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The International Criminal Court at Ten

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Introduction

When assessing the tenth anniversary of the International Criminal Court, one is necessarily confronted with a question as to when is the actual birthday of the Court. The institution itself now celebrates 17 July, and it is apparently a much appreciated paid holiday for employees at the Court, who take advantage of the day off to soak up the sun at Scheveningen beach. But the Court wasn't really "born" on 17 July, which is the day the Rome Conference concluded in 1998 with the famous vote by which the Statute was adopted. The Rome Statute requires sixty ratifications for entry into force,[1] and this was only achieved on 17 April 2002. Article 126 says that entry into force takes place about two months after the requisite ratifications, so the magic date might be 1 July 2002. It is an important date in any event, because it marks the starting point of the Court's temporal jurisdiction.[2] But the Court wasn't functional on 1 July 2002. Judges and a Prosecutor had not yet been elected, and the subsidiary instruments required by the Statute, the Rules of Procedure and Evidence and the Elements of Crimes had not yet been adopted. The Court was only in a position to actually begin its judicial activities in June 2003, when the Prosecutor was sworn into office. Thus, the Court actually has several possible birthdays. Its employees would no doubt be delighted if every one of these were to be celebrated with a paid day off. For the purposes of this article, let us say that the Court is "about" ten years old. The aim of this short article is to consider some features of the institution's work in this first decade of its activity.

1. Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art 129 (hereinafter Rome Statute). See RS Clark, 'Article 126', in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed, CH Beck et al 2008) 1775–1776.

2. Rome Statute (n 1) Art 11. See SA Williams, 'Article 11', in Triffterer (n 1) ibid. 539–545.

Too many judges, too little work

It is often overlooked that when the Rome Statute was adopted, the *ad hoc* tribunals for Yugoslavia and Rwanda had been operational and engaged in trial work for only a few years. Most of the rich lessons from their activity in the procedure (and substance) of international criminal law had yet to be learned. Thus, when the first trial began at the International Criminal Court in 2009 it was using a procedural model that had been designed more than a decade earlier. The invaluable lessons learned from the experience of the *ad hoc* tribunals were not taken into account at all.

The procedural system of the United Nations international tribunals had been largely left to the judges, whereas that of the International Criminal Court was more rigorously codified by the states that negotiated the Statute and the Rules of Procedure and Evidence. Many felt the Rome system was better, and certainly it more closely resembled models in domestic legal systems. But while this may have been an advantage, there were also disadvantages with the inflexibility of the scheme. At the United Nations tribunals, the Rules of Procedure and Evidence have been subjected to a constant process of fine tuning and amendment. The judges have adjusted the procedure in light of experience but also to accommodate changes in the nature of the case load. Although the same should be possible at the International Criminal Court, in practice there is nothing of the sort. The Court's Rules of Procedure and Evidence have never been amended. While complex when compared with the *ad hoc* tribunals, the amending process at the Court should not be so terribly difficult. On closer examination, it seems that the failure to amend the procedural regime is not so much a function of the difficulty of the process as a genuine resistance to the idea.

Outside the Court's own institutions, much thought is given to amendment among academics.[3] But within the Court, and the Assembly of States Parties, the idea took hold that it was premature to contemplate amendments with respect to the procedure, structures and other operational aspects. The theory was that a "full cycle" (arrest, confirmation hearing, trial, appeal) should be completed before any changes would be considered. The approach contrasts rather sharply with the attitude taken at the *ad hoc* tribunals. Perhaps there is some merit in this more conservative and cautious

3. RS Clark, 'Possible Amendments for the First ICC Review Conference in 2009' (2007) 4 New Zealand Yearbook of International Law 103 and C Burchard, O Triffterer and J Vogel (eds), *The Review Conference and the Future of the International Criminal Court* (Kluwer Law International 2010).

