## FIRST PROSECUTIONS AT THE INTERNATIONAL CRIMINAL COURT

by William A. Schabas, Galway

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Whether or not one is supportive of the International Criminal Court, any knowledgeable specialist has to admit that in the history of public international law it is a truly extraordinary phenomenon. From an exceedingly modest proposal in the General Assembly in 1989,<sup>1</sup> derived from an atrophied provision of the 1948 *Genocide Convention*,<sup>2</sup> the idea has grown at a pace faster than even its most steadfast supporters have ever predicted. At every stage, the vast majority of participants in the process of creating the Court have underestimated developments. For example, during the 1998 Rome Conference, human rights NGOs argued that the proposed threshold for entry into force of sixty ratifications was an American plot to ensure that the Court would never be created. Prominent delegations insisted that the Court could only operate if it had universal jurisdiction, predicting that a compromise by which it could only prosecute crimes committed on the territory of a State party or by a national of a State party would condemn it to obscurity and irrelevance. Countries in conflict or in a post-conflict peace process, where the Court might actually be of some practical use, would never ratify the *Rome Statute*, they argued.<sup>3</sup> Within recent months, in late 2005 and early 2006, judges of the Court have confided to me their genuine doubts that the Court would ever get its hands on an accused person.

And yet less than a decade after the adoption of the Rome Statute, there are 100 States parties, eighty more than the safe threshold that human rights NGOs and many national delegations thought was necessary to ensure entry into force within a foreseeable future. As for the fabled universal jurisdiction, despite exercising jurisdiction only over the territory and over nationals of States parties, the real Court now has plenty of meat on the bone: Sierra Leone, Colombia, Uganda, Democratic Republic of Congo, Cambodia, Macedonia and Burundi are all States parties, to name a few of the likely candidates for Court activity. In other words, the lack of universal jurisdiction has proven to be no obstacle whatsoever to the operation of the institution. And on 20 March 2006, the first accused, Thomas Lubanga Dyilo, appeared in The Hague before a Pre-Trial Chamber of the International Criminal Court,

charged with war crimes committed on the territory of a State party to the Rome Statute subsequent to 1 July 2002.

Yet the undying, endemic negativism about the Court's future and success shows no signs of abating, despite these regular lessons from the reality of its existence. Few seem to have learned the lesson that this is an idea whose time has come, as Victor Hugo said, and that nothing can stop it. Optimistic projections about the International Criminal Court are almost entirely absent from the academic literature. One of the exceedingly rare exceptions to this observation appeared in the pages of the *Human Rights Law Journal*, in 1999.<sup>4</sup> But it stands out essentially because it is such an isolated example.

The purpose of this essay is not to explain the phenomenon of discouraging assessments about the Court, despite overwhelming evidence to the contrary. Nor is it to account for why the Court has been so successful, something that has been addressed elsewhere.<sup>5</sup> Rather, it proposes a review of the first investigative and judicial activities of this new institution, starting with the entry into force of the Rome Statute and concluding with the first appearance of an accused before the Court.

### 1. Start Up of the Court

The *Rome Statute of the International Criminal Court* entered into force on 1 July 2002.<sup>6</sup> The magic number of sixty ratifications was reached on 11 April 2002. Because several States were planning to ratify at the time, the United Nations organised a special ceremony at which several of them deposited their instruments simultaneously.

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<sup>1</sup> GA Res. 44/89.

<sup>2</sup> *Convention for the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277, art. 6.

<sup>3</sup> See, e.g., UN Doc. A/CONF.183/C.1/SR.7, paras. 48-51; UN Doc. A/CONF.183/C.1/SR.8, para. 7.

<sup>4</sup> William A. Schabas, ‘The Follow-Up to Rome: Preparing for Entry into Force of the International Criminal Court Statute’, (1999) 20 *Human Rights Law Journal* 157, at p. 166.

<sup>5</sup> William A. Schabas, ‘The International Criminal Court: The Secret of its Success’, (2001) 12 *Criminal Law Forum* 415.

<sup>6</sup> *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, art. 126(1), which says it shall enter into force on the first day of the month after the 60<sup>th</sup> day following the date of deposit of the 60<sup>th</sup> instrument of ratification, acceptance, approval or accession. Full text in (1998) 19 HRLJ 453.

One of the undesired consequences of entry into force was a change in strategy by the United States. From an approach that might have been described as 'live and let die', premised on the unlikelihood that the *Statute* would enter into force, Washington shifted to an aggressive and destructive policy.<sup>7</sup> In May 2002, the United States threatened to withdraw peacekeeping troops from East Timor if there was no immunity from the International Criminal Court.<sup>8</sup> In late June 2002, the United States announced that it would exercise its Security Council veto over all future peacekeeping missions unless the Council were to invoke Article 16 so as to shield United Nations-authorized missions from prosecution by the Court. The result was Resolution 1422, adopted by the Security Council on 12 July 2002, allegedly pursuant to article 16 of the *Rome Statute*. It 'requests' that 'if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise'. Although adopted without opposition in the Council, the initiative was resoundingly condemned by several States during the debate, including such normally steadfast friends of the United States as Germany and Canada.<sup>9</sup> The resolution was renewed a year later, in accordance with article 16 of the *Rome Statute*.<sup>10</sup> But in 2004, as the issue of a second renewal arose, the United States quietly withdrew the proposal, wounded by the allegations of torture at Abu Ghraib prison.

Following entry into force, the first session of the Assembly of States Parties was held from 3 to 10 September 2002. The Assembly formally adopted the Elements of Crimes and the Rules of Procedure and Evidence in versions unchanged from those approved by the Preparatory Commission.<sup>11</sup> A number of other important instruments were also adopted, and plans made for the election of the eighteen judges and the Prosecutor. Nominations for these positions closed at the end of November, with more than forty candidates for the bench, although none had yet been put forward for the pivotal position of Prosecutor. Elections of the judges were completed by the Assembly of States Parties during the first week of February 2003, at its resumed first session. In a totally unprecedented development for international courts and tribunals, more than one-third of the judges elected in February 2003 were women.

The first Prosecutor, Luis Moreno Ocampo of Argentina, was only elected on 23 April 2003. Ocampo had a distinguished record as a human rights lawyer in his country of origin. Apparently, a decade earlier, he had also been proposed by the United States as the very first candidate for Prosecutor of the International Criminal Tribunal for the former Yugoslavia. Ocampo's government vetoed the nomination.<sup>12</sup>

## 2. Prosecutorial Policy

Within days of taking office, Ocampo issued a 'Draft Policy Paper' and invited comments.<sup>13</sup> He convened two days of public hearings in The Hague, on 17-18 June for discussion of his proposed priorities and strategies. In September 2003, the finished version of the 'Paper on some policy issues before the Office of the Prosecutor' appeared. Ocampo noted that in determining where to initiate prosecutions, he would have to take into account 'the practical realities, including questions of security on

the ground' and 'the necessary means of investigation and possibilities for protection of witnesses'.<sup>14</sup> Referring to the concept of complementarity with national justice systems, which is a fundamental principle of the Court, he said he would encourage States to initiate their own proceedings before national judicial institutions. '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.<sup>15</sup> Ocampo said: '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.'<sup>16</sup> 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'.<sup>17</sup> But the Prosecutor also suggested a somewhat different philosophy, by which the Court's operations might result from cooperation rather than antagonism:

[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.<sup>18</sup>

Nevertheless, '[a]s a general rule, however, the policy of the Office in the initial phase of its operations will be to take action only where there is a clear case of failure to take national action'.<sup>19</sup>

The policy paper indicated that the targets of prosecution would be 'the leaders who bear most responsibility for the crimes', and that, where possible, the Prosecutor would encourage national prosecutions for lower-ranking perpetrators. According to the Prosecutor, '[t]he global character of the ICC, its statutory provisions

<sup>7</sup> See William A. Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council', (2004) 15 *European Journal of International Law* 701.

<sup>8</sup> Colum Lynch, 'U.S. Seeks Court Immunity for E. Timor Peacekeepers', *Washington Post*, 16 May 2002, p. A22; Colum Lynch, 'U.S. Peacekeepers May Leave E. Timor', *Washington Post*, 18 May 2002, p. A20.

<sup>9</sup> UN Doc. S/PV.4568; UN Doc. S/PV.4568 (Resumption 1) + Corr. 1.

<sup>10</sup> UN Doc. S/RES/1487 (2003).

<sup>11</sup> 'Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002, Official Records', ICC-ASP/1/3, para. 22.

<sup>12</sup> David J. Scheffer, 'Three Memories from the Year of Origin, 1993', (2004) 2 *Journal of International Criminal Justice* 353, at pp. 359-360.

<sup>13</sup> 'Draft paper on some policy issues before the Office of the Prosecutor, for discussion at the public hearing in The Hague on 17 and 18 June 2003'.

<sup>14</sup> 'Paper on some policy issues before the Office of the Prosecutor', p. 2.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 5.

<sup>17</sup> *Ibid.*, p. 5.

<sup>18</sup> *Ibid.*, p. 5.

<sup>19</sup> *Ibid.*

and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.<sup>20</sup> He warned of an 'impunity gap', where perpetrators who did not qualify as 'those who bear the greatest responsibility' might escape accountability.<sup>21</sup>

The term 'those who bear the greatest responsibility' seems to have originated in the Security Council resolution proposing establishment of the Special Court for Sierra Leone.<sup>22</sup> At the time, the United Nations Secretary-General said this was an indication of a limitation on the number of accused by reference to their command authority and the gravity and scale of the crime. Annan proposed, as an alternative, 'that the more general term "persons most responsible" should be used'.<sup>23</sup> But the Security Council did not demur, replying that its 'those who bear the greatest responsibility' terminology should be retained, in order to limit the focus of the Special Court 'to those who played a leadership role'.<sup>24</sup> The Special Court for Sierra Leone has since interpreted the terms in light of the drafting history, holding that the leadership role of an accused rather than the severity of the crime or its massive scale should determine jurisdiction.<sup>25</sup>

The Prosecutor justified his strategic approach to targets with reference to various provisions of the *Rome Statute*. He noted the references to 'the most serious crimes of concern to the international community as a whole' in the preamble and in article 5. He also pointed to article 17, which circumscribes the concept of complementarity, and which authorizes the Court to declare inadmissible a case that 'is not of sufficient gravity to justify further action by the Court'. The Prosecutor said that '[t]he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission'.<sup>26</sup> Finally, he noted that article 53 empowers the Prosecutor to decline to investigate or prosecute when this would not serve 'the interests of justice'.

