

## ***Lubanga*, the DRC and the African Court: Lessons learned from the first International Criminal Court case**

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### **Summary**

*Thomas Lubanga Dyilo will be the first person tried under the jurisdiction of the International Criminal Court. His case will have an important effect, not only on his home country, the Democratic Republic of the Congo, but on the world. Through an analysis of Lubango's case and the current development of the International Criminal Court's case load, the positives and negatives of International Criminal Court jurisdiction become apparent, particularly in relation to national or international primary jurisdiction. While the International Criminal Court is crucial for the development of international judicial authority, the Court is extending its reach too eagerly and willingly. In so doing, the Court is destroying the autonomy and development of governments and judicial systems in African countries. Therefore, the International Criminal court should show more restraint in its acceptance of cases and instead pursue alternative methods of bolstering national judiciaries. To be effective, the Court's mission must first focus on teaching and encouragement of local rule of law. The Court should focus on judicial decision making only as a secondary option. Finally, the Court should be increasingly subject to United Nations Security Council referrals than to state referrals or the prosecutor's own powers.*

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[S]upporters of the Court hope that this trial will help to ease many doubts about the direction of the Court as the *Tadic* case was able to do for the ICTY.<sup>1</sup>

## 1 Introduction

Thomas Lubanga Dyilo will be the first man tried under the jurisdiction of the International Criminal Court (ICC). His case will have an important effect, not only on his home country, the Democratic Republic of the Congo (DRC), but on the world. This first ICC decision will affect state sovereignty and current international organisations, such as the United Nations (UN). It will increase the possibility of universal jurisdiction. It could also potentially threaten some of the world's unrestrained superpowers.

This paper will begin with general information on Thomas Lubanga Dyilo, the DRC, and the DRC's present use of the ICC. It will analyse the development and current case load of the ICC and provide general information on the African Court on Human and Peoples' Rights (African Court), a potential corollary for judicial authority in Africa. This paper will then look at the benefits and drawbacks of a nation's referral of a case to the ICC, compared to jurisdiction in-country or in a regional court such as the African Court. It will continue by arguing that countries such as the DRC should maintain primary jurisdiction whenever possible. If that is not possible, regional courts, such as the African Court, should have secondary jurisdiction. Cases should be referred to the ICC only as a last resort and only when criteria for referrals are better defined.

It will conclude that while the ICC is crucial for the development of international judicial authority, the ICC is extending its reach too eagerly and willingly. In so doing, the ICC is destroying the autonomy and development of governments and judicial systems in African countries. Therefore, the ICC should show more restraint in its acceptance of cases and instead pursue alternative methods of bolstering national judiciaries.

This paper will argue that, to be effective, the ICC's mission must first focus on teaching and the encouragement of local rule of law. The ICC should focus on judicial decision making only as a secondary option. Finally, this paper will contend that the ICC should be subject more to UN Security Council referrals than to state referrals or the prosecutor's own powers. That is, in order to control the ICC's potentially dangerous over-wielding use of power over nations, the ICC should be increasingly restricted to referred cases from the UN Security Council.

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<sup>1</sup> MC Bassiouni 'The ICC — *Quo vadis?*' (2006) 4 *Journal of International Criminal Justice* 421 425.

## 2 Background on the DRC, Thomas Lubanga Dyilo and the DRC's jurisdictional options

### 2.1 The history of the DRC conflict

The DRC is a struggling nation. The beginning of the 'current conflict dates back to May 1997, when the Alliance of Democratic Forces for the Liberation of Congo, led by Laurent Kabila, overthrew the dictatorship of Mobutu Sese Seko'.<sup>2</sup> Shortly after, in 1998, Uganda and Rwanda invaded the DRC, allegedly interested in Tutsi-Hutu issues.<sup>3</sup> As the Ugandan and Rwandan interference threatened Laurent Kabila's power, Angola, Namibia and Zimbabwe sent troops to support Kabila.<sup>4</sup> A temporary peace ensued. In 1999, the major parties gathered to sign 'the Lusaka Peace Accords, resulting in the deployment in 2000 of a UN force, the UN Organisation Mission in the Democratic Republic of the Congo (MONUC)'.<sup>5</sup> Unfortunately, the accords did not stop the violence.<sup>6</sup> Laurent Kabila 'managed to retain power until his assassination in January 2001, when his son Joseph was appointed to succeed him'.<sup>7</sup> Joseph has remained in tentative control since his father's death.