position. It may be the reflection of the involvement of diplomats both in the Assembly of States Parties and within the Court itself (where they are, strictly speaking, former diplomats). Diplomats might be nervous about reopening compromises that were negotiated with difficulty, fearful that one change would lead to a cascade. Thus, although given the opportunity to make minor (and perhaps major) repairs to the system at the Kampala Review Conference, there was a refusal to consider the matter. Instead, much time was consumed at Kampala with a series of "stocktaking sessions," which were a mix of academic conference and NGO campaign meeting. While interesting and worthwhile in a sense, they hardly merited the expense and energy of bringing more than a thousand people to central Africa. The term "stocktaking" implied introspection, but there was very little of that in reality. Most of the sessions involved hectoring States Parties about their obligations to the Court, rather than reflection on the problems within the Court. There was also a sense that these and similar activities had been conceived rather late in the preparations for Kampala once it was understood that the agenda of amendments—which was, after all, the purpose of the Review Conference—would be rather more slender than many observers would have expected.

Actually, it takes little imagination to see how the procedure can be improved, the pre-trial and trial activity simplified, and the Court made more efficient. In that sense, the Kampala Conference was a missed opportunity. An unfortunate message was delivered of an institution that is rather reluctant to acknowledge its shortcomings and that seems content with its performance.

One of the innovations in the Rome Statute is the confirmation hearing, the preliminary proceeding at which the Pre-Trial Chamber is to determine whether there are "substantial grounds" to go to trial.[4] The confirmation hearing can add up to a year to the length of the proceedings as a whole. Its enthusiasts explain that it adds a layer of protection against abusive trials, which may well be true. In four cases, the confirmation hearing resulted in dismissal of the charges, which is reassuring to defense lawyers (and troubling, to the extent that it reflects misjudgment by the Prosecutor).[5]

4. Rome Statute (n 1) Art 61. See K Shibahara and WA Schabas, 'Article 61', in Triffterer (n 1) 1171–1181.

5. *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010); *Prosecutor v Callixte Mbarushimana* (Decision on the confirmation of charges) ICC-01/04-01/10-465-Red Pre-Trial Chamber I (16 December 2011); *Prosecutor v Callixte Mbarushimana* (Judgment on the appeal of the Prosecutor against the decision

But in all such arguments, a cost-benefit analysis is central. Is the added length to the proceedings, especially if the accused is in custody, worth the investment in time and resources that is involved?

The closest that the *ad hoc* tribunals come to a confirmation hearing is the so-called Rule 61 Procedure. Under the Rules of Procedure and Evidence of the *ad hoc* tribunals, when an arrest warrant cannot be executed there is a special procedure at which evidence may be produced and witnesses called. The accused is, of course, not present at the hearing, and may not even be represented by counsel.[6] At the conclusion of the hearing, the Trial Chamber may determine "there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment." Rule 61 was adopted as a compromise intended to assuage critics from continental European justice systems who charged that the lack of an *in absentia* procedure would seriously hamper the work of the Tribunal.[7] The main distinction is that a Rule 61 proceeding does not pronounce a sentence. In the early years of the International Criminal Tribunal for the former Yugoslavia, several hearings were held pursuant to Rule 61, but the practice was discontinued once the Tribunal had defendants in custody and the suggestion that it could only function if it could conduct *in absentia* hearings no longer made any sense.[8] Reflecting on the procedure, Louise

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of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges') ICC-01/04-01/10-514 Appeals Chamber (30 May 2012); *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11-382-Red Pre-Trial Chamber II (23 January 2012); *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11-373-Red Pre-Trial Chamber II (23 January 2012).

6. *Prosecutor v Karadžić* et al (Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-5-R61 & IT-95-18-R61 (11 July 1996) para 4. But see *Prosecutor v Rajić* (Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-12-R61 (13 September 1996); *Prosecutor v Rajić* (Separate Opinion of Judge Sidhwa) IT-95-12-R61 (13 September 1996) paras 10–16.