### 3. Triggering the Jurisdiction

The 1994 draft statute submitted to the General Assembly by the International Law Commission provided for two means of triggering the jurisdiction of the proposed international criminal court. The first was what would later be described as 'state-party referral'. The draft statute described such a state as a 'complainant state'.<sup>27</sup> A State party could lodge a 'complaint'.<sup>28</sup> 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.<sup>29</sup> 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'.<sup>30</sup> 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'<sup>31</sup> and in the final draft adopted by the Preparatory Committee that formed the basis of negotiations at the Rome Conference.<sup>32</sup> The

nomenclature, though not the substance, was changed in a 'discussion paper' issued by the Bureau of the Rome Conference on 6 July 1998.<sup>33</sup> 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 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"'.<sup>34</sup>

The famous Bureau draft was presented to a select group of delegations at a meeting held on a Sunday at the Canadian Embassy,<sup>35</sup> deeply irritating those delegations who were not invited, not to mention the NGOs, who were also excluded. But 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

<sup>20</sup> *Ibid.*, p. 7.

<sup>21</sup> *Ibid.*, p. 5.

<sup>22</sup> UN Doc. S/RES/1315 (2000)

<sup>23</sup> 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone', UN Doc. S/2000/915, para. 29.

<sup>24</sup> 'Letter dated 22 December 2000 from the President of the Security Council Addressed to the Secretary General', UN Doc. S/2000/1234, p. 1.

<sup>25</sup> *Prosecutor v. Fofana* (Case No. SCSL 2004-14-PT), Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, 3 March 2004, para. 40.

<sup>26</sup> 'Paper on some policy issues before the Office of the Prosecutor', p. 7.

<sup>27</sup> '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).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, para. 21(1)(a).

<sup>30</sup> *Ibid.*, para. 21(1)(b).

<sup>31</sup> '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.

<sup>32</sup> '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.

<sup>33</sup> 'Discussion Paper, Bureau, Part 2. Jurisdiction, Admissibility and Applicable Law', UN Doc. A/CONF.183/C.1/L.53, p. 16.

<sup>34</sup> Philippe Kirsch & Darryl Robinson, 'Referral by States Parties', in Antonio Cassese, Paola Gaeta & John R.W.D. Jones, *The Rome Statute of the International Criminal Court, A Commentary*, Oxford: Oxford University Press, 2002, pp. 619-625, at p. 623.

<sup>35</sup> Philippe Kirsch & Darryl Robinson, 'Reaching Agreement at the Rome Conference', in Antonio Cassese, Paola Gaeta & John R.W.D. Jones, *The Rome Statute of the International Criminal Court, A Commentary*, Oxford: Oxford University Press, 2002, pp. 67-91, at p. 74, fn. 23.

have been expected to do were some important change being implied.<sup>36</sup> When the coordinator responsible for the Bureau draft, Erkki Kourula, introduced the debate, he said: 'Article 11, entitled "Referral of a situation by a State", was a technical issue.'<sup>37</sup> The change in terminology did not provoke a single comment, indicating that the delegates to the Rome Conference considered 'referral' to be a synonym for 'complaint'.<sup>38</sup> The absence of any reference to self-referral in the main commentaries on the *Statute*, confirms this observation.<sup>39</sup> In other words, the drafting history of article 14 of the *Rome Statute* leaves little doubt that what was contemplated was a 'complaint' by a State party against another State.

The second trigger mechanism proposed in the 1994 International Law Commission draft was a Security Council referral. In effect, the international court was conceived of as a permanent tribunal at the beck and call of the Security Council.<sup>40</sup> It would be largely equivalent to the *ad hoc* tribunal that had been recently created for the former Yugoslavia,<sup>41</sup> except that it would be available on an ongoing basis, as required. The Security Council could also regulate the state party complaint mechanism, because no prosecution could be commenced arising from a situation being dealt with under Chapter VII of the *Charter of the United Nations* unless the Security Council otherwise decided.<sup>42</sup> The provision governing Security Council referral did not undergo any significant change during the drafting process, and is set out in article 13(b) of the *Rome Statute*.

One of the main inadequacies in the draft statute, according to most NGOs and many States, was the failure to endow the Prosecutor with the independent authority to undertake prosecutions, in the absence of a complaint from a State party or referral by the Security Council.<sup>43</sup> The principal argument was that the proposed court would be unlikely to have much work if it relied upon States parties and the Security Council to trigger its jurisdiction. With respect to State party referral, it was noted that States would be very reluctant to lodge a complaint against other States. As evidence, observers pointed to the atrophying State party referral provisions of the United Nations human rights treaties. The caucus of 'like minded' States made the independent or *proprio motu* prosecutor one of the main planks in its programme.<sup>44</sup> On the other side, the United States insisted that the independent or *proprio motu* prosecutor was one of the issues it could not abide.

The *proprio motu* prosecutor was recognized in article 15 of the final draft, adopted at the Rome Conference on 17 July 1998. To allay fears of the opponents, the Prosecutor's independence was tempered by a degree of oversight from the Pre-Trial Chamber.<sup>45</sup> Moreover, the concept of complementarity, which was barely hinted at in the 1994 draft, had also become quite robust. That the Court could not proceed when a national jurisdiction was investigating or prosecuting was largely a response to the enhanced powers of the new independent prosecutor. But this was not enough to satisfy the United States. Less than a week after the conclusion of the Rome Conference, the head of the United States delegation, Ambassador David Scheffer, told the Senate Committee on Foreign Relations: 'The treaty also creates a *proprio motu* or self-initiating prosecutor who, on his or her own authority with the consent of two judges it will encourage overwhelming the court with complaints, can initiate investigations and prosecutions without referral to the court of a situation either by a government that is party to the treaty or by the Security Council. We opposed this proposal, as we are

concerned that and risk diversion of its resources, as well as embroil the court in controversy, political decision-making, and confusion.'<sup>46</sup> During the Rome Conference, Department of State spokesman James Rubin had warned: 'If neither the Security Council nor any state endorses action by the Court, the prosecutor would act without a critical and essential base of international consensus'.<sup>47</sup> China<sup>48</sup> and Israel<sup>49</sup> were also openly critical of the *proprio motu* prosecutor.

Thus, the *Rome Statute* recognizes three ways of triggering the jurisdiction of the Court. Acting under Chapter VII of the *Charter of the United Nations*, the Security Council may refer a situation in which crimes within the Court's jurisdiction appear to have been committed.<sup>50</sup> A State party may also refer a situation to the Court, 'requesting the Prosecutor to investigate the

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

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

<sup>38</sup> 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.

<sup>39</sup> Philippe Kirsch & Darryl Robinson, 'Referral by States Parties', in Antonio Cassese, Paola Gaeta & John R.W.D. Jones, *The Rome Statute of the International Criminal Court, A Commentary*, Oxford: Oxford University Press, 2002, pp. 619-625; Antonio Archesi, 'Referral of a situation by a State Party', in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Baden-Baden: Nomos Verlagsgesellschaft, 1999, pp. 353-358.

<sup>40</sup> '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, art. 23(1).

<sup>41</sup> UN Doc. S/RES/827 (1993).

<sup>42</sup> '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, art. 23(3).

<sup>43</sup> Leila Nadya Sadat and S. Richard Carden, 'The New International Criminal Court: An Uneasy Revolution', (2000) 88 *Georgetown Law Journal* 381, at pp. 400-401.

<sup>44</sup> See, e.g., Amnesty International, 'Challenges Ahead for the United Nations Preparatory Committee: Drafting a Statute for a Permanent International Criminal Court', AI Index: IOR 40/003/1996, 1 February 1996.

<sup>45</sup> Silvia A. Fernandez de Gurmendi, 'The Role of the International Prosecutor', in Roy Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague: Kluwer Law International, 1999, pp. 175-188, at p. 181.

<sup>46</sup> 'Prepared Statement of David J. Scheffer, Ambassador-at-large for War Crimes Issues and Head of the US Delegation to the UN Diplomatic Conference, Before the Senate Committee on Foreign Relations', 23 July 1998. See also: David J. Scheffer, 'Staying the Course with the International Criminal Court', (2001) 35 *Cornell International Law Journal* 47, at pp. 81-82; David Scheffer, 'Developments in International Criminal Law: the United States and the International Criminal Court', (1999) 93 *American Journal of International Law* 12, at p. 15; William K. Lietzau, 'The United States and the International Criminal Court After Rome: Concerns from a US Military Perspective', (2001) 64 *Law and Contemporary Problems* 119, at p. 126, fn. 30.

<sup>47</sup> James P. Rubin, 'U.S. Position on Self-Initiating Prosecutor at the Rome Conference on Establishment of an International Criminal Court', 23 June 1998.

<sup>48</sup> 'Permanent International Criminal Court Established', (1998) 35:2 UN Chronicle Online Edition.

<sup>49</sup> 'Views on International Criminal Court Put Forward in Sixth Committee', Press Release GA/L/2879, 2 November 1999.

<sup>50</sup> *Rome Statute of the ICC* (note 6), art. 13(b).

situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes'.<sup>51</sup> Finally, the Prosecutor 'may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court'.<sup>52</sup> After nearly four years of operation, one 'situation' has been referred to the Court by the Security Council, that of the Darfur province in western Sudan, and three have been referred to the Court by States parties: the conflicts in northern Uganda, eastern Congo and the Central African Republic. The *proprio motu* powers have yet to be invoked.<sup>53</sup>

In his 2003 Policy Paper, the Prosecutor wrote at some length about the *proprio motu* powers:

The Prosecutor's *proprio motu* power to initiate an investigation with authorisation from a Pre-Trial Chamber is a very important mechanism under the Statute. This procedure provides the legal basis to carry out investigations even where states have failed to refer an objectively serious situation. The Prosecutor will use this power with responsibility and firmness, ensuring strict compliance with the Statute.<sup>54</sup>

Early in his mandate, the Prosecutor issued a Statement on the 'communications' he had received in accordance with article 15, informing him of allegations that might lead to exercise of his *proprio motu* authority. He indicated that his office had selected the situation in Ituri, Democratic Republic of Congo, as the most urgent situation to be followed. The Statement said that the Office of the Prosecutor had received six communications regarding the situation in Ituri, including two detailed reports from non-governmental organisations.<sup>55</sup> The Prosecutor's Statement of July 2002 referred to communications that concerned the territory of States that were not party to the *Rome Statute*, namely Iraq, Israel and Côte d'Ivoire. Aside from the Ituri situation, the Statement did not mention explicitly any other State party to the *Statute*. In September 2003, in his report to the Assembly of States Parties the Prosecutor confirmed that Ituri was the focus of his activity.<sup>56</sup>

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.<sup>57</sup>

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'.<sup>58</sup> 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.'<sup>59</sup> 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 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.'<sup>60</sup> 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.<sup>61</sup>

#### 4. Self-Referral by Uganda

The Government of Uganda referred the situation in northern Uganda to the International Criminal Court in 16 December 2003.<sup>62</sup> The letter of referral made reference to

<sup>51</sup> *Ibid.*, art. 14(1).