One especially volatile region of the DRC is an area known as Ituri. Various forces have vied for its control. From 1998 to 2003, Uganda occupied Ituri.<sup>8</sup> This Ugandan occupation of Ituri exacerbated tensions between local Hema and Lendu communities. Instead of working with the local groups, '[t]he Ugandan army helped arm and train the approximately ten armed insurgent groups that currently exist in Ituri, instigating ethnic feuds between the Hema and Lendu militias . . .'.<sup>9</sup> As the Hema and Lendu groups dominated the population in the region, almost all of the ethnic groups there became associated with the conflict.<sup>10</sup> Thomas Lubanga Dyilo, the man currently held by the ICC, was involved with the conflict as a leading Hema member.<sup>11</sup> Lubanga led the Union of Congolese Patriots (UPC).<sup>12</sup> Using the slogan 'Ituri for Iturians', Lubanga and his UPC fought for autonomy.<sup>13</sup>

<sup>2</sup> J Graff 'Corporate war criminals and the International Criminal Court: Blood and profits in the Democratic Republic of Congo' (2004) 11 *Human Rights Brief* 23.

<sup>3</sup> n 2 above, 23-24.

<sup>4</sup> n 2 above, 24.

<sup>5</sup> Human Rights Watch *Democratic Republic of Congo: Ituri: 'Covered in blood'. Ethnically targeted violence in Northeastern DR Congo* (2003) 15.

<sup>6</sup> As above.

<sup>7</sup> Graff (n 2 above) 24.

<sup>8</sup> Human Rights Watch (n 5 above) 2.

<sup>9</sup> Graff (n 2 above) 24.

<sup>10</sup> 'Ituri is home to 18 different ethnic groups with the Hema/Gegere and Lendu/Ngiti communities together representing about 40 per cent of the inhabitants.' Human Rights Watch (n 5 above) 14.

<sup>11</sup> Human Rights Watch (n 5 above) 5.

<sup>12</sup> As above.

<sup>13</sup> Human Rights Watch (n 5 above), citing Human Rights Watch interview, Bunia (February 2003).

As ethnic tensions rose, the Ituri region became especially contentious because of its abundant mineral reserves. 'Ituri is one of the richest areas of Congo with deposits of gold, diamonds, coltan, timber and oil.'<sup>14</sup> By exacerbating the tension between local ethnic groups, countries such as Rwanda and Uganda gained untold riches from the Ituri region. Human Rights Watch noted that<sup>15</sup>

[t]rade statistics show the extent to which Uganda has profited from the riches of the DRC. Gold exports from Uganda more than doubled after their troops crossed into the DRC . . .

Rwanda aimed to attain the same position of exploitation. 'Rwandan authorities allegedly also hoped to profit from the gold of Ituri.'<sup>16</sup> The prospect of great wealth struck a deep chord.

In addition to gold, Uganda also flagrantly took advantage of Ituri's diamond resources.<sup>17</sup>

No diamond exports were recorded from Uganda in the decade before their troops arrived in the DRC. Then from 1997 to 2000, diamond exports jumped from 2 000 to 11 000 carats.

Because of these economic incentives, the neighbouring countries of Rwanda and Uganda gave little thought to the ethnic troubles they exacerbated.

As Rwanda and Uganda created friends and enemies based on mineral reserves, the DRC devolved into a continual cycle of war and terror. Human Rights Watch believed that 'at least 5 000 civilians died from direct violence in Ituri between July 2002 and March 2003'.<sup>18</sup> Civilians felt the greatest losses, and not only in the Ituri region. Human Rights Watch noted that the losses felt in Ituri 'are just part of an estimated total of 3,3 million civilians dead throughout the Congo, a toll that makes this war more deadly to civilians than any other since World War II'.<sup>19</sup> Tragically, millions died for the sake of mineral reserves exploited through the use of ethnic and political tensions.

The world community has done little to quell the violence and inhumane practices. The UN did decide to send in a small team of international observers, known as the UN Organisation Mission in the DRC (MONUC). However, between 1999 and April 2003, MONUC 'had only a small team of fewer than ten observers covering this volatile area of some 4,2 million people'.<sup>20</sup> Not until April 2003 did the UN

<sup>14</sup> Human Rights Watch (n 5 above) 12.

<sup>15</sup> Human Rights Watch (n 5 above), citing Security Council, Addendum to the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, S/2001/1072 (13 November 2001).

<sup>16</sup> Human Rights Watch (n 5 above), 13, citing 'UPC rebels grab Mongbwalu's gold' *African Mining Intelligence* 15 January 2003 53.