7. *Prosecutor v Rajić* (n 6). 'A Rule 61 proceeding is not a trial in absentia. There is no finding of guilt in this proceeding'. *Prosecutor v Dragan Nikolić* (Review of Indictment Pursuant to Rule 61) IT-94-2-R61 (20 October 1995): 'The Rule 61 procedure [...] cannot be considered a trial in absentia: it does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal.'

8. See F Patel King, 'Public Disclosure in Rule 61 Proceedings Before the International Criminal Tribunal for the Former Yugoslavia' (1997) 29 New York University Journal of International Law and Policy 523; M Thieroff and EA Amley, Jr, 'Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61' (1998) 23 Yale Journal of International Law 231; BT Hildreth, 'Hunting

Arbour said it was "detrimental" to the work of the Prosecutor.[9] Neither the International Criminal Tribunal for Rwanda nor the Special Court for Sierra Leone ever showed any interest in Rule 61 proceedings. They are now little more than a footnote, and with hindsight look like efforts to create work for judges and prosecutors at an institution without defendants. In that sense, there are obvious similarities with the confirmation hearing of the International Criminal Court. As the institution gets busier, it seems likely that the confirmation hearing will be reduced in scale until at some point there is a willingness to eliminate it altogether.

The Regulations of the Court require that the decision on the confirmation hearing be issued within sixty days of its conclusion.[10] Working within this requirement, the Pre-Trial Chambers have issued lengthy rulings in which the facts and law are reviewed.[11] The time limit is useful, because where one is not imposed, the judges generally take much, much longer to issue written rulings. On the arguably simpler issue of whether or not to issue an arrest warrant, they have sometimes taken several months.[12] By comparison, issuance of an arrest warrant at the *ad hoc* tribunals is a matter of a few days.

Questions about the utility of the confirmation hearing inexorably lead to thoughts about the value of the Pre-Trial Chamber itself. Again, this is a feature introduced in the Rome Statute that has no equivalent at the *ad hoc* tribunals, where the same issues are very adequately dealt with by a single pre-trial judge. A minimum of one-third of the entire cohort of judges at the International Criminal Court is tied up with this pre-trial work. If the Chamber were abolished, there would be more judges for trials which are, after all, the bread and butter of the institution.

At the other end of the system sits the Appeals Chamber. There was no appeal at Nuremberg or Tokyo. When the Yugoslavia Tribunal was

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the Hunters: The United Nations Unleashes its Latest Weapon in the Fight against Fugitive War Crimes Suspects—Rule 61' (1998) 6 Tulane Journal of International and Comparative Law 499; AL Quintal, 'Rule 61: The "Voice of the Victims" Screams Out for Justice' (1998) 36 Columbia Journal of Transnational Law 723.

9. L Arbour, 'The Crucial Years', (2004) 2 Journal of International Criminal Justice 397.

10. Regulations of the Court, Adopted by the judges of the Court (26 May 2004) ICC-BD/01-01-4 Reg 53.

11. For example, *Prosecutor v Lubanga* (Decision on the Confirmation of the Charges) ICC-01/04-01/06 (29 January 2007); *Prosecutor v Katanga* et al (Decision on the Confirmation of the Charges) ICC-01/04-01/07 (30 September 2008); *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009).

12. For example, *Prosecutor v Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009).

established in the early 1990s, the text of the International Covenant on Civil and Political Rights made an effective right of appeal a *sine qua non*. Proposing inclusion of a right of appeal for the Yugoslavia Tribunal, the Secretary-General's Report said "such a right is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber."[13]

The implication, confirmed by the reference to Article 14 of the International Covenant, was that this was to be an appeal from the final verdict. The corresponding provision, Article 25 of the Statute of Yugoslavia Tribunal said: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds."[14] But the judges themselves soon determined that in addition to an appeal of conviction—the only requirement imposed by human rights law—that interlocutory matters could also be dealt with.[15] The idea stuck, and was incorporated in the Rome Statute.[16]

By the time the International Criminal Court completed its first full cycle of judicial elections in early 2012, a full-time five-judge Appeals Chamber (together with professional assistants and secretarial help) had occupied a floor of the Court's premises for nearly the entire period without ever engaging in the fundamental reason for its existence: appeal by an accused of a conviction. The Appeals Chamber has barely managed to keep itself occupied with interlocutory appeals. The occasional decisions are generally sparsely reasoned and there are few separate or dissenting opinions. The job could very well have been accomplished with a panel of part-time or standby judges, called to The Hague as required and remunerated according to the work that they actually accomplish.

