

# THE RELEVANCE OF “A SITUATION” TO THE ADMISSIBILITY AND SELECTION OF CASES BEFORE THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE  
International Criminal Court  
Legal Analysis and Education Project  
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## ABOUT THE WAR CRIMES RESEARCH OFFICE

The core mandate of the War Crimes Research Office is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or “hybrid” war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor (Special Panels), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at this stage of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO is taking on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

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### COVER PHOTOGRAPHS (from left)

*A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer*

*The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer*

*A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer*

*Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office*

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## **EXECUTIVE SUMMARY**

Under the Rome Statute of the International Criminal Court (ICC), the Court's Prosecutor does not have unfettered authority to commence an investigation anywhere that the Court has jurisdiction. Instead, Article 13 of the Rome Statute, entitled "Exercise of Jurisdiction," provides that the Court may exercise jurisdiction in only one of three circumstances: (i) where "a situation" is referred by a State Party to the Rome Statute; (ii) where "a situation" is referred by the United Nations Security Council; or (iii) where the ICC Prosecutor "has initiated an investigation" *proprio motu* with the authorization of the Court's Pre-Trial Chamber, which must determine that there is a reasonable basis to proceed with the proposed investigation. To date, the Court's exercise of jurisdiction has been triggered three times by a State Party and once by the Security Council, resulting in the situations in Uganda, the Central African Republic, the Democratic Republic of Congo (DRC), and Darfur, respectively. The Court's Prosecutor has in turn initiated a series of individual cases falling within the four situations, meaning that much of the focus at the Court in recent years has been on the initiation or progress of these *cases*.

Yet the practice at the Court thus far has also raised questions about the appropriate understanding of *situations*, a term that is not defined in any of the governing documents of the ICC. This report seeks to address two of those questions, which have notably engendered little discussion, despite potentially having a significant impact on the future work of the Court. The first question is: when the ICC Prosecutor accepts a referral from a State Party or the Security Council, does he or she have to accept the situation as defined by the referral or can he or she expand its parameters? The second issue is: at what point should the Prosecutor consider gravity and other admissibility criteria required by Article 17 of the Rome Statute?

**Issue One: *Sua Sponte* Changes by the Prosecutor to the Parameters of a Situation Referred By a State Party or the Security Council May Have Negative Consequences**

As reviewed in detail below, the drafting history of Article 13 demonstrates that, as a general matter, situations referred to the ICC by States Parties and the Security Council should be broadly worded so as to allow the Prosecutor to determine which case or cases to pursue within that situation. However, absent invoking his or her *proprio motu* powers, there is no evidence that the ICC Prosecutor may choose cases that fall *beyond* the terms of a State Party or Security Council referral. Of course, if the Prosecutor does not think the parameters of a given situation are appropriate, he or she may reject the situation, use the underlying information to request authorization from the Pre-Trial Chamber to initiate *proprio motu* proceedings, or ask for a revised referral.

Nevertheless, in the context of the Uganda situation currently before the ICC, the Prosecutor seems to have *sua sponte* altered the terms of the state's self-referral. Specifically, although the government of Uganda referred to the ICC the "situation concerning the Lord's Resistance Army (LRA)," the Prosecutor responded that his office would be analyzing *all* crimes within northern Uganda, suggesting he might prosecute crimes committed by *either* the LRA or the Ugandan government. Uganda did not submit a new referral, but neither has it publicly objected to the Prosecutor's interpretation of its referral (possibly because the Prosecutor has to date only sought indictments for members of the LRA). However, if the Prosecutor were to initiate a case against a government official for crimes committed in northern Uganda, it is conceivable that the defense would argue that the Court does not have jurisdiction to hear the case, as the Court's jurisdiction over the Uganda situation was triggered via a state referral and Uganda

only gave the Prosecutor permission to pursue the LRA under that referral.

The notion that the Prosecutor cannot *sua sponte* expand the parameters of a situation without invoking his or her *proprio motu* powers may seem unimportant in the context of this example. Everyone would likely agree that it is desirable for the Prosecutor to investigate all sides of the conflict in Uganda. Yet authorizing the ICC Prosecutor to initiate investigations *proprio motu* was a highly controversial matter during the drafting of the Rome Statute, one that was only accepted due to the inclusion of a role for the Pre-Trial Chamber in the process. Allowing the Prosecutor to pursue cases in the absence of a referral or approval by the Pre-Trial Chamber may make states more reluctant to refer situations in the future, particularly via so-called “self-referrals,” which have to date been responsible for the majority of the Court’s work. The Security Council may similarly become reluctant to refer situations, thereby reducing the possibility that the Court will be able to prosecute egregious crimes that, without a UN Security Council referral, would fall outside of its jurisdiction. Finally, states that have yet to become parties to the Rome Statute may use the scenario of a runaway Prosecutor acting beyond the scope of a referral as grounds to remain outside of the ICC.

**Issue Two: The Prosecutor May Consider the Rome Statute’s Gravity Requirement When Deciding Whether to Pursue an Investigation, But Must Apply the Requirement to Individual Cases Rather Than to the Situation as a Whole**

In addition to jurisdictional and so-called “triggering” requirements, the Rome Statute requires that cases brought before the Court satisfy certain “admissibility” requirements. Specifically, Article 17 provides that the Court “shall determine” that “a case is inadmissible” where: (i) that case has been or is being genuinely investigated or prosecuted by a state’s national judicial system (the “complementarity requirement”),

or (ii) where the case is not of sufficient gravity to justify further action by the Court (the “gravity requirement”). It is notable that Article 17 refers to cases, and not to situations. Indeed, during the drafting of the Statute, some states had advocated applying the admissibility requirements to the initial investigation of referrals, but ultimately this proposal was rejected. This is not to say that admissibility considerations are irrelevant to the Prosecutor’s determination whether to pursue a situation referred to the Court or to seek commencement of a *proprio motu* investigation. To the contrary, Article 53(1) of the Rome Statute and Rule 48 of the ICC’s Rules of Procedure and Evidence *require* that, in determining to proceed with a referral or initiate *proprio motu* proceedings, the Prosecutor consider whether *a case* would be admissible. However, there is neither language in the Statute, nor support in the drafting history, for the notion that Article 17’s admissibility requirements apply to *situations*.

This is an important issue because the ICC Prosecutor appears to assume that at least one of Article 17’s provisions – namely, the requirement that cases must be “of sufficient gravity to justify further action by the Court” – should also be applied to situations. An example of this is the Prosecutor’s public statements as to why he is not investigating allegations of crimes committed by British troops in Iraq. According to the Prosecutor, his team performed a preliminary investigation of these allegations and determined that the incidents he could pursue involved four to twelve victims of willful killing and a limited number of victims of inhuman treatment. Ultimately, the Prosecutor concluded that he could not seek to initiate an investigation *proprio motu* because the *situation* did not appear to meet the required gravity threshold. The Prosecutor then went on to compare the gravity of the alleged crimes by British forces in Iraq to the entire situations in Uganda, the DRC, and Darfur, noting that the latter situations featured, *inter alia*, thousands of willful killings and the collective displacement of more than 5 million people. Thus, in

determining not to go forward in Iraq, the Prosecutor seems to have based his decision on a comparison of the gravity of all the alleged crimes he found in Iraq *that would fall within the jurisdiction of the Court* with the *total level* of killings and other crimes in other situations examined by the Prosecutor.