<sup>17</sup> Human Rights Watch (n 5 above), citing Security Council (n 15 above).

<sup>18</sup> Human Rights Watch (n 5 above) 1.

<sup>19</sup> As above.

<sup>20</sup> Human Rights Watch (n 5 above) 2.

increase MONUC forces, and then only to several hundred representatives.<sup>21</sup> This nominal increase came too late. Because little was done to stop the violence in the DRC, it remained unchecked for many years. Unfortunately, the problems, which were never stopped, continue to be a force which the DRC must now struggle to confront.

## 2.2 Charges against Lubanga

As mentioned previously, Lubanga headed the Union of Congolese Patriots (UPC). Lubanga's UPC stands accused of numerous atrocities. For example, the UPC took an area known as Bunia in August 2002. They forced workers to dig at the gold mines without pay.<sup>22</sup> The UPC also murdered non-Hemas. When controlling the Bunia area, 'Lubanga's UPC launched a campaign of arbitrary arrests, executions and enforced disappearances. Witnesses described it as a 'man hunt for Lendu, Ngiti, "non-originares" and others . . .'<sup>23</sup> In addition to civilian murders and enforced work, the armed forces central to the Ituri region are accused of numerous other egregious crimes. As an example, Lubanga's UPC, along with other groups in the area, stands accused of systematic campaigns of cannibalism directed against civilians.<sup>24</sup>

However, these are not the charges for which Lubanga is presently at the ICC. Instead, Lubanga is first charged with the recruitment of child soldiers. Admittedly, Lubanga is not alone in this crime. The recruitment of child soldiers occurred across the country during the conflict. Human Rights Watch noted that the forced military recruitment of children involved boys and girls as young as seven.<sup>25</sup> However, Lubanga's UPC might be accused of showing the least restraint in its forced recruitment of child soldiers.<sup>26</sup>

On November 8, 2002 at 8:00 am, the UPC reportedly entered the Ecole Primaire of Mudzi Pela and forcibly rounded up the entire fifth grade, some forty children, for military service. A similar operation was carried out in Salongo where the UPC surrounded a neighborhood and then abducted all the children they could find.

The recruitment numbers from these operations were minor compared to the total number of child soldiers enlisted by Lubanga's UPC. All together, Lubanga's force allegedly might have enlisted approximately 30 000 children in the Ituri region.<sup>27</sup>

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<sup>21</sup> As above.

<sup>22</sup> Human Rights Watch (n 5 above) 24.

<sup>23</sup> Human Rights Watch (n 5 above) 27.

<sup>24</sup> WW Burke-White 'Complementarity in practice: The International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* 557 587.

<sup>25</sup> Human Rights Watch (n 5 above) 46.

<sup>26</sup> Human Rights Watch (n 5 above) 47.

<sup>27</sup> Bassiouni (n 1 above) 425.

By alleged child recruitment, Lubanga's UPC has violated international law. He has potentially violated Protocol II of 1977 to the 1949 Geneva Convention. Protocol II 'prohibits all combatants in an internal armed conflict from recruiting children under the age of fifteen or allowing them to take part in hostilities'.<sup>28</sup> In addition to Protocol II violations, Lubanga's alleged action violates article 38 of the Convention on the Rights of the Child (CRC), which the DRC ratified in 1990.<sup>29</sup> Therefore, authorities may charge Lubanga in an international forum.

### 2.3 DRC's choice of jurisdiction

If Lubanga's alleged crimes occurred today, authorities could charge him in three different judicial forums. His trial could be held in the DRC, the African Court or in the ICC. As it stands, the African Court did not come into force until 25 January 2004.<sup>30</sup> However, since the African Commission on Human and Peoples' Rights (African Commission) has existed since 1987,<sup>31</sup> it is arguable that the African Court could claim jurisdiction over any cases violating African Commission standards since 1987 (see part 5). For the current sake of argument, any future cases similar to Lubanga's which occurred after 25 July 2004 could legitimately be held in the African Court as well as the ICC.

Instead of having this case heard in the state of primary jurisdiction or at the regional African Court, Kabila referred Lubanga's case directly to the ICC. From its beginning, the ICC has struggled in its attempts to charge Lubanga. For example, the court postponed Lubanga's confirmation hearing originally scheduled for June 2006 to September 2006 due to violence in Ituri.<sup>32</sup> Human Rights Brief updated the situation: 'The prosecutor delayed full disclosure of evidence to the defence, due partially to the escalating violence and in the interest of protecting

<sup>28</sup> Human Rights Watch (n 5 above) 46: 'Although the DRC is not a party to Protocol II, many of its provisions are widely accepted as customary international law', citing Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art 4(3)(c) (8 June 1977).