Would the sky fall in if there was no interlocutory appeal at all? There might be variations in procedure from one chamber to another, but that is something that many justice systems accept as a fact of life. Some argue the virtue of "clarifying" the law so as to ensure "legal certainty." But it might be more constructive for a Court in its early years to "let a hundred flowers bloom," and to encourage experimentation and innovation. The

13. Report of the Secretary-General Pursuant to Paragraph (2) of Security Council Resolution 808 (1993), UN Doc S/25704 (1993) para 116.

14. Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc S/RES/827 (1993), annex, Art 25(1) (hereinafter ICTY Statute).

15. Rules of Procedure and Evidence, Rules 72(B), 73(B), 108*bis*(A).

16. Rome Statute (n 1) Art 82. See C Staker, 'Article 82', in Triffterer (n 1) 1475–1480.

Rome Statute contemplates a division of labor whereby the Pre-Trial and Trial Chambers are enriched by a large proportion of judges with criminal trial experience. That makes sense. But the consequence may be that there is less criminal trial experience at the Appeals Chamber, and a tendency for it to be top-heavy with judges from the international law stream. This means that tricky determinations about trial procedure made by experienced judges working at the coal face are being second-guessed by those who are probably less familiar with daily life in the courtroom.

A much-heralded innovation in the Rome Statute is the recognition of a role for victims of crime. The Statute's provisions concerning victim participation might well have been interpreted relatively narrowly. Instead, an elaborate and costly regime of victim representation and participation has developed. Much of the institutional energy of the Court in its first decade has been devoted to addressing this. But it is not apparent that the right scheme for victim participation has been found. One suspects that if the victims understood that many millions had been invested—mainly in professional salaries and international travel—in order to ensure the respect of their rights, they might ask if they could simply be given the money instead. The continental procedural model of the *partie civile* on which victim participation was premised seems very remote from what we actually see in the Chambers of the International Criminal Court.

One example of this indulgence is the Trust Fund for Victims, whose establishment is called for by Article 79 of the Rome Statute.[17] As it was understood, this was to provide a mechanism for seizing the assets of the wealthy warlords and tyrants upon successful prosecution by the Court. Of course, to date it has collected nothing of the sort, because no trials have been completed. It was probably unrealistic to view the defendants as a reliable source of resources that might be used to address issues of compensation and restitution for victims. At the *ad hoc* tribunals, most of the defendants have been declared indigent for the purposes of legal aid. Even the notorious Charles Taylor, widely alleged to have billions tucked away in foreign bank accounts, was not declared to be capable of paying his own lawyers' fees because the money could not be found. And proof of assets for the purposes of legal aid should not be nearly as demanding as for the seizure of bank accounts and other property.

The Fund itself gets a limited income in the form of voluntary contributions from the wealthier States Parties. The money is being spent on a

17. Rome Statute (n 1) Art 79. See M Jennings, 'Article 79', in Triffterer (n 1) 1439–1442.

range of projects in regions where the Court is active. For the year 2010, the Fund expected an income of something under 2 million euro in such gifts. It had budgeted an operating cost of 1.2 million euro. This is an expensive way to do what amounts to overseas development assistance. Maybe States should give their money to the UNDP or Oxfam, and let the Trust Fund become inoperative until such time as the Prosecutor is astute enough to catch a wealthy defendant.