<sup>52</sup> *Ibid.*, art. 15(1).

<sup>53</sup> See: Giovanni Conso, 'The Basic Reasons for US Hostility to the ICC in Light of the Negotiating History of the Rome Statute', (2005) 3 *Journal of International Criminal Justice* 314, at pp. 321-322.

<sup>54</sup> 'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications', September 2003.

<sup>55</sup> 'Communications Received by the Office of the Prosecutor of the ICC', Press Release No.: pids.009.2003-EN, 16 July 2003.

<sup>56</sup> 'Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo', 8 September 2003.

<sup>57</sup> 'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications', September 2003.

<sup>58</sup> 'Informal expert paper: The principle of complementarity in practice', p. 3.

<sup>59</sup> *Ibid.*, p. 18. Also: p. 20.

<sup>60</sup> *Ibid.*, p. 19.

<sup>61</sup> *Ibid.*, p. 19, fn. 24.

<sup>62</sup> 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', (2005) 5 *International Criminal Law Review*: 83.

the 'situation concerning the "Lord's Resistance Army" in northern and western Uganda'. The Prosecutor 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]'.<sup>63</sup> On 29 January 2004, the Prosecutor made a public announcement of the referral.

On 26 May 2004, the Judges adopted the *Regulations* of the Court. These require the Prosecutor to inform the Presidency in writing as soon as a situation has been referred by a State Party, or by the Security Council, and to provide the Presidency with any information that may facilitate the timely assignment of a situation to a Pre-Trial Chamber, including, in particular, the intention of the Prosecutor to submit a request for authorization to proceed with an investigation.<sup>64</sup> Three weeks later, by letter dated 17 June 2004, the Prosecutor provided the Presidency with such a notification. On 5 July 2004, the Presidency assigned the 'situation in Uganda' to Pre-Trial Chamber II, composed of Judges Tuiloma Neroni Slade, Mauro Politi and Fatoumata Dembele Diarra.<sup>65</sup> On 9 July 2004, Judge Tuiloma Neroni Slade was elected Presiding Judge of Pre-Trial Chamber II, in accordance with Regulation 13(2) of the *Regulations* of the Court. Judge Slade was also designated as the 'single judge' of the Chamber, for the purpose of decisions delegated to a single judge.<sup>66</sup>

According to article 53 of the *Rome Statute*, when a case is referred, the Prosecutor is required to initiate an investigation unless he determines, after evaluating the information made available to him, that there is no reasonable basis to proceed under this *Statute*. Upon his determination that there is a reasonable basis to proceed with an investigation, he must request authorization from the Pre-Trial Chamber.<sup>67</sup> On 28 June 2004, more than seven months after the initial referral by the Government of Uganda, Prosecutor Ocampo announced his conclusion that there was a 'reasonable basis' to proceed with an investigation. Several weeks later, at the third session of the Assembly of States Parties, he said that there was credible evidence of widespread and systematic attacks have been committed against the civilian population since July 2002, including the abduction of thousands of girls and boys. Information indicated rape and other crimes of sexual violence, torture, child conscription, and forced displacement continue to take place. The Prosecutor said he had concluded a cooperation agreement in order to facilitate the investigation and execute arrest. The Prosecutor assembled a team of twelve investigators and lawyers. It conducted more than fifty missions to Uganda with a view to assembling evidence. Some twenty missions were also undertaken to meet with local leaders, and a meeting held in The Hague with national authorities and local community leaders.

On 6 May 2005, nearly seventeen months after the referral by Uganda, the Prosecutor submitted applications for five arrest warrants, in accordance with article 58 of the *Rome Statute*. These were subsequently amended, and considered by the three judges of Pre-Trial Chamber II on 18 May 2005,<sup>68</sup> and in hearings during the month of June. The application contained general allegations about the Lord's Resistance Army (LRA), indicating it had been directing attacks against the Ugandan army (Uganda People's Defence Force or UPDF) and local militias (known as Local Defence Units or LDUs) as well as against civilian populations. According to the Prosecutor, the LRA had engaged in a cycle of violence and established a pattern of 'brutalisation of civilians' by acts

including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements. Abducted, including children, were said to have been forcibly 'recruited' as fighters, porters and sex slaves to serve the LRA and to contribute to attacks against the Ugandan army and civilian communities.<sup>69</sup> The Pre-Trial Chamber noted that the existence and acts of the LRA, as well as their impact on Uganda's armed forces and civilian communities, have been reported by the Government of Uganda and its agencies and by several independent sources, including the United Nations, foreign governmental agencies, non-governmental organisations and world media.<sup>70</sup> A number of specific attacks on internally displaced persons camps were alleged. Five sealed arrest warrants were issued on 8 July 2005 against five leaders of the LRA: Joseph Kony, Vincent Otti, Rasa Lukiwaya, Okot Odhiambo and Dominic Ongwen.<sup>71</sup> None of the accused have yet been apprehended. In February 2006, a number of UN peacekeeping troops were killed in a failed effort to arrest one of the suspects who was believed to be in eastern Congo.

Several specific crimes against humanity were alleged, including 'unlawful killings',<sup>72</sup> enslavement, rape, sexual enslavement and 'inhuman acts' (inflicting serious bodily injury and suffering). Many war crimes were also charged: unlawful killings and cruel treatment (contrary to common

<sup>63</sup> See *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, paras. 3-4.

<sup>64</sup> *Regulations of the Court*, Doc. ICC-BD/01-01-04, art. 45.

<sup>65</sup> *Situation in Uganda* (ICC-02/04), Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, 5 July 2004.

<sup>66</sup> *Situation in Uganda* (ICC-02/04), Designation of a Single Judge of Pre-Trial Chamber I, 19 November 2004.

<sup>67</sup> *Rome Statute of the ICC* (note 6), art. 15(3).

<sup>68</sup> A single judge is authorized to issue arrest warrants. However, the Pre-Trial Chamber considered it appropriate, under the circumstances, that the Prosecutor's application be examined by the full bench: *Situation in Uganda* (ICC-02/04-6), Decision on the Exercise of Functions by the Full Chamber in Relation to an Application by the Prosecutor Under Article 58, 18 May 2005.

<sup>69</sup> *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. 5. Also: *Situation in Uganda* (ICC-02/04-54), Warrant of Arrest for Vincent Otti, 8 July 2005, para. 5; *Situation in Uganda* (ICC-02/04-55), Warrant of Arrest for Raska Lukwaya, 8 July 2005, para. 5; *Situation in Uganda* (ICC-02/04-56), Warrant of Arrest for Okot Odhiambo, 8 July 2005, para. 5; *Situation in Uganda* (ICC-02/04-57), Warrant of Arrest for Dominic Ongwen, 8 July 2005, para. 5.

<sup>70</sup> *Ibid.*, para. 6.

<sup>71</sup> *Situation in Uganda* (ICC-02/04-87), Decision on the Prosecutor's Application for Warrants of Arrest under Article 59, 8 July 2005. The Prosecutor was unhappy with a procedural aspect of the 8 July 2005 decision authorizing the arrest warrants, and applied for leave to appeal. Relying upon the jurisprudence of the *ad hoc* tribunals for the former Yugoslavia, Rwanda and Sierra Leone, the Pre-Trial Chamber adopted a restricting interpretation of the scope of interlocutory appeal and dismissed the motion: *Situation in Uganda* (ICC-02/04-01/05), Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on th Prosecutor's Applications for Warrants of Arrest under Article 59, 19 August 2005.

<sup>72</sup> The *Rome Statute's* definition of crimes against humanity refers to 'murder', not 'unlawful killing'.

article 3 of the *Geneva Conventions*), intentional directing of an attack against a civilian population, and against individual civilians not taking direct part in hostilities, pillage, enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. In most cases, the accused were charged with having 'ordered' the commission of these crimes, pursuant to article 25(3)(b) of the *Rome Statute*. The Prosecutor did not invoke the potent concept of 'joint criminal enterprise' set out in article 25(3)(d), which has proven to be so potent in prosecutions at the International Criminal Tribunal for the former Yugoslavia. Nor did he claim any application of the principle of superior responsibility, described in article 28 of the *Statute*, despite what would seem to be its obvious application to the case of five rebel leaders.

In support of the application, the Prosecutor included a 'Declaration on Temporal Jurisdiction', dated 27 February 2004, whereby the Republic of Uganda accepted the exercise of the Court's jurisdiction for crimes committed following the entry into force of the *Statute* on 1 July 2002. Because Uganda ratified the *Rome Statute* on 14 June 2002, it only entered into force with respect to Uganda on 1 September 2002, two months after the entry into force of the *Statute* itself. Although there is no explicit provision allow for a State party to backdate the effect of its ratification, article 12(3) of the *Rome Statute* allows a non-Party state to accept jurisdiction over specific crimes. Presumably, article 12(3) is the authority for Uganda's 'Declaration of Temporal Jurisdiction'.

The Prosecutor also submitted a 'Letter on Jurisdiction', dated 28 May 2004, from the Solicitor-General of the Republic of Uganda to the Prosecutor. It stated that 'the Government of Uganda has been unable to arrest persons who may bear the greatest responsibility' for the crimes within the referred situation; 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'.