<sup>29</sup> Human Rights Watch (n 5 above) 46, citing Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) (entered into force 2 September 1990).

<sup>30</sup> F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 1. See African Commission on Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights [http://www.achpr.org/english/\\_info/court\\_en.html](http://www.achpr.org/english/_info/court_en.html) (accessed 28 January 2007).

<sup>31</sup> First Annual Activity Report of the African Commission on Human and Peoples' Rights, para 4.

<sup>32</sup> EJ Rushing *et al* 'Updates from the International Criminal Courts' (2006) 14 *Human Rights Brief* 38 41.

victims and witnesses.<sup>33</sup> The lack of peace on the ground in Ituri led to increased unwillingness of the ICC to continue with the prosecution. While the ICC asserts jurisdiction, it is proving slow and ineffective in its prosecution.

The ICC asserted its jurisdiction over Lubanga too quickly. In so doing, it potentially destabilised rather than stabilised the situation in the DRC. This choice of the ICC to claim jurisdiction over the Lubanga case threatens the DRC and the African Court. Also, the ICC has set a poor precedent in overreaching the extent of its authority in this case. This mistake could have extensive ramifications for many countries in Africa and for all peoples across the world. However, before one criticises the ICC's handling of the DRC case, a rudimentary understanding of both the ICC and the African Court is necessary.

### 3 Development and current caseload of the ICC

#### 3.1 Background on the ICC

In order to understand the threatening direction the ICC is taking, it is important to look at its development, organisational structure and current case load. Then one can analyse whether the current precedent set by ICC with the Lubanga case is helpful or harmful for African nations and for the world in general.

The ICC began as a forum for prosecuting individual criminals through international jurisdiction. Unlike the International Court of Justice (ICJ), which prosecutes states under UN supervision, the ICC is a somewhat distinct legal entity. The ICC has a dissimilar mandate compared to the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). The ICTY and ICTR operated directly under UN Security Council supervision.<sup>34</sup> As one writer notes, '[t]he ICC, by contrast, is largely independent of the Council and vests the power to investigate and prosecute . . . in a single individual, its independent prosecutor'.<sup>35</sup> That is, the ICC has no direct authority over it. The prosecutor is limited only to a very minimal extent by ICC member states. 'The Rome Statute makes the prosecutor formally accountable to the ICC Assembly of State Parties and to the ICC judiciary.'<sup>36</sup> That is, the prosecutor's powers are reasonably boundless compared to previous international courts.

The initial formulations of how the ICC and its prosecutor might operate went through many revisions. 'The first draft of the treaty that would eventually become the Rome Statute was produced by

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<sup>33</sup> As above.

<sup>34</sup> AM Danner 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510.

<sup>35</sup> As above.

<sup>36</sup> Danner (n 34 above) 524.

the International Law Commission (ILC) in 1994.<sup>37</sup> It would take eight more years before the proposed treaty would evolve into and eventually create the ICC. Finally, in 2002, 104 countries joined to sign the Rome Statute, thereby creating the ICC.<sup>38</sup>

As a new institution with uncertain power and restraints, the ICC is still experimenting in its attempts at commanding power. The Rome Statute requires that the ICC not unduly infringe on national jurisdiction. This is laid out in the idea that '[t]he ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine ...'<sup>39</sup> In other words, the ICC should never interfere unless absolutely necessary. As national courts have the primary responsibility for the prosecution of crimes, 'the ICC is "complementary" to national criminal jurisdictions and may exercise jurisdiction only when certain criteria are satisfied'.<sup>40</sup> Unfortunately, this idea of 'complementarity' is vaguely construed and loosely interpreted. Therefore, the issue of 'complementarity' will be essential later in determining whether the current ICC is overstepping its mandate.