The issue here is not necessarily the Prosecutor's ultimate decision not to seek authorization to commence *proprio motu* proceedings in Iraq. To the contrary, as a matter of prosecutorial discretion, he is free to determine that the Court's resources are better exercised elsewhere, and it may well be that there was no individual *case* that would have been admissible before the Court. Rather, the issue is that, to the extent the Prosecutor is ruling out pursuing an investigation based on a lack of "situational gravity," this sort of analysis could in the future inappropriately exclude one or more cases from the Court. Indeed, there are a number of potential circumstances where most of the cases that the Court would be interested in prosecuting within a given geographical region fall beyond its reach, but this does not necessarily mean that there are *no* grave cases in that region within the Court's jurisdiction. For instance, this may arise where the gravity of an entire situation may not seem equivalent to others, but the *impact* of a particular crime within that situation is widespread, as in the case of an attack on peacekeepers who may then be pressured to withdraw from their role. Similarly, the Prosecutor may have occasion to look at an area where the national judicial system was functioning to genuinely prosecute all crimes within the ICC's jurisdiction *except* a certain category of crimes, such as crimes of sexual violence. Again, as long as one or more individual cases within the situation would meet the gravity threshold, the ICC should not forgo prosecuting the relevant cases solely on the ground that the situation does not involve a wider range of cases that could be prosecuted by the Court.

Of course, as a practical matter, it may often be that a given situation will involve many cases that may be prosecuted by the Court, as genocide, crimes against humanity, and war crimes seldom occur in isolation. Nevertheless, it is worth stressing that the gravity requirement applies only to cases, and not to situations, and recalling that while the ICC is dedicated to combating the most serious crimes of concern to the international community, it is equally committed to putting an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

## I. INTRODUCTION

Under the Rome Statute of the International Criminal Court (ICC), the Court's Prosecutor does not have unfettered authority to commence an investigation anywhere that the Court has jurisdiction. Instead, Article 13 of the Rome Statute, entitled "Exercise of Jurisdiction," provides:

The Court may exercise its jurisdiction with respect to [the crimes contained in the Statute] if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party...;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with [Article 15 of the Rome Statute, which sets forth the procedure by which the Prosecutor may seek authorization from the Pre-Trial Chamber to commence an investigation].<sup>1</sup>

To date, the Court's jurisdiction has been triggered three times in accordance with Article 13(a) and once in accordance with Article 13(b). Specifically, three countries – Uganda, the Central African Republic, and the Democratic Republic of Congo – have each "self-referred" a situation dealing with crimes committed on its own territory, and the United Nations Security Council has referred the situation in Darfur, Sudan.<sup>2</sup> Based on those referrals, the Court's Prosecutor has initiated a series of individual cases falling within the four situations,

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<sup>1</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, Art. 13 (17 July 1998).

<sup>2</sup> See *infra* n. 56 *et seq.* and accompanying text.

meaning that much of the focus at the Court in recent years has been on the initiation or progress of these *cases*.

Yet the practice at the Court thus far has also raised questions about the appropriate understanding of *situations*, a term that is not defined in any of the governing documents of the ICC. This report seeks to address two of those questions, which have notably engendered little discussion, despite potentially having a significant impact on the future work of the Court. The first question is: when the ICC Prosecutor accepts a referral, does he or she have to accept the situation as defined by the referral or can he or she expand the parameters? The second issue is: at what point should the Prosecutor consider gravity and other admissibility criteria required by Article 17 of the Rome Statute?

To properly analyze these issues, the report first reviews the drafting history of the relevant provisions and the wording of the final Rome Statute. The report will then describe the circumstances in which these questions have arisen and offer recommendations as to how they should be answered in the context of the Court's work going forward.

## **II. DRAFTING HISTORY**

### **A. 1994 INTERNATIONAL LAW COMMISSION DRAFT STATUTE**

Since the end of World War I, there have been numerous efforts to create a permanent international criminal court, yet states did not begin negotiating its structure in earnest until the end of the twentieth century. In 1994, the International Law Commission (ILC)<sup>3</sup> drafted a proposed statute that became the working draft for preparing for the Rome Conference to Establish an International Criminal Court.

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<sup>3</sup> The International Law Commission is a body of the United Nations dedicated to the progression and codification of international law. *See* International Law Commission, Introduction, <http://www.un.org/law/ilc/index.htm>.

Among the issues addressed by the 1994 draft statute were not only the jurisdiction of the Court – *i.e.*, the types of crimes punishable by the Court and the persons subject to such punishment – but also the appropriate *exercise* by the Court of its jurisdiction. Specifically, the ILC proposed that the Court have authority to exercise jurisdiction in one of two instances. The first instance would be where a “complaint” was brought by a state that had some nexus to the relevant crime or crimes being referred to the Court.<sup>4</sup> A “complaint,” according to the draft statute, was to be quite specific, containing “the circumstances of the alleged crime and the identity and whereabouts of any suspect.”<sup>5</sup> The second instance in which the Court could exercise jurisdiction under the 1994 draft statute would be where the United Nations Security Council referred “a matter” to the Court.<sup>6</sup> In this context, although the Security Council triggered the exercise of jurisdiction, the Prosecution would have authority to decide which specific crimes and individuals should be charged in relation to the referred matter.<sup>7</sup> Notably, giving the Security Council power to trigger the exercise of the Court’s jurisdiction had been a controversial point in the lead up to the 1994 draft statute, as a number of states voiced concerns about the Security Council’s making complaints “for political purposes.”<sup>8</sup> At

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<sup>4</sup> See International Law Commission, *Draft Statute for an International Criminal Court with Commentaries*, in II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1994, at 41 (entitled “Preconditions to the Exercise of Jurisdiction,” draft Article 21 provided: “The Court may exercise its jurisdiction over a person with respect to a crime [falling within the jurisdiction of the Court] if... [a complaint is brought]... (i) By the State which has custody of the suspect with respect to the crime (“the custodial State”); (ii) By the State on the territory of which the act or omission in question occurred.”).

<sup>5</sup> *Id.* at 45.

<sup>6</sup> *Id.* at 43.

<sup>7</sup> *Id.* at 43-44.

<sup>8</sup> *Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court*, U.N. Doc. A/CN.4/458, at

the same time, however, the ILC “felt that such a provision was necessary in order to enable the Council to make use of the [C]ourt as an alternative to establishing ad hoc tribunals as a response to crimes which affront the conscience of mankind,” such as the *ad hoc* tribunal for the former Yugoslavia.<sup>9</sup> In order to address the concerns regarding politically-charged referrals by the Security Council, it was suggested that the “Council should not refer to the tribunal specific complaints against named individuals,”<sup>10</sup> but rather should “request the prosecutor to investigate particular situations.”<sup>11</sup> Hence, the 1994 statute envisioned the referral by the Security Council of “a matter,” as opposed to the filing of a “complaint” involving alleged crimes committed by particular suspects.<sup>12</sup>

In addition to the two triggering mechanisms included in the 1994 draft statute, one member of the International Law Commission proposed “that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint [or referral by the Security Council] if it appear[ed] that a crime within the jurisdiction of the court would otherwise not be duly investigated.”<sup>13</sup> Some states – including New Zealand and Switzerland – expressed support for such a provision during the course of the ILC’s preparation of the 1994 draft because they feared that in some instances neither the states nor the

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45, 83 (18 and 28 February, 11, 24 and 25 March, 11, 13 and 17 May, 24 June and 10 August 1994).

<sup>9</sup> International Law Commission, *Draft Statute for an International Criminal Court with Commentaries*, *supra* n. 4, at 44.

<sup>10</sup> *Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court*, *supra* n. 8, at 63.

<sup>11</sup> *Id.* at 77.

<sup>12</sup> *See supra* n. 4 *et seq.* and accompanying text (discussing fact that, under the 1994 draft statute, States Parties were to refer “complaints” to the Court).

<sup>13</sup> International Law Commission, *Draft Statute for an International Criminal Court with Commentaries*, *supra* n. 4, at 46.