On 9 September 2005, the Prosecutor applied to have the warrants unsealed.<sup>73</sup> The Pre-Trial Chamber so decided on 13 October 2005, and the warrants became known to the general public the following day.<sup>74</sup> Unsealing of the arrest warrants was greeted enthusiastically by international human rights NGOs. But both Amnesty International and Human Rights Watch questioned the one-sided approach, and called upon the Prosecutor to proceed against the government forces as well.<sup>75</sup> The suspicion is inescapable that the Prosecutor has a tacit, if not an explicit, understanding with the Ugandan authorities that he will prosecute the rebel leaders only. Although the public record does not indicate this clearly, it seems apparent enough that the Prosecutor solicited Uganda's referral in December 2003. The self-referral cannot have been a spontaneous and unexpected development that emerged as a result of creative thinking by international lawyers within the Ugandan Foreign Ministry. Philosophically, it flowed from the ruminations within the Office of the Prosecutor in late 2003. The idea came from The Hague, not Kampala. To the extent that the Prosecutor believes his strategy of encouraging self-referral is a productive one, he must surely reassure States that those who refer the case are not threatened. If he does not do this, far from encouraging other States to follow the example of Uganda, they will see self-referral as a trap.

The Prosecutor has provided some summary indications to explain his decisions in terms of the priorities of investigation and prosecution with respect to the Uganda situation. 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.<sup>76</sup>

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.<sup>77</sup>

With respect, it does not seem at all clear that a quantitative test should be used to assess 'gravity' for the purpose of determining prosecutorial priorities. The Court was established to deal with impunity, and not to prosecute large-scale crimes in an abstract sense. The problem of impunity in Uganda lies not with the rebel Lord's Resistance Army. Of course, there is a problem apprehending the LRA leaders. But if they can be arrested, there is certainly no difficulty bringing them to justice before the Courts of Uganda. Unlike some States in sub-Saharan Africa, Uganda has a sophisticated criminal justice system with a proudly independent judiciary.<sup>78</sup> The problem with impunity in Uganda resides in the fact that pro-government forces are committing atrocities. This is not being addressed by either the country's national justice system or by the International Criminal Court. The priority of the Court should be on perpetrators who are being sheltered by Uganda, and who are protected by its authorities.

<sup>73</sup> *Situation in Uganda* (ICC-02/04-01/05-20), Prosecutor's Application for Unsealing of the Warrants of Arrest, 9 September 2005.

<sup>74</sup> *Situation in Uganda* (ICC-02/04-01/05-52), Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, 13 October 2005.

<sup>75</sup> 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.

<sup>76</sup> '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.

<sup>77</sup> 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.

<sup>78</sup> 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.

The reason for this is bound up in the principles of international criminal justice, whose *raison d'être* has always been to prosecute the crimes that States leave unpunished, generally because States themselves commit the crimes or are complicit in them. This explains the need for both universal jurisdiction and international jurisdictions. As a general rule, rebels and will be adequately prosecuted by the courts of the State where their crimes took place. Philosophically, it is this understanding that drives the concept of complementarity. Only when States are 'unwilling' or 'unable' to prosecute are cases before the International Criminal Court deemed to be admissible.

Even in a case of 'uncontested admissibility', to borrow the phrase employed by the experts consulted by the Prosecutor, it remains legitimate to consider whether the State is itself willing and able to prosecute. With respect to the Lord's Resistance Army, there is no serious evidence to indicate that the Ugandan justice system is unable to proceed. Uganda said it has been unable to arrest the offenders. But this is also true of the International Criminal Court. It is a shared problem, and does not seem germane to the concept of inability, which implies dysfunctional or non-existent courts in failed States. On the other hand, by invoking Uganda's 'Letter on Jurisdiction' of 28 May 2004 in his application for arrest warrants, the Prosecutor seemed to be suggesting that the country was 'unwilling'. The Attorney-General of Uganda said the ICC was 'the most appropriate and effective forum' for prosecuting 'those bearing the greatest responsibility'. The problem here is that the *Rome Statute* says the opposite, '[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes ...'<sup>79</sup>

Although a literal reading of the *Rome Statute* appears to allow a State to invoke article 14 and refer a 'situation' within its own territory, there are strong historical and logical arguments to suggest this should not be permitted. The original draft of the *Statute* proposed by the International Law Commission spoke of a 'complaint' rather than a 'referral' by a State party, as discussed earlier in this paper. Even if a State might be allowed to 'refer' a situation on its territory, it seems absurd that it could 'lodge a complaint' against itself. There is no evidence that the change in terminology during the drafting of the *Rome Statute*, from 'complaint' to 'referral' was meant to alter the understanding of the drafters that when a State party triggered the jurisdiction of the Court, it did so against another State party, and not against itself.

In any event, the utility of the State party referral against itself seems dubious. It is certainly unnecessary. By ratifying or acceding to the *Rome Statute*, every State party has in effect accepted the authority of the Prosecutor to investigate cases on its territory. The Prosecutor had suggested that an advantage of self-referral was indicating to the Prosecutor that the State in question had the 'political will' to cooperate with the investigation. But all of the relevant obligations are already covered by the *Rome Statute* itself. Is ratification not a sufficient indication of 'political will' to cooperate with the Court and to facilitate its work?

Nevertheless, self-referral seems to have the interesting legal consequence of positioning Uganda at the top of the prosecutorial agenda. Without self-referral, Uganda would be only one of 100 States within the territorial sights of the Prosecutor. To the extent that he sought to justify arrest warrants based on the greater number of victims, as he has done with the Lord's Resistance Army, the Prosecutor

would be required to look at killings throughout not only the territories of the 100 States parties, but also those committed by nationals of States parties elsewhere in the world, rather than those within a region of one sovereign state. This might lead to Colombia, for example, or Burundi, or even Iraq. In other words, by inciting Uganda to refer the situation in the north of the country against itself, so to speak, the Prosecutor has allowed Uganda to jump the queue, where it might not otherwise belong if it was being treated as a *proprio motu* case.

##### 5. Self-Referral by the Democratic Republic of Congo

The Democratic Republic of Congo (DRC) was one of a several States that submitted their instruments of ratification of the *Rome Statute* on 11 April 2002, enabling the sixtieth ratification to be achieved and the *Statute* to enter into force. As a result, the Court has jurisdiction over the territory of the DRC from the beginning of its operations, that is, over acts taking place subsequent to 1 July 2002. As early as July 2003, the Prosecutor had indicated that the Ituri region of the DRC was his first priority. His initial analysis was founded on the potential use of his *proprio motu* powers, in accordance with article 15 of the *Rome Statute*. This changed on 3 March 2004, when the DRC 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 giving any indication as to whether this was because it was unwilling or unable to proceed.

Surprisingly, given his previous statements about Ituri, the Prosecutor took several more months before declaring that he had determined there was a rational basis to commence the investigation. On 17 June 2004, he informed the Presidency of the referral. On 21 June 2004, after citing an estimated 5,000 to 8,000 unlawful killings committed in the region since 1 July 2002, he announced the opening of a formal investigation. President Kirsch assigned Pre-Trial Chamber I, composed of Judges Claude Jorda, Akua Kuenyehia and Sylvia Steiner, to the Congo situation.<sup>80</sup>

<sup>79</sup> *Rome Statute of the ICC* (note 6), preamble.

<sup>80</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-1), Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, 5 July 2004.

<sup>81</sup> On the conflict of systems at the *ad hoc* tribunals, see: Megan Fairlie, 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit', (2004) 4 *International Criminal Law Review* 243.

<sup>82</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-2-t), Election of the Presiding Judge of Pre-Trial Chamber I, 16 September 2004.

<sup>83</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-9-t), Décision de convoquer une conférence de mise en état, 17 February 2005.

<sup>84</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-14-t), Decision on the Prosecutor's Application for Leave to Appeal, 14 March 2005; *Situation in Democratic Republic of Congo* (ICC-01/04-11-t), Décision concernant la demande d'autorisation d'interjeter appel déposée par le Procureur, 17 March 2005.

<sup>85</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-19-t), Decision to Hold a Consultation under Rule 114, 21 April 2005.

The procedure at the International Criminal Court is significantly different than that of the *ad hoc* tribunals. It is more of a hybrid of inquisitorial and adversarial systems than its predecessors.<sup>81</sup> The *Rome Statute* establishes a robust Pre-Trial Chamber that in some ways is analogous to the role of the *juge d'instruction* in systems derived from continental European models. The interests of both the defence and the victims are present and represented at a much earlier stage in proceedings than under the procedure applicable before the *ad hoc* tribunals. The initial experiment with the innovative mechanisms has taken place under the direction of a French magistrate, Claude Jorda, who as President of Pre-Trial Chamber I<sup>82</sup> has made no secret of his intention to depart from the model of the *ad hoc* tribunals, mainly by enhanced judicial supervision of the Prosecutor in the pre-investigation and investigation stages.

On 17 February 2005, without any particular initiative from the Prosecutor, Pre-Trial Chamber I decided to convene a status conference. The Pre-Trial Chamber referred to earlier communications with the Prosecutor, and cited his own Policy Document in support of the call for the meeting. It said this was necessary in order to ensure the protection of victims and witnesses, and the preservation of evidence.<sup>83</sup> The Prosecutor objected to the authority of the Pre-Trial Chamber to take such an initiative at such an early stage in the proceedings.<sup>84</sup>

In April, the Prosecutor informed the Trial Chamber of the existence of 'a unique investigative opportunity'. In his letter to the Pre-Trial Chamber, the Prosecutor indicated he had obtained certain documents, but on the condition that they be returned to their owner within six months. Article 56 of the *Rome Statute* says that when the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, he shall so inform the Pre-Trial Chamber. In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence. Article 56 is one of the best examples demonstrating the innovative procedural regime of the International Criminal Court, by which the interests of the defense are formally protected from the earliest stages of an investigation.