The Rome Statute is explicit on how a case referral may begin and as to what crimes may be prosecuted. Three forces may instigate ICC prosecutions. First, member states of the ICC may refer their own cases.<sup>41</sup> 'Second, the UN Security Council may refer a situation to the prosecutor under its chapter VII powers. Finally, the prosecutor may himself trigger the ICC's jurisdiction ...'<sup>42</sup> through *proprio motu* power. For jurisdiction, ICC cases are limited to the gravest crimes. The ICC may try only three crimes: genocide, crimes against humanity and war crimes.<sup>43</sup> Another rule restricts the ICC's prosecution. ICC cases, as under the Rome Statute, are limited to occurrences after

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<sup>37</sup> Danner (n 34 above) 513, citing Draft Statute for the International Criminal Court, Report of the International Law Commission on the Work of its 46th session, UN GAOR, 49th Sess, Supp No 10 43, UN Doc A/49/10 (1994), reprinted in (1994) 2 *Yearbook of the International Law Commission* 46, UN Doc A/CN.4/Ser.A/1994/Add 1 (Part 2) (ILC Draft); see also RS Lee (ed) *Introduction to the International Criminal Court: The making of the Rome Statute* 1 3 (describing the ILC draft).

<sup>38</sup> International Criminal Court 'About the Court' <http://www.icc-cpi.int/about.html> (accessed 28 January 2007).

<sup>39</sup> As above.

<sup>40</sup> P Akhavan 'The Lord's Resistance Army case: Uganda's submission of the first state referral to the International Criminal Court' (2004) 99 *American Journal of International Law* 403 412-413.

<sup>41</sup> Danner (n 34 above) 516, citing the Rome Statute of the International Criminal Court, 17 July 1998, art 15(1), UN Doc A/CONF.183/9 (1998), reprinted in (1998) 37 *International Legal Materials* 999, corrected through 8 May 2000 by UN Doc CN.177.2000.TREATIES-5 (Rome Statute) <http://www.icc-cpi.int> (accessed 28 January 2007).

<sup>42</sup> As above.

<sup>43</sup> International Criminal Court (n 38 above).



1 July 2002, when the treaty came into effect.<sup>44</sup> These rules form the general basis for ICC jurisdiction as they have developed through the Rome Statute.

### 3.2 Current cases at the International Criminal Court

As soon as the ICC began, it was inundated with referrals. By March 2005, the ICC had received 'around fifteen hundred communications from around the world — from individuals, non-governmental organisations, and professional associations . . .'<sup>45</sup> Sifting through those referrals brought the ICC to its current case load.

The ICC currently has three primary situations listed on its case load. All three of these cases come from Africa. These include the *Situation in Democratic Republic of the Congo*, ICC-01/04 and the corollary *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06; the *Situation in Uganda*, ICC-02/04 and the corollary *The Prosecutor v Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*, ICC-02/04 -01/05; and the *Situation in Darfur, Sudan*, ICC-02/05.<sup>46</sup> Another case, the *Situation in Central African Republic*, ICC-01/05;<sup>47</sup> is temporarily stalled.<sup>48</sup> Of these four cases, three countries have self-referred them to the ICC. The UN Security Council has referred Darfur, Sudan, to the ICC.<sup>49</sup>

## 4 Home countries should maintain primary jurisdiction: The *Lubanga* case should have remained in the DRC

The *Lubanga* case should have remained in the DRC. First, holding the *Lubanga* case nationally would have enhanced government legitimacy. Second, it would have provided the people of the DRC with the benefits of national prosecution. Third, it would have encouraged domestic legal changes. Fourth, the DRC would have had a sufficient police and legal force to hold the case. Instead, by not holding the case in the DRC, the ICC delegitimised the government, took away potential benefits from the citizens of the DRC, slowed domestic legal changes and harmed the potential strength of the present police and legal system in the DRC.

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<sup>44</sup> n 41 above.

<sup>45</sup> S Fernandez 'Remarks' (2005) 99 *American Society of International Law* 278.

<sup>46</sup> International Criminal Court 'Situations and cases' <http://www.icc-cpi.int/cases.html> (accessed 28 January 2007).

<sup>47</sup> As above.

<sup>48</sup> See Appendix: Central African Republic.

<sup>49</sup> n 46 above.

#### 4.1 Better in general

Not only in the DRC, but worldwide, national prosecutions are preferable. First, they allow for prosecuting a larger number of alleged criminals. As one writer notes, national prosecutions are important 'because international courts can only prosecute a small fraction of the large-scale human rights violations that occur'.<sup>50</sup> Second, national prosecutions reinforce the government and the rule of law in a particular nation. 'National prosecutions are a valuable opportunity both to force the local justice system to perform better and to build public confidence in that system.'<sup>51</sup> This public confidence is needed, especially in the DRC's case.