Security Council would actually make a referral.<sup>14</sup> However, other ILC members “felt that the investigation and prosecution of the crimes covered by the Statute should not be undertaken in the absence of the support of a State or the Security Council.”<sup>15</sup> Hence, these states maintained that, absent action by the Security Council, “the prosecutor should have the consent of interested States before initiating investigations and prosecutions.”<sup>16</sup>

#### B. COMMENTS ON THE 1994 DRAFT STATUTE

After the release of the 1994 draft statute, states submitted comments and proposed revisions for the purpose of arriving at a revised draft. In the context of the 1994 draft provisions on the exercise of the Court’s jurisdiction, one issue raised by states was the continuing concern regarding the best way to prevent the Security Council from making political referrals.<sup>17</sup> The approach reflected in the ILC’s draft

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<sup>14</sup> *Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court*, *supra* n. 8, at 59-60, 95-96.

<sup>15</sup> International Law Commission, *Draft Statute for an International Criminal Court with Commentaries*, *supra* n. 4, at 46.

<sup>16</sup> Ad Hoc Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee*, delivered to the General Assembly, U.N. Doc. A/50/22, at 5 (16 September 1995).

<sup>17</sup> *See, e.g.*, International Law Commission, *Report on the Work of its Forty-Sixth Session*, 46, delivered to the General Assembly, U.N. Doc. A/CN.4/464/Add.1 (22 February 1995); Press Release, United Kingdom Mission to the United Nations, New York, *Summary of Observations made by the Representative of the United Kingdom of Great Britain and Northern Ireland on 3, 4, 5, 6 and 7 April 1995*, Press Release 32/95, at 6 (7 April 1995); Ad Hoc Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee*, *supra* n. 16, at 27; Ad Hoc Committee on the Establishment of an International Criminal Court, *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of An International Criminal Court*, delivered to the General Assembly, U.N. Doc. A/AC.244/1 and A/AC.244/1/Add.2, at 20-21 (20 March 1995 and 30 and 31 March 1995);

– namely, to have the Security Council refer “matters,” not cases, to the Court – was generally supported.<sup>18</sup> While different states favored the term “situation” over “matter,” both words seemed to indicate something broader than “bringing a case against a specific individual.”<sup>19</sup> Thus, although the drafters ultimately shifted the relevant wording from “matter” to “situation,” there does not appear to have been any agreed upon substantive difference between the two words.<sup>20</sup> States also echoed their earlier statements that permitting the

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Ad Hoc Committee on the Establishment of an International Criminal Court, 3-13 April 1995 mtg., at 14, U.N. Doc. A/AC.244/2 (21 April 1995).

<sup>18</sup> See, e.g., Press Release, United Kingdom Mission to the United Nations, *supra* n. 17, at 6; Ad Hoc Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee*, *supra* n. 16, at 5; Ad Hoc Committee on the Establishment of an International Criminal Court, *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of An International Criminal Court*, *supra* n. 17, at 20-21; Ad Hoc Committee on the Establishment of an International Criminal Court, 3-13 April 1995 mtg., *supra* n. 17, at 14.

<sup>19</sup> Ad Hoc Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee*, *supra* n. 16, at 27. See also The Republic of Korea, *Proposal by the Republic of Korea on Article 23(1), delivered to the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. Non-Paper/WG.3/No.14 (8 August 1997) (“[N]otwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20, if the Security Council acting under Chapter VII of the Charter of the United Nations decides to refer to the Court a matter [a situation] in which one or more crimes appear to have been committed.”); Hans-Peter Kaul, *Statement by Hans-Peter Kaul Head of the German delegation on United Nations negotiations on the establishment of an International Criminal Court (ICC) Complementarity, Trigger Mechanism*, at 3-4, delivered to the Preparatory Committee on the Establishment of an International Criminal Court (4 August 1997) (“[W]e support the ILC proposal that the statute should give to the Security Council the explicit competence to submit to the Court situations involving threats to or breaches of international peace and security and acts of aggression. But it would be in our view quite inappropriate if the Security Council could submit individual cases.”).

<sup>20</sup> See, e.g., United States Delegation, “*Trigger Mechanism*,” *Second Question the Role of the Security Council and of Complaints by States Articles 23 and 25*, at 5, delivered to the Preparatory Committee on ICC

Security Council to refer situations would “obviate the necessity for the Council to establish new Ad Hoc Tribunals.”<sup>21</sup>

As the idea of the Security Council’s referring a “situation” rather than a “case” gained popularity, some delegations began to push for States Parties also to refer “situations,” due to unease with allowing States Parties to name individual suspects for investigation and prosecution.<sup>22</sup> At the same time, however, several delegates wanted to allow for the possibility of a “situation” pointing “to particular individuals as likely targets for investigation” where warranted.<sup>23</sup> As in the context of

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(April 1996) (“[T]he United States started its discussion on the Security Council referral by saying that the Security Council should be able to bring a ‘matter’ to the Court. However, as the discussion progressed onto why the Security Council should have this power, the United States began to refer to the ‘situation before the ICC’ most likely because the Security Council is seized of “situations” so that was the language familiar to the United States.”).

<sup>21</sup> Press Release, United Kingdom Mission to the United Nations, *supra* n. 17, at 6. *See also* Statement by the Representative of the Russian Federation to the Ad Hoc Committee on the Establishment of an International Criminal Court, at 3 (5 April 1995); Ad Hoc Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee*, *supra* n. 16, at 2; Press Release, General Assembly, *Debate on Proposed International Criminal Court Continues in Sixth Committee*, U.N. Doc. GA/L/2880 (2 November 1995).

<sup>22</sup> Preparatory Committee on the Establishment of an International Criminal Court, 25 March-12 April 1996 mtg., U.N. Doc. A/AC.249/1, at 43 (7 May 1996); United States Delegation, “*Trigger Mechanism*,” *supra* n. 20, at 1-2, 5-6; Press Release, General-Assembly, Role of Security Council In Triggering Prosecution Discussed in Preparatory Committee for International Criminal Court, U.N. Doc. L/2776, at 4 (4 April 1996).

<sup>23</sup> Preparatory Committee on the Establishment of an International Criminal Court, 25 March-12 April 1996 mtg., *supra* n. 22, at 43; Preparatory Committee on the Establishment of an International Criminal Court: Working Group 3 on Complementarity and Trigger Mechanisms, *Decisions taken by the Preparatory Committee at its session held from August 4-15, 1997*, at 6-7, delivered to the General Assembly, U.N. Doc. A/AC.249/1997/L.8/Rev.1 (14 August 1997).

Security Council referrals, there was some disagreement over the appropriate terminology, with the term “situation” being favored over “matter” in the end.<sup>24</sup> While few delegations continued to subscribe to the referral of cases in every instance, there was some support for allowing States Parties and the Security Council to refer individual cases in certain instances, for example “against persons responsible for gross, large-scale violations of human rights or humanitarian norms.”<sup>25</sup> The general rule, however, was that situations – rather than cases – were the proper subject of referral by states.

Another idea that was revived during states’ negotiations on the 1994 draft statute was whether the Court’s Prosecutor should have the power to initiate an investigation on his or her own initiative.<sup>26</sup> It was unclear if, under this proposal, the Prosecutor would initiate situations or cases. Those that favored the Prosecutor’s ability to initiate investigations *ex officio* did so on the grounds that in certain

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<sup>24</sup> Press Release, General Assembly, Preparatory Committee on International Criminal Court Discusses Power to be given Prosecutor, U.N. Doc. L/2778 (4 April 1996) (noting that some states objected to the use of the term “situation” because the term is employed in the United Nations Charter, which “might give rise to confusion”); Luigi Condorelli and Santiago Villalpando, *Referral and Deferral by the Security Council*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 627, 632 (eds. Antonio Cassese, Paola Gaeta, & John R.W.D. Jones, 2002) (explaining that some states preferred the term “situation” precisely *because* it is used in the UN Charter).