At consultations held pursuant to Rule 114 of the *Rules of Procedure and Evidence*,<sup>85</sup> the Prosecutor proposed that Netherlands Forensic Institute, which is an independent expert body within the Dutch Ministry of Justice, having no connection to the Prosecutor, be appointed by the Pre-Trial Chamber 'to perform an objective, independent and impartial examination in accordance with well-established scientific criteria'. Some weeks later, the Pre-Trial Chamber approved an Investigation Plan prepared by the Netherlands Forensic Institute, authorizing the expertise to proceed.<sup>86</sup> The Pre-Trial Chamber also said there was a 'need to protect the general interests of the defence through the appointment of ad hoc counsel for the defence, given the likelihood that the items submitted for the forensic examinations referred to in the "Prosecutor's Request" will not be available at subsequent stages of the proceedings'.<sup>87</sup> Article 76(1) of the *Regulations* states that '[a] Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require'. Accordingly, on 1 August 2005 the Registrar, Bruno Cathala, appointed Tjarda Van der Spoel as *ad hoc*

counsel for the defense.<sup>88</sup> On 22 August 2005, the *ad hoc* counsel for the defense challenged the existence of a 'unique investigative opportunity'.<sup>89</sup> He also raised questions about jurisdiction and admissibility. The Pre-Trial Chamber ruled as follows: '[C]hallenges to the jurisdiction of the Court or the admissibility of a case pursuant to article 19(2)(a) of the Statute may only be made by an accused person or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; [...] at this stage of the proceedings no warrant of arrest or summons to appear has been issued and thus no case has arisen; [...] the *Ad hoc* Counsel for the Defence has no procedural standing to make a challenge under article 19(2)(a) of the Statute.'<sup>90</sup>

The victims, too, had established a presence in the case. On 26 May 2005, the Pre-Trial Chamber received applications from six victims asking to participate in the proceedings.<sup>91</sup> The materials were submitted by Sidiki Kaba, President of the Paris-based International Federation for Human Rights. The subsequent proceedings are difficult to assess, because much of the content has been redacted, presumably in order to protect the identities of the applicants. In January 2006, Pre-Trial Chamber I released a ruling on the application. If nothing else, the decision is important as the first significant substantive decision by the Court since its establishment. In addition to determining the factual issue as to whether the six applicants qualified as victims, in accordance with Rule 85 of the Rules of Procedure and Evidence,<sup>92</sup> the Court was confronted with the legal question as to the stage at which victims could enter proceedings before the Court.

The victims had applied to participate in proceedings even before defendants had been identified and arrest warrants had been issued. The Prosecutor considered that this was too early. He pointed to the general provision concerning victim participation in proceedings, article 68(3) of the *Rome Statute*, which is part of the section

<sup>86</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-35), Decision on the Prosecutor's Communication to the Pre-Trial Chamber, 1 June 2005.

<sup>87</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-21), Decision to Hold a Consultation under Rule 114, 26 April 2005.

<sup>88</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-85), Solemn Undertaking of Mr. Tjarda Van der Spoel, 18 August 2005.

<sup>89</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-86-Conf), *Ad hoc* counsel for the Defence's submissions, 22 August 2005. Also: *Situation in Democratic Republic of Congo* (ICC-01/04-), Submissions on Jurisdiction and Admissibility, 11 October 2005.

<sup>90</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-93), Decision following the Consultation held on 11 October 2005 and the Prosecution's Submission on Jurisdiction and Admissibility filed on 31 October 2005, 9 November 2005.

<sup>91</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-73), Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp, 21 July 2005.

<sup>92</sup> 'For the purposes of the Statute and the Rules of Procedure and Evidence: (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.'

concerning the trial itself. The Prosecutor also felt that victim intervention at the investigation stage could jeopardize the appearance of integrity and objectivity of the investigation. It could also be seen as entailing disclosure of the scope and nature of the investigation. The Prosecutor submitted that it was inconsistent with basic considerations of efficiency and security to disclose such details to third parties during an investigation.<sup>93</sup>

Pre-Trial Chamber I noted that the enhanced position of victims in the *Rome Statute* emerged from discussions about their role within the 'international body of human rights law and by international humanitarian law'. According to the Chamber, 'the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests.'<sup>94</sup> With particular reference to the French version of article 68(3) (which speaks of *la procédure*), the Chamber said that the term 'proceedings' did 'not necessarily exclude the stage of investigation of a situation. On the contrary, a number of provisions include the stage of investigation of a situation within the meaning of the term "*la procédure*".'<sup>95</sup> Answering the Prosecutor's argument that victim intervention might compromise his investigation, the Court said that the only issue to be determined in this respect was the extent of victim involvement. Reference was made to authorities from international human rights case law. Pre-Trial Chamber I observed that the European Court of Human Rights had applied article 6(1) of the *European Convention on Human Rights* to victims from the investigation stage, even before confirmation of charges, particularly where the outcome of the criminal proceedings was of decisive importance in terms of obtaining reparation.<sup>96</sup> A similar approach had been taken by the Inter-American Court of Human Rights, the Court noted.<sup>97</sup>

The Pre-Trial Chamber granted the application after assessing the specific circumstances of each victim. Here, too, it referred to international human rights law in order to determine, for example, whether emotional suffering or economic loss were sufficient to qualify an individual for status as a victim.<sup>98</sup> Victim VPRS 1, for example, was recognized because she had suffered emotional suffering related to the loss of family members, and economic loss as a result of the looting and burning of her house.<sup>99</sup> Leave to appeal the decision by the Pre-Trial Chamber has been denied.<sup>100</sup>

With both defence counsel and victims quarrelling before the Pre-Trial Chamber, all that was missing was a defendant. On 10 February 2006, the Prosecutor's application for an arrest warrant directed at Thomas Lubanga Dyilo, filed a month earlier on 13 January 2006, was granted by the Pre-Trial Chamber. This followed an *ex parte* hearing on 2 February 2006. Lubanga had apparently been in custody in the DRC for nearly a year prior to issuance of the arrest warrant. He had been in detention in the *Centre pénitentiaire et de rééducation de Kinshasa* since 19 March 2005, although the Prosecutor was concerned that he might soon be released.

The process itself seems to have involved some vigorous exchanges between Prosecutor and Pre-Trial Chamber, characteristic of the interventionist approach taken by the judges in this case and the corresponding resistance of the Prosecutor. Article 58(2) of the *Rome Statute* requires the Prosecutor to submit a 'concise statement of the facts' and 'a summary of the evidence' as part of an application for an arrest warrant. But apparently Pre-Trial Chamber I

answered the request for the warrant with an 'invitation' that the Prosecutor provide additional 'supporting materials'. The Prosecutor seems to have bristled at the suggestion, although he eventually cooperated, noting that he was not required by the *Statute* to comply with such an 'invitation'. The Prosecutor insisted that the terms of the *Statute* indicated that 'the legislator has deliberately chosen, at the stage of the arrest warrant application, to require the Pre-Trial Chamber to trust the Prosecutor's summary' and that 'the Prosecutor has a choice in what to present to the Pre-Trial Chamber'.<sup>101</sup>

The Pre-Trial Chamber conceded that the Prosecutor was under no procedural obligation to submit further materials, but said that if the judges were not satisfied with the materials presented to them, they could decline to issue an arrest warrant.<sup>102</sup> Pre-Trial Chamber I invoked the rights of the accused in this respect, in effect disagreeing that it should 'trust' the Prosecutor. It referred to the 'reasonable suspicion' standard established in the case law of the European Court of Human Rights<sup>103</sup> and the Inter-American Court of Human Rights.<sup>104</sup> Supporting

<sup>93</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-101-t), Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, para. 56.

<sup>94</sup> *Ibid.*, paras. 50-51.

<sup>95</sup> *Ibid.*, para. 38.

<sup>96</sup> *Ibid.*, para. 52, citing: *Moreira de Azevedo v. Portugal*, Series A, No. 189, 23 October 1990; *Tomasi v. France*, Series A, No. 241-A, 27 August 1992 = (1992) 13 HRLJ 453; *Acquaviva v. France*, Series A, no. 333-A, 21 November 1995; *Selmouni v. France*, App. No. 25803/94, 28 July 1999 = (1999) 20 HRLJ 228; *Calvelli and Ciglio v. Italy*, App. No. 32967/96, 17 January 2002; *Perez v. France*, App. No. 47287/99, 12 February 2004; *Antunes Rocha v. Portugal*, App. No. 64330/01, 31 May 2005.

<sup>97</sup> *Ibid.*, para. 53, citing *Blake v. Guatemala*, Series C, No. 36, 24 January 1998 = (1998) 19 HRLJ 393; R. Aldana-Pindell, 'An emerging universality of justiciable victims rights in the criminal process to curtail impunity for state-sponsored crimes', (2004) 26 *Human Rights Quarterly* 605.

<sup>98</sup> *Ibid.*, para. 116, citing *Ayder et al. v. Turkey*, App. No. 23656/94, 8 January 2004, paras. 10 and 1412 ff.; *Keenen v. United Kingdom*, App. No. 27229/95, 3 April 2001, para. 138.

<sup>99</sup> *Ibid.*, para. 117.

<sup>100</sup> *Situation in Democratic Republic of Congo* (ICC-01/04-135), Décision relative à la requête du procureur sollicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 2, VPRS 4, VPRS 5 et VPRS 6, 31 March 2006.

<sup>101</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06), Prosecutor's Further Submission, cited *in extenso* in *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006.

<sup>102</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 9.

<sup>103</sup> *Ibid.*, para. 12, citing: *Fox, Campbell and Hartley v. United Kingdom*, Series A, No. 182, 30 August 1990, paras. 31-36; *K.F. v. Germany*, Reports 1997-VII, 27 November 1997, para. 57; *Labita v. Italy* (App. 26772/95), 6 April 2000, paras. 155-161; *Berkday v. Turkey*, App. 22493/93, 1 March 2001, para. 199; *O'Hara v. United Kingdom*, App. 37995/57, 16 October 2001, paras. 34-44.

<sup>104</sup> *Ibid.*, citing: *Bámaca Velásquez v. Guatemala*, Series C, No. 70, 25 November 2000, paras. 138-144 = (2001) 22 HRLJ 367; *Loayza Tamayo v. Peru*, Series C, No. 33, 17 September 1997, paras. 49-55 = (1998) 19 HRLJ 203; *Gangaram-Panday v. Suriname*, Series C, No. 16, 21 January 1994, paras. 46-51 = (1994) 15 HRLJ 168.

its reference to international human rights law, the Pre-Trial Chamber invoked article 21(3) of the *Rome Statute*, the provision on applicable law, which states: 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.' This resort to international human rights sources in an early ruling of the International Criminal Court presents a nice contrast with the first decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY), slightly more than a decade earlier. In its initial ruling on an application to allow anonymous witnesses, an ICTY Trial Chamber dismissed the relevance of European Court of Human Rights precedents, saying that the international criminal tribunal was 'in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence'.<sup>105</sup>

The arrest warrant concerned the recruitment of child soldiers, noting that between July 2002 and December 2003 members of the *Forces patriotiques pour la libération du Congo*, of which Lubanga is the leader, had repeatedly enlisted children under fifteen years of age, who were brought to various training camps. The arrest warrant says there are also reasonable grounds to believe that during the same period, children under fifteen participated actively in hostilities. Commenting on the warrant in a press statement, Prosecutor Ocampo said, with his characteristic hyperbole, '[f]orcing children to be killers jeopardises the future of mankind'.<sup>106</sup> The *Rome Statute* has two essentially identical provisions concerning conscription and enlistment of child soldiers, one applicable to international armed conflict,<sup>107</sup> the other to non-international armed conflict.<sup>108</sup> Both provisions are cited in the arrest warrant.<sup>109</sup> Lubanga was charged as a 'co-perpetrator', pursuant to article 35(3)(a) of the *Rome Statute*.<sup>110</sup> It is of interest that in March 2006, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia rejected the concept of 'co-perpetration', opting instead for that of 'joint criminal enterprise'.<sup>111</sup> Ironically, the introduction of the concept of 'joint criminal enterprise' into the case law of the International Criminal Tribunal for the former Yugoslavia was justified with reference to article 25(3)(d) of the *Rome Statute*.<sup>112</sup> But Lubanga is not charged under article 25(3)(d), although he might have been. Nor are the provisions concerning superior responsibility invoked against him, although they too seem applicable.