#### 4.2 Government legitimacy

A trial in the DRC would have greatly enhanced the stability of the government and therefore of the people. The DRC's current government, led by Joseph Kabila, needs a respectable judicial system in order to uphold its legitimacy. Following the assassination of Joseph's father in 2001, Joseph Kabila became President of the transitional government; he was 'joined by four vice-presidents representing the former government, former rebel groups, and the political opposition'.<sup>52</sup> While those competing leading forces threatened the DRC's growth, Kabila's government presently seems to be relatively stable. 'The transitional government held a successful constitutional referendum in December 2005 and elections for the presidency, National Assembly and provincial legislatures in 2006.'<sup>53</sup> In December of 2006, Kabila was inaugurated President.<sup>54</sup> Kabila is slowly asserting control of his nation.

One way that the international community can support Kabila's government or simply the rule of law in the DRC is by supporting the DRC's judicial system. In order to increase the Kabila government's legitimacy, it is important that Kabila's government take charge of the prosecutions. Instead, by taking away the DRC's judicial authority, the ICC has potentially de-legitimised Kabila's government.

#### 4.3 Timing of the crimes

Kabila's government will gain legitimacy if it is encouraged to try the crimes which allegedly took place before the enactment of the Rome

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<sup>50</sup> B Concannon Jr 'Beyond complementarity: The International Criminal Court and national prosecutions: A view from Haiti' (2000) 32 *Columbia Human Rights Law Review* 201 225.

<sup>51</sup> As above.

<sup>52</sup> *The world factbook, Congo, Democratic Republic of the* <https://www.cia.gov/cia/publications/factbook/geos/cg.html#Gvt> (accessed 30 January 2007).

<sup>53</sup> As above.

<sup>54</sup> As above.

Statute. Legislation under the Rome Statute will apply too late to charge many of those responsible for earlier atrocities. If the DRC wants to reinforce the government and rule of law, it must be able to prosecute all the guilty throughout the war.

#### 4.4 Citizens benefit from national prosecutions

Citizens benefit when prosecutions are conducted nationally. For example, national prosecutions work more efficiently for victims. One researcher found that 'victims generally prefer a local prosecution to an international one'.<sup>55</sup> Costs are cut down, and citizens see justice unfold before them. 'National prosecutions should remain the primary option, wherever feasible, because they . . . are usually preferable from the perspectives of victims and local justice systems.'<sup>56</sup> In other words, citizens feel that they are part of the justice when prosecutions are conducted nationally.

If the ICC asserts jurisdiction, alleged national criminals are no longer judged by their peers. No national reconciliation or justice is achieved. As Morris notes, the accused 'is called to account not before the court of any state, but before an international institution. In essence, this is a supra-national solution to the problem of national transgressors.'<sup>57</sup> This does not solve the national problem that the people of the DRC need to confront.

#### 4.5 Incentives for effective local systems

National crimes encourage national laws that work. By charging Lubanga internationally, the DRC loses its incentive to create an effective local legal system. First, by ICC overseeing the charges, the government does not need to encourage local police to charge criminals. This creates a problem. While one high-ranking official is prosecuted in a lengthy and costly trial at the ICC, individuals back on the ground in the DRC can remain aloof and violent. There is no real rule of law to constrain them. That is, with the ICC's removal of jurisdiction, Kabila's government might face a continuing spiral of violence as the perpetrators realise that it is unlikely that they will be punished for their actions. Therefore, taking this case out of the DRC encourages protracted violence and anarchy.

Second, by giving jurisdiction to the ICC, the Kabila government has had no reason to change its criminal codes to prosecute the alleged wrongdoers. In the DRC, '[n]one of the international crimes proscribed in the Rome Statute have been implemented into the civilian penal

<sup>55</sup> Concannon (n 50 above) 227.

<sup>56</sup> Concannon (n 50 above) 202.

<sup>57</sup> M Morris 'The democratic dilemma of the International Criminal Court' (2002) 5 *Buffalo Criminal Law Review* 591-594.

code'.<sup>58</sup> The DRC has lost its incentive to change its law. Attempts at changing the law to include Rome Statute provisions are not necessary. 'While the Congolese legislation implementing the Rome Statute will rectify many of these shortcomings, it has yet to be passed and will not apply retroactively.'<sup>59</sup> With no incentive to adopt or apply the Rome Statute, the DRC's legal system remains ineffective.