<sup>25</sup> Ad Hoc Committee on the Establishment of an International Criminal Court, *Comments Received Pursuant to paragraph 4 of general Assembly Resolution 49/53 on the Establishment of an International Criminal Court, delivered to the General Assembly*, U.N. Doc. A/AC.244/1, at 28 (20 March 1995 and 30 March 1995). *See also* Preparatory Committee on the Establishment of an International Criminal Court, 25 March-12 April 1996 mtg., *supra* n. 22, at 40.

<sup>26</sup> Ad Hoc Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee*, *supra* n. 16, at 5, 25-26; Ad Hoc Committee on the Establishment of an International Criminal Court, 3-13 April 1995 mtg., *supra* n. 17, at 7.

circumstances political considerations would render states or the Security Council unlikely to make referrals to the Court.<sup>27</sup> Giving the Prosecutor the power to act in the absence of a referral, these states argued, would better ensure justice for the victims of the most heinous crimes.<sup>28</sup> Those states that opposed giving the Prosecutor the ability to institute proceedings before the court thought “such an independent power would lead to politicization of the Court and allegations that the Prosecutor had acted for political motives.”<sup>29</sup> Furthermore, states expressed concern that the limited resources of the Court’s Prosecutor would become overwhelmed with “frivolous complaints,” alluding to information that would likely be sent to the Prosecutor by groups other than states or by states unwilling to make a formal referral to the Court.<sup>30</sup> In an attempt to broker a compromise between the two views, states offered suggestions for a *proprio motu* power that included safeguards. One of the early suggestions for adding a *proprio motu* power specifically included a provision “that the prosecutor should have the consent of interested States before initiating investigations and prosecutions.”<sup>31</sup> A later proposal contained the requirement that the Prosecutor “conclude that there is sufficient basis for a prosecution” before initiating *proprio motu* proceedings and “only if national jurisdiction is either not available or ineffective ... or if an interested State has referred the matter to the Court.”<sup>32</sup> Finally, the

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<sup>27</sup> Preparatory Committee on the Establishment of an International Criminal Court, 25 March-12 April 1996 mtg., *supra* n. 22, at 43-44.

<sup>28</sup> Press Release, Sixth Committee, Individuals’ Complaints Should have Standing Before International Criminal Court, New Zealand tells Sixth Committee, U.N. Doc. GA/L/3012 (1 November 1996).

<sup>29</sup> Preparatory Committee on the Establishment of an International Criminal Court, 25 March-12 April 1996 mtg., *supra* n. 22, at 44.

<sup>30</sup> *Id.*

<sup>31</sup> Ad Hoc Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee*, *supra* n. 16, at 5.

Swiss delegation proposed that the Prosecutor be given power to initiate investigations *proprio motu* only with the express approval of the Pre-Trial Chamber, which would have the power to determine if “the matter and the information received justif[ied]” an investigation.<sup>33</sup> The Swiss proposal was well-received, with several states having been convinced that the compromise provided “sufficient procedural safeguards... to avoid the ‘loose cannon’ or ‘a paranoid Dr. Strangelove’ Prosecutor that a small number of states feared.”<sup>34</sup>

### C. 1998 ROME CONFERENCE

The debates concerning appropriate trigger mechanisms for the exercise of the Court’s jurisdiction continued into the Rome Conference, although most of the relevant issues were easily resolved. On the subject of how the Security Council and States Parties should frame referrals to the Court, there was “general agreement” that both should have the power to refer a “situation,” which could in turn “involve many different cases for investigation.”<sup>35</sup> This solution not

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<sup>32</sup> The Federal Republic of Germany, *Modified German Draft Proposal of 1996, delivered to the preparatory committee on the Establishment of an International Criminal Court*, U.N. Doc. Non-Paper/WG.3/No.8 (6 August 1997).

<sup>33</sup> The Swiss Delegation, *Proposal of the Swiss Delegation, delivered to the preparatory committee on the Establishment of an International Criminal Court*, U.N. Doc. Non-paper/WG.3/NO.34 (14 August 1997).

<sup>34</sup> Preparatory Committee on the Establishment of an International Criminal Court: Working Group 3 on Complementarity and Trigger Mechanisms, *Decisions taken by the Preparatory Committee at its session held from August 4-15, 1997*, at 7, delivered to the General Assembly, U.N. Doc. A/AC.249/1997/L.8/Rev.1 (14 August 1997).

<sup>35</sup> The United Kingdom of Great Britain and Northern Ireland, *Proposal by the United Kingdom of Great Britain and Northern Ireland to the Trigger mechanism Preparatory Committee on the Establishment of an International Criminal Court Working Group on Complementarity and Trigger Mechanism, delivered to the Trigger mechanism Preparatory Committee on the Establishment of an International Criminal Court Working Group on*

only reduced concerns regarding politicized referrals or complaints, but also made sense as a practical matter, since it was envisioned that states would often be unable to identify which crimes had been committed, and by whom, prior to an investigation.<sup>36</sup> Notably, however, nothing from the drafting history clearly indicates that the negotiating states intended to *require* that a situation involve more than one case.

The one issue relating to the Court's exercise of jurisdiction that remained controversial was the Prosecutor's *proprio motu* power to commence investigations without a referral from a State Party or the Security Council. Importantly, many nongovernmental organizations (NGOs) heavily pushed for the inclusion of such a provision in the final statute, arguing that it would allow the Court to "actively look for violations to redress, rather than simply respond, to the political assessment of States and of the Security Council,"<sup>37</sup> as well as to preserve the "neutrality, objectivity and impartiality" of the Court.<sup>38</sup>

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*Complementarity and Trigger Mechanism*, U.N. Doc. A/AC249/1998/WG.3/DP.1 (25 March 1998).

<sup>36</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Vol. II*, at 187, delivered to the General Assembly (15 June-17 July 1998); Philippe Kirsch, QC & Darryl Robinson, *Referral by States Parties*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 619, 622-23 (eds. Antonio Cassese, Paola Gaeta, & John R.W.D. Jones, 2002).

<sup>37</sup> Press Release, Rome Conference on the Establishment of an International Criminal Court, UN Diplomatic Conference to Establish International Criminal Court to Convene in Rome, 15 June-17 July Historic Meeting Seeks to Create Global Jurisdiction to Try Individuals for War Crimes, Crimes Against Humanity, U.N. Doc. L/ROM/1 at 3 (12 June 1998).

<sup>38</sup> The High Commissioner, *The High Commissioner's Position Paper on the Establishment of a Permanent International Criminal Court*, at 21, delivered to the Rome Conference on the Establishment of an International Criminal Court, U.N. Doc. UNICC/NONE/98/1 ROM.98-0038 (15 June 1998).