The Challenge of Selecting Situations and Cases

Although the procedural issues pose interesting challenges, it may be that the crux of the difficulty facing the International Criminal Court is substantive. After all, this is where the real differences lie between the Court and the *ad hoc* institutions. James Crawford, who chaired the International Law Commission drafting committee in the early 1990s, has said that the statute it prepared was what the Commission thought would meet general acceptance. Professor Crawford has suggested that the world may not have been ready for the more radical concepts that emerged from the Rome Conference. If he is right, this may help us to understand the difficulties that the Court faces in becoming operational and effective.

The Rome Statute makes an important distinction between "situations" and "cases." The process of prosecution begins with identification of a "situation" rather than a "case." Thus, we have the "Situation in the Democratic Republic of the Congo" and the "case" of Thomas Lubanga, leader of a combatant faction in a civil war accused of recruiting child soldiers. There is the "Situation in northern Uganda" and the "case" of Joseph Kony, head of the Lord's Resistance Army.

The great originality of the International Criminal Court compared with all of its predecessors is that the Prosecutor selects both the "situation" and the "case." At the other institutions, starting with Nuremberg, the "situation" has invariably been selected by the political body that created the tribunal. The Prosecutor at these institutions only selects the "case." In 1945, the four-power London Conference charged the International Military Tribunal with delivering justice to "the major war criminals of the European axis." The four prosecutors concurred about the individuals they would prosecute. Even there, it seems they were instructed by their various governments in making this choice. In the course of the trial, the judges heard evidence of war crimes perpetrated by the Allied forces—the

Katyn massacre, unrestricted naval warfare—but were without jurisdiction to address these issues. Had one or more of the prosecutors suggested that these matters be dealt with in the interests of "balance" and fairness, he would have been quickly replaced by someone prepared to live within the Tribunal's mandate.

When the International Criminal Tribunal for the former Yugoslavia was established in 1993, it was said that the shortcomings at Nuremberg had been corrected. A specific provision in the Statute enshrines the independence of the Prosecutor. The Prosecutor is appointed by the Security Council, and "shall not seek or receive instructions from any Government or from any other source."[18] But he or she must still live within the confines of the narrow jurisdictional scheme established by the Security Council. At the *ad hoc* tribunals, the Prosecutor's discretion is limited to the choice of "cases." The "situation," on the other hand, is part of his job description and he cannot change it. This was also the International Law Commission's vision of the prosecutor of an international criminal court, but one that the Rome Conference did not endorse. Indeed, the *proprio motu* prosecutor enshrined in Article 15 of the Rome Statute has been held out as one of the great achievements of the negotiations.[19]

Political factors are not entirely absent in the selection of "situations" at the International Criminal Court. Alongside the *proprio motu* authority of the Prosecutor is the power given to the Security Council[20] and to States Parties[21] to refer "situations," thereby "triggering" the exercise of jurisdiction, to use the jargon of the Court. But it is a trigger with a safety catch, because the Prosecutor is not obliged to proceed at the behest of the Security Council or a State Party. He or she may even decline to pursue the agenda set by the Security Council or a State Party, subject to a vague and untested degree of judicial supervision.[22] To date, the Prosecutor has never resisted the initiatives of the Security Council or States Parties. In the case of the four self-referrals, from Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali, in practice these

18. ICTY Statute (n 14) Art 16(2).
19. Rome Statute (n 1) Art 15. See M Bergsmo & J Pejić, 'Article 15', in Triffterer (n 1) 581–593.
20. Rome Statute (n 1) Art 13(b). See SA Williams and WA Schabas, 'Article 13', in Triffterer (n 1) 563–574.
21. Rome Statute (n 1) Art 14. See A Marchesi, 'Article 14', in Triffterer (n 1) 575–579.
22. Rome Statute (n 1) Art 53. See M Bergsmo and P Kruger, 'Article 53', in Triffterer (n 1) 1065–1076.

were instigated by the Prosecutor rather than the State Party concerned. It seems likely that the referral letters were drafted in The Hague and simply sent to the national capitals for signature. The Security Council referrals of the situations in Darfur and Libya were welcomed because they brought the Court to the center of some of the great international crises of the day. Indeed, it was for situations like Darfur and Libya that the International Criminal Court was created.