Referring approvingly to the practice of Pre-Trial Chamber II with respect to the Uganda referral, Pre-Trial Chamber I noted that in deciding whether to issue the arrest warrant, it would assess both the jurisdiction and the admissibility of the case *ex officio* and *ex parte*. For the Pre-Trial Chamber, the 'Congo Situation' was in the course of being transformed into the 'Lubanga case', and this required a separate and distinct assessment of issues of jurisdiction and admissibility. Referring to its decision of 17 January 2006, Pre-Trial Chamber I recalled that a case was defined as 'specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects'.<sup>113</sup> Jurisdiction seemed obvious enough, given that the *Rome Statute* applied to the Democratic Republic of Congo since 1 July 2002, and that the alleged crimes took place on its territory. With respect to admissibility,

the Pre-Trial Chamber said two issues were to be determined: whether national jurisdictions were inactive or were unwilling or unable to proceed, and whether the case was of sufficient gravity.

The Pre-Trial Chamber cited the initial referral by the Government to the Court, saying it was not '*en mesure*' to proceed with investigations and prosecutions. According to the Pre-Trial Chamber, 'it appears that the DRC is indeed unable to undertake the investigation and prosecution [...] In the Chamber's view, this is why the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime'.<sup>114</sup> But, said the judges, the fact that Lubanga had been detained for nearly a year, and that proceedings were underway against him before national courts, indicated that the Prosecutor's version 'does not wholly correspond to the reality any longer'.<sup>115</sup> Nevertheless, the Trial Chamber observed that the proceedings underway against Lubanga in the Democratic Republic of Congo did not concern conscription of child soldiers. Because the DRC courts were not proceeding on this issue, it held that case before the International Criminal Court was admissible.<sup>116</sup>

This seems an exceedingly strict interpretation of the *Rome Statute*. Although States have been encouraged to incorporate the crimes as defined in the *Rome Statute* within their national legislation, few have done so. This is not to excuse the lethargy of legislators within States parties, but the Court ought to take a realistic approach to the subject. Even where States have actually incorporated the *Rome Statute* crimes within national law, they will not always proceed against alleged offenders under the international criminal law provisions, if only for reasons of expediency. Why would a national prosecutor complicate matters by attempting to establish the complex threshold requirements of genocide or crimes against humanity when he or she can more easily obtain a conviction for murder and the severe penalty likely to accompany it?

The fact remains that Lubanga was being brought to justice by the courts of the country where his alleged crimes had been committed, and the International Criminal Court might well have been more cautious before intervening. It is certainly not obvious that when an individual is held for nearly a year in pre-trial detention

<sup>105</sup> *Prosecutor v. Tadić* (Case No. IT-94-1-T), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 28.

<sup>106</sup> 'Statement by Luis Moreno-Ocampo, Press Conference in relation with the surrender to the Court of Mr. Thomas Lubanga Dyilo', 18 March 2006.

<sup>107</sup> *Rome Statute of the ICC* (note 6), art. 8(2)(b) (xxvi).

<sup>108</sup> *Ibid.*, art. 8(2)(e)(vii).

<sup>109</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06-2), Arrest Warrant, 10 February 2006.

<sup>110</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 93.

<sup>111</sup> *Prosecutor v. Stakic* (Case No. IT-97-24-A), Judgment, 22 March 2006.

<sup>112</sup> *Prosecutor v. Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 222.

<sup>113</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 21.

<sup>114</sup> *Ibid.*, para. 35.

<sup>115</sup> *Ibid.*, para.

<sup>116</sup> *Ibid.*, paras. 38-39.

that there is a serious problem of impunity. Both the Prosecutor and the Pre-Trial Chamber seem to have been a bit impetuous in this case, perhaps anxious to have a real defendant before the Court. But in so doing, they have offered an interpretation of the *Statute* which is arguably more intrusive with respect to the criminal justice of States than was ever intended. This may well have an impact on future ratifications of the *Rome Statute*. Many States are carefully studying the first cases at the Court, to see whether its promise to defer to national prosecutions will be respected.

In *Lubanga*, the Pre-Trial Chamber did not indicate the crimes with which the accused was charged in the Democratic Republic of Congo, but they were presumably serious enough to warrant his preventive detention for nearly a year. They might well have been *more* serious than those with which he was being charged by the Court. In such a context, where an accused person is also being prosecuted by national authorities, the determination of admissibility cannot be reduced to a mechanistic comparison of charges in the national and the international jurisdiction, in order to see whether a crime contemplated by the *Rome Statute* is being prosecuted directly or even indirectly. It must involve an assessment of the relative gravity of the offences tried by the national jurisdiction put alongside those of the international jurisdiction. Recruitment of child soldiers is serious enough, but maybe Lubanga was being prosecuted in Congo for large scale rape and murder. We are simply not given this information.

The Pre-Trial Chamber considered the issue of gravity of the *Lubanga* case, but in isolation, and not with regard to the pending charges within Congo. The *Rome Statute* requires the Court to declare a case inadmissible when it is 'not of sufficient gravity to justify further action by the Court'.<sup>117</sup> The Pre-Trial Chamber set out its perspective on its assessment of this aspect of admissibility,

First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale. If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes (which are defined by both contextual and specific elements) included within the material jurisdiction of the Court. Second, in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community. In the Chamber's view, this factor is particularly relevant to the Prosecution's Application due to the social alarm in the international community caused by the extent of the practice of enlisting into armed groups, conscripting into armed groups and using to participate actively in hostilities children under the age of fifteen.<sup>118</sup>

The Pre-Trial chamber added that the gravity threshold at the admissibility stage was 'intended to ensure that the Court initiates cases only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation'.<sup>119</sup> Focussing on the leaders would enable the Court to play a deterrent role, said the judges.<sup>120</sup> In this context, the Court referred to recent changes to the law of the *ad hoc* tribunals as part of their 'completion strategies'.<sup>121</sup> It bears mentioning that these provisions owe their provenance to initiatives of Judge Jorda, President of Pre-Trial Chamber I, who in an earlier incarnation was President of the International Criminal Tribunal for the former Yugoslavia. The ICTY provisions were intended to tame the Prosecutor, who

initially resisted attempts by the judiciary to encroach upon her discretion in selecting cases.<sup>122</sup>

The decision of Pre-Trial Chamber I to issue the arrest warrant was challenged by duty counsel Jean Flamme, in a notice dated 24 March 2006. In the notice of appeal, he argued that the Pre-Trial Chamber erroneously applied article 17 of the *Rome Statute*, and that it should have ruled the case inadmissible.<sup>123</sup> There is a procedural problem with the notice of appeal. Article 19(6) of the *Rome Statute*, which is invoked in the notice of appeal, says that '[d]ecisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82'. But the context indicates that the provision refers to appeals from challenges to admissibility which have been submitted under article 19, which an accused is entitled to file under article 19(2). In other words, the proper recourse for Lubanga is probably to challenge admissibility, and not to appeal the issuance of the arrest warrant.

While the Prosecutor worked with the authorities of Democratic Republic of Congo in order to ensure the accused person's transfer to The Hague, the *Lubanga* arrest warrant remained under seal.<sup>124</sup> The Registrar formally transmitted the request for arrest and surrender of Lubanga on 14 March 2006. Lubanga was apparently brought before a Congolese judicial authority, which authorised his surrender and transfer to the International Criminal Court. Lubanga was promptly brought to The Hague by French military aircraft. On 20 March 2006, Lubanga appeared before the Pre-Trial Chamber, for the purpose of establishing that he had been informed of the crimes he was alleged to have committed, and that he knew of his rights under the Statute, including the right to apply for interim release. A hearing to confirm the charges must be held within a reasonable time, in accordance with article 61 of the *Rome Statute*. The Pre-Trial Chamber set 17 June 2006 for the hearing. Presiding Judge Jorda said: 'Three months are necessary for you to become familiar with the mass of documents,' Jorda said, "in order to proceed on a fair basis.'

<sup>117</sup> *Rome Statute of the ICC* (note 6), art. 17(1)(d).

<sup>118</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 46.

<sup>119</sup> *Ibid.*, para. 50.

<sup>120</sup> *Ibid.*, para. 54.

<sup>121</sup> *Ibid.*, paras. 55-60. For example, the Court noted Security Council Resolution 1534 (2004), and Rules 11bis and 28(A) of the Rules of Procedure and Evidence. On the 'completion strategies' of the *ad hoc* tribunals, see: William A. Schabas, *The UN International Criminal Tribunals: the former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006.

<sup>122</sup> On the situation at the *ad hoc* tribunals, see, e.g., Matthew Brubacher, 'Prosecutorial Discretion within the International Criminal Court', (2004) 2 *Journal of International Criminal Justice* 71, at pp. 85-86.

<sup>123</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06-57-Corr), Requête d'appel du conseil de permanence de la décision du 10 février 2006 de la Chambre préliminaire I, relative à la requête du Procureur aux fins de délivrance d'un mandat d'arrêt en vertu de l'art. 58 du Statut, 24 March 2006.

<sup>124</sup> It was made public once Lubanga was in the Court's custody: *Prosecutor v. Lubanga* (ICC-01/04-01/06-37), Decision to Unseal the Warrant of Arrest Against Mr. Thomas Lubanga Dyilo and Related Documents, 17 March 2006.