Several states continued to express the need for “the Pre-Trial Chamber [to be able to] exercise judicial control over the actions of the Prosecutor,”<sup>39</sup> because in the view of those states, “for the Prosecutor to take such a decision in isolation would not respect the necessary institutional balance.”<sup>40</sup> Other states rejected the idea that the Prosecutor should have the power to initiate investigations at all, arguing that the proposed “system of checks and balances... was inadequate.”<sup>41</sup> Again, these latter states voiced concern that including such a provision would on the one hand give the Prosecutor too much

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<sup>39</sup> *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II, supra n. 36*, at 183, 201, 204, 206. *See also* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 7<sup>th</sup> mtg., U.N. Doc. A/CONF.183/SR.7, at 13 (18 June 1998); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 2nd mtg., U.N. Doc. A/CONF.183/SR.2, at 4 (15 June 1998); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 3rd mtg., U.N. Doc. A/CONF.183/SR.3, at 9 (16 June 1998); *Statement by Ms. Hilde F. Johnson Minister for International Development and Human Rights Norway*, delivered to the Diplomatic Conference on the Establishment of an International Criminal Court Rome, at 5 (15 June 1998); Committee of the Whole, 29<sup>th</sup> mtg., U.N. Doc. A/CONF.183/C.1/SR.29, at 3-4 (9 July 1998); *Statement by Ambassador Gilberto Vergne Saboia, Head of the Brazilian Delegation*, delivered to the Rome Conference on the Establishment of an International Criminal Court, at 2 (16 June 1998); *Statement by Hon. S. Amos Wako, Attorney-General of the Republic of Kenya*, delivered to the Rome Conference on the Establishment of an International Criminal Court, at 2 (16 June 1998).

<sup>40</sup> *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Vol. II, supra n. 36*, at 189.

<sup>41</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 10<sup>th</sup> mtg., at 2-6, U.N. Doc. A/CONF.183/C.1/SR.10 (20 November 1998). *See also* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 7<sup>th</sup> mtg., at 11, U.N. Doc. A/CONF.183/SR.7 (18 June 1998); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 9<sup>th</sup> mtg., at 6-10, U.N. Doc. A/CONF.183/SR.9 (17 July 1998).

power, and on the other hand make the Office of the Prosecutor as a whole ineffective, because it would spend all its time sorting through information coming in from governments, NGOs, and individuals instead of prosecuting cases.<sup>42</sup> Additionally, some states argued that the proposed power would open the Prosecutor up to political pressures that would weaken his or her independence.<sup>43</sup> Finally, there was concern regarding the credibility of the information the Prosecutor received.<sup>44</sup> As previously discussed, the Swiss Proposal along with relevant procedural safeguards eased many of these fears,<sup>45</sup> and ultimately allowed for the inclusion of a third triggering mechanism that would permit the Prosecutor to act without state or Security Council consent, but only where a Pre-Trial Chamber approved the action.<sup>46</sup>

### III. THE ROME STATUTE

As noted above, Article 13 of the final version of the Rome Statute provides as follows:

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<sup>42</sup> See Sharon A. Williams, *Article 13: Exercise of Jurisdiction*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 343, 348 (Otto Triffterer ed., 1999).

<sup>43</sup> Committee of the Whole, 31<sup>st</sup> mtg., at 11, U.N. Doc. A/CONF.183/C.1/SR.301 (9 July 1998); *Statement by H.E. Mr. Ramanathan Vengadesan, Ambassador of Malaysia to Italy*, at 2, delivered to the Rome Conference on the Establishment of an International Criminal Court (18 June 1998).

<sup>44</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 10<sup>th</sup> mtg., at 4, U.N. Doc. A/CONF.183/C.1/SR.10 (20 November 1998).

<sup>45</sup> The Swiss Delegation, *Proposal of the Swiss Delegation, delivered to the preparatory committee on the Establishment of an International Criminal Court*, U.N. Doc. Non-paper/WG.3/NO.34 (14 August 1997).

<sup>46</sup> See *infra* n. 62 (providing text of Article 15 of the Rome Statute, which sets forth the procedure in the event the ICC Prosecutor wishes to exercise his or her *proprio motu* power).

The Court may exercise its jurisdiction with respect to [the crimes contained in the Statute] if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14<sup>[47]</sup>;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15<sup>[48]</sup>.<sup>49</sup>

A. STATE PARTY AND SECURITY COUNCIL REFERRALS OF “A SITUATION”

As discussed earlier,<sup>50</sup> the drafters of the Rome Statute determined that both States Parties and the Security Council should refer situations – rather than complaints – to the Court. Yet, nowhere in the Rome

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<sup>47</sup> Article 14 of the Rome Statute provides:

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Rome Statute, *supra* n. 1, Art. 14.

<sup>48</sup> See *infra* n. 62 (providing text of Article 15 of the Rome Statute).

<sup>49</sup> Rome Statute, *supra* n. 1, Art. 13.

<sup>50</sup> See *supra* n. 18 *et seq.* and accompanying text.

Statute or in the Court's Rules of Procedure and Evidence is the term "situation" defined.

Most commentators take from the language of the Statute and its drafting history that "a 'situation' should be defined by reference to temporal and geographical parameters, as was the case for the ICTY and the ICTR."<sup>51</sup> Similarly, the ICC Pre-Trial Chambers consider a situation to be a territorial area where "one or more crimes within the jurisdiction of the Court appear to have been committed" within a given time period.<sup>52</sup> The Pre-Trial Chamber has also said that a situation could be further limited by "personal parameters" in "some cases."<sup>53</sup> It has been suggested that "personal parameters" are factors "such as nationality of perpetrators or victims, partisanship in a conflict, or the nature of the crimes... particular types of crimes."<sup>54</sup> However, it is not clear when the inclusion of personal parameters will be tolerated, particularly given the drafters' concerns about politically motivated referrals. Finally, it is worth noting that Articles 13(a) and

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<sup>51</sup> Kirsch and Robinson, *supra* n. 36, at 625; Statute for the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S.C./1660, Art. 8 (28 February 2006) ("[T]he territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."); Statute for the International Criminal Tribunal for Rwanda, U.N. Doc. SC/1717, Art. 7 (13 October 2006) ("[T]he territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighboring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.").

<sup>52</sup> Situation in the Democratic Republic of Congo, Case No. ICC-01/04, Decision to Hold Consultation under Rule 114, at 2 (21 April 2005).

<sup>53</sup> *Id.*

<sup>54</sup> Kirsch and Robinson, *supra* n. 36, at 625.

(b) each use the language “one or more crimes,” thereby confirming that a “situation” may consist of a single case.<sup>55</sup>

To date, three States Parties have referred to the Court situations within their own borders, and the Security Council has referred one situation. All of these referrals have included at least a starting date and a geographical area to describe the situation being referred.<sup>56</sup> Uganda submitted the first referral, authorizing the Prosecutor to investigate the “situation concerning the Lord’s Resistance Army.”<sup>57</sup> Second, the Central African Republic referred “the situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002, the date of entry into force of the Rome Statute.”<sup>58</sup> Third, the Democratic Republic of Congo (DRC) referred “the situation in the DRC since 1 July 2002.”<sup>59</sup> Most recently, the Security Council passed a resolution referring “the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.”<sup>60</sup>

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<sup>55</sup> Rome Statute, *supra* n. 1, Art. 13(a) and (b).

<sup>56</sup> *The Situation in Uganda*, Case No. ICC-02/04-1 06-07-2004 1/4, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, 4 (5 July 2004); *The Situation in the Central African Republic*, Case No. ICC-01/05, Decision Assigning the Situation in Central African Republic to Pre-Trial Chamber III, 4 (19 January 2005); Case No. ICC-01/04, *supra* n. 52, at 2; *The Situation in Darfur, Sudan*, Case No. ICC-02/05-1-Corr 22-04-2005, Decision Assigning the Situation in Darfur, Sudan to Pre-Trial Chamber I, at 4 (21 April 2005).

<sup>57</sup> Case No. ICC-02/04-1 06-07-2004 1/4, *supra* n. 56, at 4.

<sup>58</sup> Case No. ICC-01/05, *supra* n. 56, at 4.

<sup>59</sup> Case No. ICC-01/04, *supra* n. 52, at 2.

<sup>60</sup> Case No. ICC-02/05-1-Corr 22-04-2005, *supra* n. 56, at 4.