Instead of being encouraged to reform, President Kabila has acted very loosely in his prosecutions. In 2003, Kabila granted amnesty for acts 'committed during the period from 2 August 1998 and 4 April 2003 ... excluding war crimes, genocide and crimes against humanity'.<sup>60</sup> In essence, Kabila granted amnesty and then looked to the international community in order to improve his rule of law. While little reform takes place in the DRC, Kabila realised that he could send the worst offenders to an outside court to be tried.

This creates two problems. First, it means that criminals are not being prosecuted. Only one has been sent to the DRC. Second, it means that Kabila's government is not legitimate. If Kabila's hand is forced to give amnesty to criminals by political pressures, he does not control his government. In order to regain control, Kabila and the ICC must encourage prosecution in the DRC.

#### 4.6 The DRC has a sufficient police force

Police ability to arrest alleged criminals and maintain peace during a national trial is crucial for a government to work. Therefore, police capability should be one factor that the ICC should use to determine a country's ability to conduct prosecutions nationally.

In the DRC, policing is sufficient to hold the *Lubanga* case at home. Granted, '[t]o date there has not been a systematic study of the policing capacity of the new transitional government'.<sup>61</sup> However, international forces are stabilising the authority of the police force in the DRC. As Burke-White notes, the Congolese government police forces are backed by MONUC's Civilian Police Component (CIVPOL).<sup>62</sup> With the support of the MONUC forces, enough police stability should be afforded to handle cases such as *Lubanga*'s.

The international community must buttress the local police force before the ICC concedes that the DRC's ability to handle problems is non-existent. Instead of buffering the police force, the ICC's usurping of

<sup>58</sup> Burke-White (n 24 above) 583, citing *Organic Law* 30 July 2004, cited in 'A few first steps: The long road to a just peace in the Democratic Republic of the Congo', International Centre for Transitional Justice Occasional Paper, October 2004 20 <http://www.ictj.org/downloads/ICTJ.DRC.Eng.pdf> (accessed 30 January 2007).

<sup>59</sup> Burke-White (n 24 above) 583.

<sup>60</sup> Burke-White (n 24 above) 584.

<sup>61</sup> As above.

<sup>62</sup> Burke-White (n 24 above) 585 (2005), citing MONUC CIVPOL Mandate <http://www.monuc.org/Civpol/> (accessed 28 January 2007).

authority created the impression that the DRC police force is not capable. This delegitimised police efforts to maintain peace and security. In the future, this action might also cause a dependency. That is, the DRC might require increased support from the international community. Therefore, as a general rule, before the ICC imposes itself, it should consider the nation's present police situation and not be too quick to impose delegitimising intervention.

#### 4.7 The DRC has a sufficient legal system

The ICC should give more deference to a given country's ability to prosecute in a national court. In giving deference, it should not ignore the country's weaknesses, but instead encourage the local government to enhance its legal system. In the case of the DRC, the ICC failed to take either action of giving deference or of encouraging local enhancement.

Burke-White noted that the DRC has a sufficient number of lawyers and judicial officials.<sup>63</sup> 'One report suggests that there are at least 1 500 lawyers and 700 other judicial officials in the country.'<sup>64</sup> While the actual number may be smaller, Burke-White comments that 'for an extremely poor African state, Congo has a respectable enough pool of lawyers to operate a judiciary'.<sup>65</sup> The ICC failed to recognise this trained body of professionals as a potential way to manage the DRC's problems without claiming jurisdiction for the ICC. Admittedly, the problem with the DRC's judges is the way they are funded: '[J]udges often lack both political independence and financial impartiality.'<sup>66</sup> This under-funding leaves judges searching for methods to supplement their salaries. 'Rumour has it that for roughly US \$1 000, the official police and judicial apparatus can be purchased to assure the arrest and incarceration of an individual.'<sup>67</sup> This supplementation threatens the judicial system. However, that problem must be dealt with rather than simply ignored through the removal of jurisdiction.

Financial problems in the legal system will not be taken care of by the ICC retaining jurisdiction over Lubanga. Instead, the problems will be exacerbated as nothing is done to stop them. The ICC needs to

<sup>63</sup> Burke-White (n 24 above) 577.

<sup>64</sup> Burke-White (n 24 above) citing Dominique Kamuandu and Theo Kasonga, *Avocats Sans Frontières*, personal interview, Kinshasa, DR Congo, 28 October 2003 (interview conducted by Adrian Alvarez and Yuriko Kuga. Human Rights Watch confirms that 'the latest figures released by the Ministry of Justice show that as of 1998, there were only 1 448 judges and prosecutors in the entire country'. See 'Democratic Republic of the Congo Confronting impunity' Human Rights Watch Briefing Paper, January 2004 IV(b).