The enthusiasm for the *proprio motu* Prosecutor was the result of two different and perhaps somewhat disparate objectives: to free the Court from the hegemony of the Security Council, and to create an institution where the decisions about targets for prosecution are based upon judicial rather than political criteria. One nourished the other. Adversaries of the Security Council invoked the goal of an apolitical prosecutor without giving much thought to how this would work in practice. Fans of the independent and impartial prosecutor transposed models from domestic justice systems, where all serious crimes against the person receive attention, without adequate reflection about the different imperatives of an international system.

When Luis Moreno-Ocampo took office in June 2003, he could build on much experience from his predecessors at Nuremberg, Tokyo, The Hague and Arusha. But in the selection of "situations," he was in virgin territory. A team of lawyers hired to set up the Office had prepared draft Regulations that attempted to parse the matter of selecting situations. The initial draft Regulations contemplated a highly transparent process of the selection of situations based upon objective judicial standards. The Prosecutor himself quickly understood that the Rome Statute did not provide much guidance on what those standards really were. Moreover, he was astute enough to recognize that mechanistic application of regulations such as those drafted by the advance team might have unexpected consequences that would be politically unwise. In the result, the draft Regulations were not adopted. Much later, the Prosecutor proposed Regulations where the issue of selection of situations was addressed in a vague manner, and in such a way as to provide him with essentially unlimited discretion.

Some students of the Rome Statute have read Article 15 as suggesting that the Prosecutor is required to act relying upon information received, from whatever source, as long as there is a "reasonable basis" to proceed. This is an absurdly unrealistic interpretation in light of the resources of a Court that has been barely able to deal with a handful of cases in a decade and that now appears overwhelmed by the new situations that have arisen

quite unpredictably in Libya and Côte d'Ivoire. The drafters at Rome gave little thought as to the basis on which the Prosecutor would exercise his phenomenal discretion. Had they done so, it is likely that they would have been unable to agree. When they attempted to codify the exercise of the authority to decline to proceed in the case of referral by the Security Council or a State Party, the best they could come up with was "interests of justice" as a criterion. It was a way of avoiding clarification and it amounted to a lack of regulation, although there have been naïve attempts to interpret the "interests of justice" formulation so as to make it say more than it really does.

The Rome Statute itself advances three concepts that may assist in the application of prosecutorial discretion: complementarity, gravity and the "interests of justice." The first of these creates a presumption in favor of national jurisdictions, directing the Court not to proceed when national jurisdictions are willing or able to prosecute. Article 17 of the Statute offers some instruction about the scope of "unwillingness" and "inability."[23] The issues lend themselves to a reasonably objective assessment. The same cannot be said of such stunningly nebulous concepts as "gravity" and the "interests of justice." These notions are so malleable as to provide any imaginative prosecutor with a rationale for what may be, in reality, rather arbitrary choices.

In order to avoid the challenge of selecting situations, early in his term the Prosecutor essentially abdicated the responsibility. He rather quietly encouraged some States to refer situations to the Court and then proceeded on this basis without challenging the validity of such choices. He used a novel interpretation of Article 14, by which States could "self-refer" situations within their own territory. The Prosecutor explained that States Parties had decided to refer the situations in Uganda, the Democratic Republic of the Congo and the Central African Republic, and acted as if he was virtually bound to proceed in the absence of evidence that the situations were inadmissible. The Prosecutor did the same when the Security Council referred the "situation in Darfur," in March 2005.