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## B. *PROPRIO MOTU* POWER OF THE PROSECUTOR

Interestingly, while sub-articles (a) and (b) of Article 13 refer to “situations in which one or more... crimes appears [*sic*] to have been committed,” sub-article (c) does not use the word “situation” and refers only to “a crime.”<sup>61</sup> Unfortunately, this ambiguity is not clarified by the text of Article 15 regarding the Prosecutor’s *proprio motu* power, which at times refers to the Prosecutor’s commencing “a case” and at times refers to “the situation.”<sup>62</sup> Neither does the relevant

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<sup>61</sup> Rome Statute, *supra* n. 1, Art. 13.

<sup>62</sup> Article 15 of the Rome Statute provides:

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a

drafting history demonstrate whether, as in the case of referrals by States Parties or the Security Council, the Prosecutor initiates situations when acting *proprio motu*, or whether he or she must seek authorization for something more specific from the Pre-Trial Chamber. Because the Prosecutor has yet to exercise his authority under Article 15, this matter has not arisen before the Court.

#### **IV. ANALYSIS AND RECOMMENDATIONS**

As suggested by the forgoing analysis, the precise parameters of a situation are not altogether clear, which raises two specific issues in relation to practices at the ICC to date. The first is: when the ICC Prosecutor accepts a referral, does he or she have to accept the situation as defined by the referral or can he or she expand the parameters? The second issue is: at what point should the Prosecutor consider gravity and other admissibility criteria required by Article 17 of the Rome Statute in determining whether to exercise jurisdiction?

##### **A. *SUA SPONTE* CHANGES BY THE PROSECUTOR TO THE PARAMETERS OF A SITUATION REFERRED BY A STATE PARTY OR THE SECURITY COUNCIL MAY HAVE NEGATIVE CONSEQUENCES**

The drafting history regarding triggering mechanisms reviewed above demonstrates that, as a general matter, situations referred to the ICC by

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subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Rome Statute, *supra* n. 1, Art. 15.

States Parties and the Security Council should be broadly worded so as to allow the Prosecutor to determine which case or cases to pursue within that situation. However, absent invoking his or her *proprio motu* powers, there is no evidence that the ICC Prosecutor may choose cases that fall *beyond* the terms of a State Party or Security Council referral. Of course, if the Prosecutor does not think the parameters of a given referral are appropriate, he or she may reject the referral and either use the underlying information to initiate *proprio motu* proceedings or ask for a revised referral. It would appear that these are the Prosecutor's only options. Nevertheless, in one context, the Prosecutor seems to have *sua sponte* altered the terms of the referral, raising questions about what would happen if the Prosecutor pursued cases falling outside of the initial referral and whether such action may have broader repercussions for the Court.

The specific instance in which the Prosecutor seems to have changed the parameters of a referral without going through the procedures outlined in Article 15 of the Rome Statute occurred in relation to the Uganda situation. As stated above, the situation in northern Uganda was investigated by the ICC Prosecutor after the government of Uganda referred to the ICC the "situation concerning the Lord's Resistance Army [LRA]," a reference to the sectarian guerrilla forces based in northern Uganda that have been engaged in armed conflict with the Ugandan government for more than three decades.<sup>63</sup> In response, the ICC Prosecutor informed Uganda that his office would be "analyzing crimes within the situation of northern Uganda by whomever committed," suggesting he would investigate and, if warranted, prosecute crimes committed by *either* the LRA or the Ugandan government.<sup>64</sup> Uganda has never submitted a new referral,

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<sup>63</sup> Case No. ICC-02/04-1 06-07-2004 ¼, *supra*. n. 56, at 4.

<sup>64</sup> *The Situation in the Democratic Republic of Congo*, Case No. ICC-01/04, Decision Assigning the Situation in the Democratic Republic of Congo to

nor has it publicly objected to the Prosecutor's interpretation of its referral (possibly because the Prosecutor has to date only sought indictments for members of the LRA). However, if the Prosecutor were to initiate a case against a government official for crimes committed in northern Uganda, it is conceivable that the defense would argue that the Court does not have jurisdiction to hear the case, as the Court's jurisdiction over the Uganda situation was triggered via a state referral under Article 13(a) and Uganda only gave the Prosecutor permission to pursue the Lord's Resistance Army under that referral. Based on the plain language of the Statute and the relevant drafting history, the Court's jurisdiction is only as broad as its referral.

A similar concern may exist in relation to the situation in Darfur. Specifically, the Prosecutor has stated, in the context of discussing his investigations in Darfur, that he is following "spill over" violence into neighboring countries, including "allegations of crimes having been committed on the territory of [Chad], in some cases against individuals and groups that were already displaced by the violence in Darfur."<sup>65</sup> Of course, if the Prosecutor is referring to crimes actually committed within the territory of Darfur by perpetrators who have since fled to Chad, or by nationals of Chad, such crimes would presumably fall within the Security Council resolution referring "the situation in Darfur since 1 July 2002" to the Court.<sup>66</sup> However, if the Prosecutor wants to pursue cases arising out of crimes that, while related to the

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Pre-Trial Chamber I, Letter from Prosecutor to President, at 4 (5 July 2004).

<sup>65</sup> The Prosecutor of the International Criminal Court, *Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council Pursuant to UNSCR 1953 (2005)*, at 3-4, delivered to the UN Security Council, Case No. ICC-02/05-40-Anx A 19-12-2006 3/12 CB PT (14 December 2006).

<sup>66</sup> Case No. ICC-02/05-1-Corr 22-04-2005, *supra* n. 56, at 4.

Darfur conflict, were committed on the territory of Chad by non-Sudanese nationals, the Prosecutor would likely have to ask the Security Council to expand its referral of the Darfur situation, ask for a new referral either from the Security Council or a State Party, or initiate *proprio motu* proceedings.<sup>67</sup> This is true even though Chad is a State Party to the Rome Statute,<sup>68</sup> since simply ratifying the Statute does not automatically trigger the jurisdiction of the Court over crimes committed on the territory or by the nationals of a State Party.

The notion that the Prosecutor cannot *sua sponte* expand the parameters of a situation without following the procedures laid out in Article 15 of the Rome Statute may seem unimportant in the context of these examples. Everyone would likely agree that it is desirable for the Office of the Prosecutor to investigate all sides of the conflict in Uganda. Similarly, spill over violence from Darfur into other states not only destabilizes those states, but also contributes to the ongoing violence in Darfur itself. However, as discussed above, authorizing the ICC Prosecutor to initiate investigations *proprio motu* was a highly controversial matter during the drafting of the Rome Statute, one that was only accepted due to the inclusion of a role for the Pre-Trial Chamber in the process.<sup>69</sup> Given the sensitivity of the issue, it is unlikely that the states at the Rome Conference ever envisioned the Prosecutor being able to expand a situation past the referral without a new referral or the initiation of *proprio motu* proceedings. The

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<sup>67</sup> To be clear, the Prosecutor has not yet made any indication of pursuing cases arising out of crimes committed in Chad connected to the situation in Darfur. However, the fact that he mentioned he was following these incidences in the context of an update on his investigation into the Darfur situation raises the possibility that he may want to do so.

<sup>68</sup> *Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council Pursuant to UNSCR 1953 (2005)*, *supra* n. 65, at 3-4.

<sup>69</sup> *See supra* n. 26 *et seq.* and accompanying text.