Besides suggesting that there are problems with the admissibility of the case, the fact that Lubanga was detained for a prolonged period in the Democratic Republic of Congo before issuance of the arrest warrant raises questions of arbitrary detention for which the Court itself may be responsible. Lubanga had been in detention for approximately one year, and possibly longer. His detention was well-known to international NGOs so it seems reasonable to presume that the Prosecutor was also aware of the situation. The Prosecutor only proceeded to seek an arrest warrant when it appeared that the detention was coming to an end, and that there was the possibility Lubanga would be released. This was specifically invoked in the application for the arrest warrant, and helped to persuade the Pre Trial Chamber.<sup>125</sup> Thus, it would appear that the Prosecutor may have been content, for a protracted period, to let Lubanga remain in the Congolese prison while he proceeded to prepare his case, and that implies a degree of complicity with the detention within the Democratic Republic of Congo prior to issuance of the arrest warrant. Similar issues have been raised before the International Criminal Tribunal for Rwanda, where the Appeals Chamber has manifested considerable unease when suspects have been held in African prisons under dubious legal pretexts while the Prosecutor continued to investigate.<sup>126</sup>

## 6. Security Council Referral of the Situation in Darfur

Sudan signed the *Rome Statute* on 8 September 2000, but has not yet deposited its ratification. As a signatory of the instrument, it is bound to refrain from acts that would defeat the object and purpose of the *Statute*.<sup>127</sup> The Court can therefore only exercise jurisdiction over acts committed on its territory pursuant to a referral by the Security Council, in accordance with article 13 of the *Statute*.

In early September 2004, United States Secretary of State Colin Powell called upon the United Nations Security Council to take action with regard to what he described as genocide underway in the Darfur province of western Sudan.<sup>128</sup> Powell explicitly invoked article 8 of the 1948 *Genocide Convention*, which authorises States parties to 'call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III'.<sup>129</sup>

Responding to Powell's appeal, by Resolution 1564 of 18 September 2004 the Security Council mandated the establishment of 'an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable'.<sup>130</sup> The Commission of Inquiry called for in the Security Council Resolution was promptly created by the United Nations Secretary-General. Chaired by the distinguished international legal scholar Antonio Cassese, who had been the first president of the International Criminal Tribunal for the former Yugoslavia among other distinctions, the Commission reported back to the Secretary-General on 25 January 2005. The Commission disagreed with Powell, concluding that the atrocities that had been committed in the Darfur region of Sudan were not acts of genocide but rather crimes against humanity. The Commission called for prosecution by the International Criminal Court.<sup>131</sup>

Several weeks after the Darfur Commission issued its report, and following protracted negotiations during which the United States put forward several options for internationalised prosecution, the United Nations Security Council responded to the report by referring 'the situation in Darfur since 1 July 2002' to the International Criminal Court.<sup>132</sup> The resolution states that the Government of Sudan and the other parties to the conflict are under an international obligation to 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor'.<sup>133</sup> Other States are 'urged' to assist the Court with respect to enforcement of the resolution.

The United States abstained in the resolution, along with Algeria, Brazil and China. But the abstention of a permanent member of the Security Council with the power to veto a resolution is a form of tacit acceptance. That the United States was forced to accept the resolution is a singular setback for its antagonistic policy towards the Court. Nevertheless, as part of the negotiations, the United States was able to inject some bits of poison into the text. Under paragraph 7, 'none of the expenses incurred in connection with the referral including expenses related to investigations and prosecutions in connection with that referral, shall be borne by the United Nations'; rather, 'such costs shall be borne by the parties to the Rome Statute and those states that wish to contribute voluntarily'. Even more troublesome is paragraph 6 of Resolution 1593: 'nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State'. The provision is similar to one included in a 2003 Security Council resolution concerning Liberia.<sup>134</sup>

Although Resolution 1593 purports to exclude ICC jurisdiction over 'nationals, current or former officials or personnel from a contributing State outside Sudan which

<sup>125</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, paras. 98-102.

<sup>126</sup> *Prosecutor v. Barayagwiza* (Case No. ICTR-97-19-AR72), Decision, 3 November 1999; *Prosecutor v. Barayagwiza* (Case No. ICTR-97-19-AR72), Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000; *Prosecutor v. Kajelijeli* (Case No. ICTR-98-44A-A), Judgment, 23 May 2005, paras. 197-255.

<sup>127</sup> *Vienna Convention on the Law of Treaties*, (1979) 1155 UNTS 331, art. 18.

<sup>128</sup> Secretary Colin L. Powell, Testimony Before the Senate Foreign Relations Committee, Washington, 9 September 2004.

<sup>129</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277.

<sup>130</sup> UN Doc. S/RES/1564 (2004), para. 12.

<sup>131</sup> *Ibid.*, para. 569. See: Luigi Condorelli & Annalisa Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC', (2005) 3 *Journal of International Criminal Justice* 590; William A. Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', (2005) 18 *Leiden Journal of International Law* 871.

<sup>132</sup> UN Doc. S/RES/1593 (2005), para. 1.

<sup>133</sup> *Ibid.*, para. 2.

<sup>134</sup> UN Doc. S/RES/1497 (2003), para. 7.

is not a party to the Rome Statute of the International Criminal Court', it also does so with respect to all other jurisdictions except those of the State of nationality of the suspect. This is quite plainly contrary to treaty provisions binding upon virtually all United Nations Member States, including the United States. It is well known that the four *Geneva Conventions* oblige a State party 'to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts'.<sup>135</sup> But Resolution 1593 tells them to do the opposite. The answer to this apparent incompatibility may lie in article 103 of the *Charter of the United Nations*: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' If that is indeed the case, then the ability of the Security Council to in effect neutralize the grave breaches of the *Geneva Conventions* puts in doubt the claims of many writers that these provisions constitute norms of *jus cogens*.

Whatever the legality of paragraph 6 of the Resolution, it is most certainly incompatible with the *Rome Statute*. It should be recalled that when Uganda referred its conflict to the ICC in such a way as to exclude jurisdiction over certain individuals, the Prosecutor responded with his own interpretation by which no such exception *ratione personae* could be effective.<sup>136</sup> Indeed, this is why the concept of referral in the *Rome Statute* relates to 'situations' rather than 'cases'. The language was adopted specifically to avoid the danger of one-sided referrals, which could undermine the legitimacy of the institution.

Assuming that paragraph 6 of Resolution 1593 is illegal, the question of severability arises. If the impugned paragraph cannot be excised from the Resolution, then the entire referral is invalid. It seems necessary to resolve this question as a preliminary matter, before any prosecutions are undertaken. Certainly a future scenario cannot be automatically excluded whereby the Prosecutor seeks authorization to proceed with a case against an individual in a peacekeeping force who is not a national of a State party for acts committed in Sudan. How could the Prosecutor rule this out at the present time? Even if the current Prosecutor were to undertake not to take such an initiative, he could not bind his successor. And this leads to the possibility that the Court might rule on the legality of paragraph 6 after a prosecution had already been undertaken and perhaps, even, after one had been completed. Would the Court then declare the Resolution and the referral to be valid notwithstanding the offending paragraph, which it would deem inoperative? Or would it refuse to sever paragraph 6 and conclude that the referral as a whole was fatally flawed?

On 21 April 2005, President Kirsch assigned the Darfur situation to Pre-Trial Chamber I.<sup>137</sup> On 1 June 2005, the Prosecutor determined that there was a reasonable basis to initiate an investigation, and he notified the Chambers and the Presidency accordingly. In his December 2005 report,<sup>138</sup> he told the Security Council that the Office of the Prosecutor had issued requests for assistance to eleven states and seventeen NGOs and IGOs. He said that witnesses to the crimes under investigation had been identified in seventeen countries, that 'well over a hundred potential witnesses have been screened and a number of formal statements have been taken'. He said the Office had established 'a semi-permanent presence in the region, which provides logistical, security and other support to the

process of witness identification and interview'. He also described developments within the Sudanese judicial system that may impact on the issue of admissibility. Some initiatives have been undertaken with a view to prosecution before national courts, although their seriousness remains to be assessed.<sup>139</sup>

At a diplomatic briefing held on 23 March 2006, the Prosecutor said:

Darfur presents new challenges for the Court. The security situation in Darfur means that any national or international investigations in Darfur at this time would cause risks for victims. No one can conduct a judicial investigation in Darfur. A comparative advantage for the ICC is that we can more easily investigate from the outside. We have interviewed witnesses in more than 10 countries. We are planning to present a clear picture of the crimes in our next report to the Security Council, in June. We have recently conducted two missions to the Sudan, in November last year and in February. We have discussed cooperation and admissibility. We have interviewed persons. The Sudan will be sending us further information that we have requested.<sup>140</sup>

## 7. Other Possible Prosecutions

Several other situations are being examined by the Prosecutor. He referred to two of them in the 23 March 2006 'diplomatic briefing'.<sup>141</sup> The first of these is the Central African Republic which, like Uganda and the Democratic Republic of Congo, has made a self-referral to the Court. The Central African Republic ratified the *Rome Statute* on 3 Oct 2001, and therefore the Court may exercise jurisdiction over its territory and its nationals from 1 July 2002. The Prosecutor received a referral from a representative of President Bozizé on 21 December 2004, which he communicated to the President of the Court the following day. The referral was announced publicly on 7 January 2005. On 19 January 2005, the situation was assigned to Pre-Trial Chamber III.<sup>142</sup> In the March 2006 briefing, the Prosecutor said that a mission had been sent to the Central African Republic to seek

<sup>135</sup> *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (1949) 75 UNTS 31, art. 49; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (1950) 75 UNTS 85, art. 50; *Convention Relative to the Treatment of Prisoners of War*, (1950) 75 UNTS 135, art. 129; *Convention Relative to the Protection of Civilian Persons in Time of War*, (1950) 75 UNTS 287, art. 146.

<sup>136</sup> *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, paras. 3-4.

<sup>137</sup> *Situation in Darfur, Sudan* (ICC-02/05-1), Decision Assigning the Situation in Darfur, Sudan to Pretrial Chamber I, 21 April 2005.

<sup>138</sup> The Security Council resolution referring the Darfur situation requires the Prosecutor to make regular reports on progress in the case.

<sup>139</sup> 'Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)', 13 December 2005.

<sup>140</sup> 'Sixth Diplomatic Briefing of the International Criminal Court, Compilation of Statements', 23 March 2006.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Situation in the Central African Republic* (ICC-01/05-1), Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III, 19 January 2005.

information on admissibility, and that there was a pending domestic decision that could affect this issue.