This was an expedient by which the Prosecutor avoided selecting a situation on his own. But even then, it soon became apparent that situations were a Matrioshka doll, and that there were situations within situations. When he obtained the first arrest warrants, in 2005, in the "situation in Uganda,"

23. Rome Statute (n 1) Art 17. See SA Williams and WA Schabas, 'Article 17', in Triffterer (n 1) 605–625.

the targets were the Lord's Resistance Army rebels. The big human rights NGOs took the Prosecutor to task for failing to proceed against the pro-government forces as well. It was at this point that he discovered "gravity", a term buried in the Statute and essentially forgotten or overlooked, until that point, by academic writers in the major commentaries.[24] Justifying his focus on the rebels, the Prosecutor said they were killing many more people than the government forces, and this meant they should be prioritized by the Court. He suggested he would get to the pro-government forces later, but never did. There was the lingering suspicion of an agreement, or perhaps only a tacit understanding, by which Museveni's helpful "self-referral" of the situation in Northern Uganda meant the focus would be on Museveni's enemies rather than on himself.

In practice, it seemed that the fabled de-politicized Prosecutor was in fact not immune to political factors. Soon, gravity was invoked once again to explain why the Prosecutor had decided to reject the many complaints about violations of the Rome Statute perpetrated by British troops in Iraq. He explained that many more people were being killed in Uganda and in the Congo, so these areas deserved the attention of the Court as a priority. The explanation was unconvincing, because the evidence of the massive death toll in Iraq was notorious. The Prosecutor seemed to be confusing "situations" and "cases", comparing the "cases" of alleged deaths in British custody in Iraq with the "situations" of mass killings in Uganda and the Congo. Days later, he announced that he was proceeding against Thomas Lubanga, a Congolese warlord, on charges of recruitment of child soldiers. But if the Democratic Republic of the Congo was inherently more serious than Iraq, because of the number of deaths, why wasn't the Prosecutor dealing with murder rather than that arguably less important crime of recruitment?

James Crawford may well have been right to suggest that the world is not ready for a Court with an independent and impartial prosecutor, analogous to what we expect in the national justice system of a functional, democratic society that is based upon the rule of law. International human

24. SA Williams, 'Article 17', in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos 1999) 393. See also M Bergsmo and P Kruger, 'Article 53', in ibid. 708–709; JT Holmes, 'Complementarity: National Courts *versus* the ICC', in A Cassese, P Gaeta and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* vol I (OUP 2002) 667–686; G Turone, 'Powers and Duties of the Prosecutor', in ibid. 1153–1154; É David, 'La Cour pénale internationale' (2005) 313 *Recueil des cours* 248–251.

rights courts, like the European Court of Human Rights, have held that there is a procedural obligation upon States to investigate and prosecute all serious crimes against the person. But the theory does not lend itself to a simplistic application in the international criminal law environment. The International Criminal Court cannot prosecute all atrocities that go unpunished at the national level. Choices are inevitable. The Prosecutor claims he makes them on the basis of judicial standards. But the whiff of politics is inescapable.

Possibly this is what really ails the Court. Seductive as the vision of an independent Prosecutor may be, the idea that the choices of situations are left to one unaccountable individual, who employs vague concepts of "gravity" and "interests of justice" to explain these, is perhaps not the Court's greatest strength but rather its greatest flaw. At the Rome Conference, the drive to eliminate a role for the Security Council in the determination of "situations" was understandable. But it may have caused another problem in the neglect of the ineluctable role of politics. The challenge, as the Court enters its second decade, may be to find ways to remedy the situation by governing and regulating the role of political factors in the choice of "situations" rather than pretending that they are simply absent.

Towards the second decade

There is a strong impression that after the euphoric success of the Rome Conference and the precocious entry into force of the Statute, the actual operations of the Court have been a disappointment. Afflicted with a cumbersome and inflexible procedural regime, there is nevertheless resistance to contemplation of any reforms. The Court lacks vision and leadership. Its employees exude frustration and even demoralization. The ardor of the African states that ratified the Statute in large numbers, proving its appeal to countries of the South confronted with internal conflict, has cooled.