Prosecutor's expanding an investigation on his or her own initiative, beyond the bounds of the actual referral, would likely raise those fears of a "loose canon" Prosecutor. This may make states more reluctant to refer situations in the future, particularly via so-called "self-referrals," which have to date been responsible for the majority of the Court's work. The Security Council may similarly become reluctant to refer situations, thereby reducing the possibility that the Court will be able to prosecute egregious crimes that, without a UN Security Council referral, would fall outside of its jurisdiction.<sup>70</sup> Finally, states that have yet to become parties to the Rome Statute may use the scenario of a runaway Prosecutor acting beyond the scope of a referral as grounds to remain outside of the ICC. As observed during the drafting of the Rome Statute, "the question of how the [C]ourt exercise[s] its jurisdiction [is] central to how Governments [will] react to the statute: the extent of participation in the statute, the credibility and independence of the court, its day-to-day functioning and the importance of its work [will] in large measure be determined by the way in which cases came before it for adjudication."<sup>71</sup>

**B. THE PROSECUTOR MAY CONSIDER THE ROME STATUTE'S GRAVITY REQUIREMENT WHEN DECIDING WHETHER TO PURSUE AN INVESTIGATION, BUT MUST APPLY THE REQUIREMENT TO INDIVIDUAL CASES RATHER THAN TO THE SITUATION AS A WHOLE**

In addition to jurisdictional requirements and the so-called "triggering" requirements of Article 13, the Rome Statute requires that cases brought before the Court satisfy certain "admissibility" requirements.

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<sup>70</sup> The Security Council alone has authority to authorize the Court to exercise jurisdiction over crimes committed on the territory of a non-State Party and/or by nationals of a non-State Party. *See* Rome Statute, *supra* n. 1, Art. 13, Art. 14.

<sup>71</sup> Ad Hoc Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee*, *supra* n. 16, at 19-20.

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Notably, the Statute specifically applies these criteria to cases, not situations. Specifically, Article 17 provides:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that *a case* is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under [the concept of *ne bis in idem* as defined by Article 20 of the Rome Statute];

(d) The case is not of sufficient gravity to justify further action by the Court.<sup>72</sup>

During the drafting of the Statute, some states thought that to avoid “a waste of investigatory resources,” there should be some showing of admissibility before the investigation even began,<sup>73</sup> however this requirement was ultimately not included in the Statute. Most delegations did not want admissibility requirements to apply to situations because the Prosecutor might not know if the admissibility requirements are met until he or she conducts an investigation.<sup>74</sup>

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<sup>72</sup> Rome Statute, *supra* n. 1, Art. 17 (emphasis added).

<sup>73</sup> *Observations of Governments on the report of the Working Group on a Draft Statute for an International Criminal Court*, *supra* n. 8, at 86.

<sup>74</sup> *Id.*

This is not to say that admissibility considerations are irrelevant to the Prosecutor's determination whether to pursue a situation referred to the Court or to seek commencement of a *proprio motu* investigation. Indeed Article 53(1) provides:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

...

(b) The case is or would be admissible under article 17...<sup>75</sup>

Similarly, Article 53(2) states:

If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

...

(b) The case is inadmissible under article 17...

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral ... or the Security Council..., of his or her conclusion and the reasons for the conclusion.<sup>76</sup>

Finally, Rule 48 of the ICC's Rules of Procedure and Evidence makes clear that the same considerations are to be applied when the

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<sup>75</sup> Rome Statute, *supra* n. 1, Art. 53.

<sup>76</sup> *Id.*

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Prosecutor is determining whether to bring an investigation *proprio motu* pursuant to Article 15.<sup>77</sup>

Hence, if it is obvious from a preliminary investigation that no case within a given situation would meet the admissibility requirements, the Prosecutor may choose not to act on a referral or on information considered as a basis for *proprio motu* proceedings. Likewise, if during the course of the investigation it becomes clear that there are no cases that he or she can prosecute, the Prosecutor may stop the investigation.<sup>78</sup> However, there is neither language in the Statute, nor support in the drafting history, for the notion that Article 17's admissibility requirements apply to situations.

This is an important issue because the ICC Prosecutor, as well as some commentators,<sup>79</sup> appear to assume that at least one of Article 17's provisions – namely, the requirement that cases must be “of sufficient gravity to justify further action by the Court” – should also be applied to situations. An example of this is the Prosecutor's public statements as to why he is not investigating allegations of crimes committed by British troops in Iraq. In the years following the 2003 invasion of Iraq, the Prosecutor has been receiving information regarding potential crimes. Since Iraq has not signed the Rome Statute, the Prosecutor can

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<sup>77</sup> Rule 48 provides: “In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c).” International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, *entered into force* 9 September 2002, R. 48.

<sup>78</sup> Note, however, that there is no time limitation on the Prosecutor to find admissible cases.

<sup>79</sup> See, e.g., Mark Osiel, *How should the ICC Office of the Prosecutor Choose its Cases? The Multiple meanings of ‘Situational Gravity’*, The Hague Justice Portal, 2 (2009); Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, in *Future Directions in International Criminal Justice*, 1, 9 (Carsten Stahn and Larissa van den Herik, eds., 2009).

only investigate alleged crimes committed by citizens of States Parties, in this instance, the United Kingdom. According to the Prosecutor, his team carried out a preliminary investigation to determine: (1) “that a crime within the jurisdiction of the Court has been or is being committed”; (2) admissibility, including gravity and complementarity; and (3) “the interests of justice.”<sup>80</sup> From the public explanation of the Prosecutor’s decision not to pursue the allegations, it appears that the incidents he could pursue involved “4 to 12 victims of willful killing and a limited number of victims of inhuman treatment.”<sup>81</sup> Ultimately, the Prosecutor concluded that the “requirements to seek authorization to initiate an investigation in the situation in Iraq have not been satisfied” because “the *situation* did not appear to meet the required [gravity] threshold of the Statute.”<sup>82</sup> The Prosecutor goes on to say:

It is worth bearing in mind that the [Office of the Prosecutor] is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of willful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.<sup>83</sup>

Thus, the Prosecutor seems to have been comparing the gravity of all of the alleged crimes he found in Iraq *that would fall within the*

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<sup>80</sup> Letter from the Office of the Prosecutor, ICC, to senders re: Iraq, at 6 (9 February 2006) (on file with the ICC) (“The Office examined all communications and readily-available information, applied rules of source evaluation and measurement, prepared tables of allegations and conducted pattern analysis on 64 incidents of potential relevance”).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> *Id.* at 9.

*jurisdiction of the Court* with the *total level* of killings and other crimes in other situations examined by the Prosecutor. In other words, he did not appear to be comparing, for example, all of the crimes committed in Iraq since the 2003 invasion against all of the crimes committed in Northern Uganda since 2002, but rather the crimes potentially falling within the jurisdiction of the Court, *i.e.* committed by British soldiers in Iraq since 2003, against the overall toll of the more than three decades of fighting between the LRA and the Ugandan government.