The Prosecutor also referred to Côte d'Ivoire, saying that he would send a mission there 'when security permits'.<sup>143</sup> Côte d'Ivoire signed the *Rome Statute* on 30 November 1998, but it has never ratified the instrument and is not a State party. In 2003, Côte d'Ivoire made a declaration accepting the jurisdiction of the Court, pursuant to article 12(3) of the *Rome Statute*. This is a curious provision, the residue of the 1994 draft statute of the International Law Commission by which State consent was contemplated on a case-by-case basis. Article 12(3) allows the Court to exercise jurisdiction if a non-party State makes a declaration 'with respect to the crime in question' committed on its territory or by one of its nationals. The reference to 'crime' rather than 'situation' implies that this is not analogous to a referral by a State party or by the Security Council. The language used in articles 12 and 13 suggests that what is envisaged is an investigation that has already been initiated by the Prosecutor, that is then followed by a request that the State concerned consent to jurisdiction. The fact that the Prosecutor has not initiated proceedings indicates his understanding that Côte d'Ivoire's declaration does not mean the case has been referred to the Court, and that its jurisdiction has been triggered.

The Prosecutor has also indicated that at least six other situations are under investigation, although he has given no further indications to suggest what they might be.<sup>144</sup> Early in his mandate, the Prosecutor pointed towards the economic actors as being those who might 'bear the greatest responsibility', and therefore merit his attention:

One important area of investigation will involve financial links with crimes. The investigation of financial transactions, for example for the purchase of arms used in murder, may well provide evidence proving the commission of atrocities. Here again the interaction between State authorities and the Office of the Prosecutor will be crucial: national investigative authorities may pass to the Office evidence of financial transactions which will be essential to the Court's investigations of crimes within the Court's jurisdiction; for its part, the Office may have evidence of the commission of financial crimes which can be passed to national authorities for domestic prosecutions. Such prosecutions will be a key deterrent to the commission of future crimes, if they can curb the source of funding. And all assistance of this kind provided by national authorities to the Office of the Prosecutor will help to keep the Court cost-effective.<sup>145</sup>

This might shift his focus from the warlords of central Africa to the entrepreneurs and financiers of Europe and elsewhere who fuel the conflicts.

The Prosecutor might well make greater use of article 12(3), which was invoked not only by Côte d'Ivoire but also, at least implicitly, by Uganda in order to cover the gap of several months between entry into force of the *Rome Statute* and its own ratification. This is a way of addressing impunity in territories that may not yet be subject to the jurisdiction of the Court. For example, could not the Palestinian Authority issue a statement indicating its intention, upon obtaining statehood, not only to accede to the *Rome Statute* but also to make a declaration under article 12(3) extending jurisdiction over its territory retroactively to 1 July 2002, the date the *Statute* entered into force. Such a declaration might help to focus the minds of those who may perpetrate violations of the *Rome Statute* within the Occupied Territories. Along somewhat the same lines, given his pro-active approach to inciting

referrals, the Prosecutor might even invite Cuba to make a declaration under article 12(3) concerning a portion of its sovereign territory that has been under foreign occupation for more than a century, and where there are credible allegations of large-scale violations of human rights!

## 8. Conclusions

The International Criminal Court is now embarked on what promises to be an exciting period of judicial lawmaking.<sup>146</sup> In addition to clarifying many of the complex procedural issues, the Court will interpret provisions that are central to its operations and that were intentionally left ambiguous by negotiators at the Rome Diplomatic Conference. Two Pre-Trial Chambers have issued preliminary rulings that indicate considerable differences in approach. Underpinning much of the debate is a philosophical divide between adversarial and inquisitorial approaches, between interventionist judges who believe they must guide the prosecution and those who consider that their role is more passive. Already, a definitive decision from the Appeals Chamber on guiding principles concerning admissibility is called for.

For each of the three active cases – Uganda, Democratic Republic of Congo, Darfur – there are serious legal and practical difficulties, as well as important questions concerning prosecutorial priorities. In the Uganda situation, the initial focus on the rebel Lord's Resistance Army has been justified by the volume of crimes alleged. Yet the most serious problem with impunity lies with the pro-government forces. The Ugandan justice system seems capable enough of trying the rebels, to the extent that they can be apprehended. Yet Uganda has in effect waived the debate about admissibility and consented to exercise of jurisdiction by the Court. By cooperating with this process, the Court may be encouraging impunity rather than helping to stamp it out. The Congo has delivered the court's first prisoner. But he has already endured prolonged detention in Congo, with which the Court itself may have some complicity. The Court was meant to be a model of fair treatment and procedure, and it would be a shame if even a whiff of abuse accompanied its first prosecution. Thomas Lubanga was being dealt with by Congolese justice, for unspecified crimes that may well have been even more serious than those with which he has been charged by the Court. In both cases, those of Uganda and the Congo, the Court was perhaps too eager to get its own cases, when it might well have been more insistent that the countries concerned shoulder their responsibility to ensure that the most serious crimes and the worst criminals do not go unpunished. Finally, there is the Darfur situation, more akin to the paradigm for which the

<sup>143</sup> 'Sixth Diplomatic Briefing of the International Criminal Court, Compilation of Statements', 23 March 2006.

<sup>144</sup> 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. 4. Also: 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.

<sup>145</sup> Policy issues, pp. 2-3.

<sup>146</sup> *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002)*, (Democratic Republic of the Congo v. Rwanda), *Jurisdiction of the Court and Admissibility of the Application, Separate Opinion of Judge ad hoc Dugard*, 3 February 2006, para. 9.

Court was really created, that of State-sponsored violence directed against vulnerable populations and minorities. It comes to the Court via a defective Security Council resolution. There is a strong tendency to overlook the inconvenient flaws in the referral. But if they are not addressed at an early stage, this may come back to haunt the prosecutions. Thrilled at having humbled the Americans, the Court has welcomed the Security Council Resolution like the Trojans with the Greeks bearing gifts.

In the current excitement about the first prosecutions, the pace seems dizzying. But maybe this is because over the previous two and a half years of operations the Court has moved at glacial speed. The applications for arrest warrants with respect to the Uganda situation came approximately eighteen months after the referral. There cannot have been much mystery about the identity of the suspects, or even the crimes with which they were charged. Using NGO reports and information in the public domain, a young law student with internet access could probably have drafted the arrest warrants in January 2004, days after the referral. Amnesty International has reported on the recruitment of child soldiers by the Lord's Resistance Army since as early as 1997.<sup>147</sup> As for the Democratic Republic of Congo, the first prisoner was in custody for nearly a year, once again under the watchful eye of international NGOs, before his ICC arrest warrant was issued. The Darfur situation was handed to the Court by the Security Council in March 2005. The report of the Commission of Inquiry had been available since January. It included much valuable investigative material and even a list of suspects. But more than a year after the Security Council referral, there have still been no arrest warrants.

This does not compare very favourably with the precedents. We all recall how the Nuremberg indictments were served on defendants in October 1945, a little more than two months after the London Conference agreed on the definition of the crimes and the architecture of the International Military Tribunal.<sup>148</sup> In more recent times, the first indictments of the International Criminal Tribunal for the former Yugoslavia were issued in November 1994,<sup>149</sup> approximately five months after Prosecutor Richard Goldstone took office, and one year after the Tribunal's judges were elected. The initial indictments of the International Criminal Tribunal for Rwanda date to November 1995,<sup>150</sup> twelve months after the Security Council resolution establishing the Tribunal. First arrests by the Special Court for Sierra Leone were

made in March 2003,<sup>151</sup> about eight months after the election of the judges and the arrival of the Prosecutor in Freetown.

Deterrence is supposed to be one of the purposes of international criminal justice in general, and the International Criminal Court in particular. The theme has often figured in the public statements of the Prosecutor. In the *Lubanga* arrest warrant decision, the Pre-Trial Chamber spoke of 'maximizing' the 'deterrent effects of the activities of the Court'.<sup>152</sup> It cited the 'deterrent function' to justify the 'key role' of the gravity threshold in determining whether a case was admissible.<sup>153</sup> Deterrence remains somewhat of an enigma for experts in criminal justice. It will never be easy to establish whether the Court really deters effectively, because while we can readily point to those who are not deterred, it is nearly impossible to identify those who are. Of course, we would like to assume that the Prosecutor and the Pre-Trial Chamber are right, and that the activities of the Court do in fact deter the atrocities that plague central Africa and other parts of the world. But if this is really the case, why are they moving so slowly? If they really believed their actions were a deterrent, surely they would be in more of a hurry.

<sup>147</sup> Amnesty International, 'Breaking God's Commands: the Destruction of Childhood by the Lord's Resistance Army', AI Index: AFR 59/001/1997, 18 September 1997.

<sup>148</sup> *France et al. v. Göring et al.*, (1946) 22 IMT 203, 13 ILR 203, 41 *American Journal of International Law* 172, at p. 172.

<sup>149</sup> *Prosecutor v. Dragan Nikolić* (Case No. IT-94-2-I), Indictment, 4 November 1994.

<sup>150</sup> *Prosecutor v. Kayishema et al.* (Case No. ICTR-95-1-I), Indictment, 22 November 1995. Also: Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of the Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994, UN Doc. A/51/399-S/1996/778, para. 44; Navanethem Pillay, 'The Rwanda Tribunal and its Relationship to National Trials in Rwanda', (1998) 13 *American University International Law Review* 1469.

<sup>151</sup> *E.g., Prosecutor v. Taylor* (Case No. SCSL2003-01-I), Indictment, 7 March 2003.

<sup>152</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 54.

<sup>153</sup> *Ibid.*, para. 60.

## 2. DECISIONS and REPORTS

### UN Human Rights Committee (UN-HRCee), Geneva/New York

Decision on admissibility of 2 November 2005 – **Communication No. 1078/2002** – Date of Communication: 10 July 2001 – *Submitted by*: Norma Yurich – *Alleged victim*: The author and her daughter, Jacqueline Drouilly Yurich – *State party concerned*: Chile

#### Yurich case

(full text)\*

**1.1** The author of the communication is Ms. Norma Yurich, a Chilean national, who submits it on her own behalf and that of her missing daughter, Jacqueline Drouilly Yurich, a student, born in 1949. She alleges violations by Chile of articles 5; 6, paragraphs 1 and 3; 7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2; 12, paragraph 4; 13; 14, paragraphs 1 to 3 and 5; 16; 17, paragraphs 1 and 2;

18, paragraph 1; and 26 of the Covenant. The author is not represented by counsel.

**1.2** The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976, and the Optional Protocol on 28 August 1992.

\* Done in English, French and Spanish, the Spanish text being the original version.