Compare this with the accomplishments of the United Nations tribunals at a similar stage in their development. Nine years after the adoption of the Security Council resolution establishing the International Criminal Tribunal for the former Yugoslavia, it had completed the trials of twenty-five accused persons. In eighteen cases, even the appeals were finished. Forty-six people were in detention in The Hague, compared with five for the International Criminal Court. The International Criminal Tribunal for Rwanda cannot claim to have been quite as productive, but its performance is still rather stellar when set beside that of the International

Criminal Court. Nine years after its establishment, it had completed the trials of thirteen accused. Several appeals had also been adjudicated. And at the same age, the Special Court for Sierra Leone had completed three trials of nine defendants through to the appeals stage.

The Prosecutor has been rather dismissive of criticism about the Court's poor performance. Yet he has himself been responsible for forecasts that have failed to materialize. A year after taking office, the Prosecutor proposed a budget based upon the proposition that "[i]n 2005, the Office plans to conduct one full trial, begin a second and carry out two new investigations."[25] A flow chart derived from the Prosecutor's plans indicated that the first trial before the Court would be completed by August 2005.[26] He became somewhat less ambitious in 2006, when a three-year strategic plan proclaimed the expectation that the Court would *complete* two "expeditious trials by 2009, and . . . conduct four to six new investigations."[27] In fact, only one trial started in 2009. No reasonable observer would use the adjective "expeditious" to describe its glacial pace. In February 2010, a new three-year strategic plan from the Office of the Prosecutor said the Court would finish the three trials then underway or about to begin, and start "at least one new trial." In addition, the Prosecutor said he intended to continue ongoing investigations in seven cases, and conduct "up to four new investigations of cases."[28] In fact, by early 2011 not even one trial was even close to completion. The first judgment only came in early 2012, seven years behind schedule, and was followed by a second at the end of the year.[29] These mistaken projections reflect an unrealistic assessment of the difficulties facing the institution.

But there are many encouraging signs that it continues to enjoy the confidence of a large number of States, including many who have yet to join the Court. In early 2011, the Court presented itself as one of the useful options to deal with evolving crises in Libya and Côte d'Ivoire. When the Security Council referred Libya to the Court, both the Prosecutor and the Pre-Trial Chamber reacted with a sense of urgency that neither had shown

25. Draft Programme Budget for 2005, ICC-ASP/3/2 para 159.
26. Ibid. 49.
27. OTP, 'Report on Prosecutorial Strategy' (14 September 2006) 3.
28. OTP, 'Prosecutorial Strategy, 2009–2012' (1 February 2010) 2.
29. By the end of 2012, the Court had delivered two trial judgments in cases against Thomas Lubanga Dylo and Mathieu Ngudjolo Chui. (See *Prosecutor v Thomas Lubanga Dylo* (Judgment) ICC-01/04-01/06-2842 (14 March 2012) and *Prosecutor v Mathieu Ngudjolo* (Judgment) ICC-01/04-02/12 (18 December 2012).)

years earlier when it had been asked to do the same thing in Darfur. Another sign of health is the successful adoption of amendments at the Kampala Conference that will eventually permit the Court to exercise jurisdiction over the crime of aggression. While the pace of ratification has slowed, political changes such as the jasmine revolution in the Arab countries open up new opportunities. Tunisia's accession to the Rome Statute in June 2011 is a positive indication in this respect.

The Court remains confronted by the need to address shortcomings that have manifested themselves in its first years of operation. Other international courts and tribunals—the International Court of Justice and the European Court of Human Rights, for example—also face challenges to adjust as the world changes around them. But there is confidence in their continued existence as a more or less permanent fixture of the global order. This cannot yet be said as safely about the International Criminal Court. The Court must address its problems with a greater sense of urgency, and one of concern that if there is a failure to do so adequately, States may begin to lose the enthusiasm for the institution with which it has been blessed since the 1990s.

Note: This contribution, which served as the basis for the key-note speech by Professor Schabas at the conference on tenth anniversary of the ICC (21 June 2012, London), is an update of an article first published in (2011) 22 *Criminal Law Forum* and adjusted for the publication in this book. Reprinted with permission of the author and publisher (Springer).