The issue here is not necessarily the Prosecutor's ultimate decision to forgo *proprio motu* proceedings in Iraq. To the contrary, as a matter of prosecutorial discretion, he is free to determine that the Court's resources are better exercised elsewhere, and it may well be that there is no individual *case* that would have been admissible before the Court.<sup>84</sup> Rather, the issue is that, to the extent the Prosecutor is ruling out pursuing an investigation based on a lack of "situational gravity,"

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<sup>84</sup> See, e.g., *Proposal by the United Kingdom of Great Britain and Northern Ireland to the Trigger mechanism Preparatory Committee on the Establishment of an International Criminal Court Working Group on Complementarity and Trigger Mechanism*, *supra* n. 35, at 4 ("[T]he ICC prosecutor should have a discretion to refuse to prosecute even through a *prima facie* case against an accused has been established and that the court should not be obliged to go ahead with every case over which it has jurisdiction, or which is not inadmissible, just because there is a *prima facie* case. These considerations belong to an examination of the powers of the prosecutor."); United States Delegation, "Trigger Mechanism," *Second Question the Role of the Security Council and of Complaints by States Articles 23 and 25*, *supra* n. 20, at 3 ("[A]s to individuals and individual cases, the Prosecutor has complete independence and freedom of action."); *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Vol. II*, *supra* n. 36, at 190 ("There was much merit in the idea that States parties should refer to the Court situations in which one or more crimes within the Court's jurisdiction appeared to have been committed. It would then be up to the Prosecutor to determine whether one or more specific persons should be charged with the crimes.").

this sort of analysis could in the future inappropriately exclude one or more cases from the Court. One can imagine a set of circumstances where most cases that the Court would be interested in prosecuting within a given geographical region fall beyond its reach, but this does not necessarily mean that there are *no* grave cases in that region within the Court's jurisdiction. For instance, this may arise where a large number of crimes are committed on the territory of a non-State Party by non-State Party nationals, but a handful of particularly heinous crimes were committed by nationals of a State Party. Similarly, there may be a scenario where a country's national judicial system genuinely prosecutes the vast majority of individuals alleged to have committed crimes during a civil war, but leaves the regime's top leaders free from investigation despite information suggesting those leaders should also be investigated. Surely the fact that there would only be a single case within this situation should not preclude the Prosecutor from pursuing the leaders. Yet another scenario where the gravity of an entire situation may not seem equivalent to others, but where there is still a sufficiently grave case may be where a small number of killings occur, but the *impact* of the crime is widespread, as in the case of an attack on peacekeepers who may then be pressured to withdraw from their role. While the term "gravity" is not defined in the Rome Statute, the current Prosecutor has repeatedly argued that the impact of a crime is relevant to determining gravity.<sup>85</sup> Hence, if one

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<sup>85</sup> See, e.g., Statement by Luis Moreno-Ocampo, Prosecutor of the ICC, *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs*, New York, at 6, 24 October 2005 ("We are currently in the process of refining our methodologies for assessing gravity. In particular, there are several factors that must be considered. The most obvious of these is the number of persons killed – as this tends to be the most reliably reported. However, we will not necessarily limit our investigations to situations where killing has been the predominant crime. We also look at number of victims of other crimes, especially crimes against physical integrity. The impact of the crimes is another important factor."); Rod Rastan, Legal Officer with the ICC Office of the Prosecutor, *The Power of the Prosecutor in Initiating Investigations*, A paper prepared for the Symposium on the International Criminal Court,

side to a conflict that is otherwise being lawfully conducted launched an attack on peacekeepers, the ICC could theoretically prosecute that case alone. Finally, the Prosecutor may have occasion to look at an area where the national judicial system was functioning to genuinely prosecute all crimes within the ICC's jurisdiction *except* a certain category of crimes, such as crimes of sexual violence. Again, as long as one or more individual cases within that state would meet the gravity threshold, the ICC should not forgo prosecuting the relevant cases solely on the ground that the situation does not involve a wider range of cases that could be prosecuted by the Court.

Importantly, the notion that the Prosecutor may only act in situations of a certain gravity is not only contradicted by the wording of Article 17, but also by the drafting history of the Rome Statute. As described above, the 1994 draft statute prepared by the International Law Commission envisioned that states would trigger the exercise of the Court's jurisdiction via the filing of complaints that consisted of "the circumstances of the alleged crime and the identity and whereabouts of

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Beijing, China, at 7, 3-4 February 2007 ("In practice, in determining whether the situation is of sufficient gravity, the Office will consider issues of severity; scale; systematicity; impact; and particularly aggravating aspects."); ICC Office of the Prosecutor, *Report on the Activities Performed during the First Three Years (June 2003-June 2006)*, at 6, 12 September 2006, available at [http://www.iccnw.org/documents/3YearReport%20\\_06Sep14.pdf](http://www.iccnw.org/documents/3YearReport%20_06Sep14.pdf) ("In the view of the Office, factors relevant in assessing gravity include: the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes."). See also Press Release, Office of the Prosecutor, Prosecutor: "The Attack on African Union Peacekeepers in Haskanita was an attack on millions of civilians they had come to protect; we will prosecute those allegedly responsible," at 2 (17 May 2009) (in which the ICC Prosecutor defends the admissibility of a case in the Darfur situation involving an attack on African Union peacekeepers that resulted in twelve deaths, noting that those targeted were "those who came to help civilians, the AU and UN Peacekeepers, the aid workers. Such attacks also ... have a direct impact on the delivery of vital services and thereby exacerbated suffering of vulnerable groups. They impact on the lives of thousands.").

any suspect.”<sup>86</sup> While this language was ultimately changed in favor of having states refer situations to the Court, the reasons behind this change were a fear of politicized complaints and a desire to maintain consistency with the trigger mechanism relating to Security Council referrals.<sup>87</sup> Indeed, there is no evidence from the drafting history that those who created the ICC wanted to restrict its functioning solely to instances where the Court could pursue many grave cases falling within the same geographical and temporal referral. Of course, as a practical matter, it may often be the case that a situation will involve many cases that may be prosecuted by the Court, as genocide, crimes against humanity, and war crimes seldom occur in isolation. Nevertheless, it is worth stressing that the gravity requirement applies only to cases, and not to situations, and recalling that while the ICC is dedicated to combating “the most serious crimes of concern to the international community,” it is equally committed to “put[ting] an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”<sup>88</sup>

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<sup>86</sup> See *supra* n. 5 *et seq.* and accompanying text.

<sup>87</sup> *Id.*

<sup>88</sup> Rome Statute, *supra* n. 1, Pmbl.

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## THE RELEVANCE OF “A SITUATION” TO THE ADMISSIBILITY AND SELECTION OF CASES BEFORE THE INTERNATIONAL CRIMINAL COURT

Under the Rome Statute of the International Criminal Court (ICC), the Court’s Prosecutor does not have unfettered authority to commence an investigation anywhere that the Court has jurisdiction. Instead, the Court may exercise jurisdiction in only one of three circumstances: (i) where “a situation” is referred by a State Party to the Rome Statute; (ii) where “a situation” is referred by the United Nations Security Council; or (iii) where the ICC Prosecutor “has initiated an investigation” *proprio motu* with the authorization of the Court’s Pre-Trial Chamber. To date, the Court’s exercise of jurisdiction has been triggered three times by a State Party and once by the Security Council, resulting in the *situations* in Uganda, the Central African Republic, the Democratic Republic of Congo (DRC), and Darfur, respectively. The Court’s Prosecutor has, in turn, initiated a series of individual cases falling within the four situations, meaning that much of the focus at the Court in recent years has been on the initiation or progress of these *cases*. Yet the practice at the Court thus far has also raised questions about the appropriate understanding of *situations*, a term that is not defined in any of the governing documents of the ICC.

This report seeks to address two of those questions, which have notably engendered little discussion, despite potentially having a significant impact on the future work of the Court. The first question is: when the ICC Prosecutor accepts a referral from a State Party or the Security Council, does he or she have to accept the situation as defined by the referral or can he or she expand its parameters? Based on the drafting history of the Rome Statute, and in particular the decision to afford the Prosecutor *proprio motu* powers only when acting with the approval of the Pre-Trial Chamber, the answer to this first question appears to be “no.” The second issue is: at what point should the Prosecutor consider gravity and other admissibility criteria required by Article 17 of the Rome Statute? Here, the report concludes that while admissibility considerations are certainly not irrelevant to the Prosecutor’s determination of whether to pursue a situation referred to the Court or to seek commencement of a *proprio motu* investigation, the plain language of the Rome Statute, the drafting history of the treaty, and practical considerations indicate that the admissibility criteria must be applied to individual cases, not to situations as a whole.



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