<sup>65</sup> Burke-White (n 24 above) 577.

<sup>66</sup> As above.

<sup>67</sup> Burke-White (n 24 above) 578, citing Jo Wells, Human Rights Law Group, personal interview, Kinshasa, Congo, 25 October 2003 (interview conducted by Yuriko Kuga and Leslie Medema).

demand that the DRC reform its judicial system. As Burke-White noted, international support could develop the stability of the DRC's court system. He argued that with national and international attention and MONUC co-operation, 'it seems quite possible that a small group of effective courts could be established ...'<sup>68</sup> To make DRC courts effective, the ICC should demand that Kabila's government pay its judicial officials more and that those officials be controlled whenever implications of judicial impartiality appear. As a start, MONUC forces or other similarly independent international bodies could oversee cases to evaluate judicial impartiality. This might work as a way to keep jurisdiction in the DRC. The ICC must remember that the DRC has trained lawyers and judges. Instead of encouraging their poor, but survival-oriented, habits, the ICC can encourage the DRC's system to actually work.

The ICC can be most helpful as a mechanism for encouraging international judicial standards in national courts. As it was created as a way of fomenting international standards, the ICC must focus its energies on national implementation of the ICC Statute.<sup>69</sup> As in the Congolese case, 'the ability of the Congolese government to undertake genuine prosecutions depends largely on whether judges are willing to directly apply international legal instruments in domestic law'.<sup>70</sup> If the ICC would be willing to teach the DRC judiciary how it can implement international law, it would help not only now, but far into the future. By encouraging the development of the judicial system rather than delegitimising it by taking away its authority, the ICC will prove much more helpful to the DRC and other nations like it. Again, the immediate focus of the ICC should not be on taking away jurisdiction from a country, but rather on boosting the system so that the national government and judiciary are independent and self-sufficient in their ability to handle internal issues.

## 5 The African Court, a potential corollary for judicial authority

Instead of commanding too much jurisdictional power for itself, the ICC should look to alternative means of regional court authority. The African Court system provides just such a corollary. However, to understand the potential for jurisdiction of the new African Court, one must first look back to the development of the African Charter on Human and Peoples' Rights (African Charter).

The African Charter arose under the auspices of the Organisation of African Unity (OAU), a body composed of member African nations. The

<sup>68</sup> Burke-White (n 24 above) 586.

<sup>69</sup> JB Terracino 'National implementation of ICC crimes' (2007) 5 *Journal of International Criminal Justice* 421 439.

<sup>70</sup> Burke-White (n 24 above) 584.

African Charter is the primary human rights instrument for Africa.<sup>71</sup> The Charter has proven somewhat helpful. One writer claims that the African Charter has impacted 'the development of constitutional law with particular reference to human rights'.<sup>72</sup> Countries have achieved this through measures, including incorporation of the African Charter into domestic law.<sup>73</sup>

However, the African Charter alone lacks the ability to enforce its rules. In order to create a more enforceable African Charter, the OAU wanted to develop a regional court. 'In 1998, the OAU Assembly of Heads of State finally adopted the Protocol establishing an African Court on Human and Peoples' Rights ...'<sup>74</sup> However, this Protocol never effectuated an actual functioning court. 'It is the lack of an effective enforcement mechanism under the African Human Rights Charter that necessitated the adoption of the Protocol on the African Human Rights Court.'<sup>75</sup>

Therefore, the African Charter is helpful but ineffective. Its original guiding organisation, the OAU, could be criticised on the same grounds. The international community largely regarded the OAU as an ineffective body. Reform came through the new African Union (AU), the successor organisation of the OAU. With the development of the AU, the course of regional court authority changed.

The AU put into action the OAU's pipe-dream: the formation of an African Court. Six years after the Protocol, in 2004, the African Charter would officially incorporate the African Court. 'The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court ... entered into force on January 25, 2004.'<sup>76</sup>

The African Court gained strength from a remainder entity of the OAU known as the African Commission. The Protocol states that the African Court shall 'complement the protective mandate of the African Commission on Human and Peoples' Rights'.<sup>77</sup> Inaugurated in 1987,<sup>78</sup> the African Commission serves as a quasi-judicial body, often only for

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<sup>71</sup> Y Akinseye-George 'New trends in African human rights law: Prospects of an African Court of Human Rights' (2001-2002) 10 *University of Miami International and Comparative Law Review* 159 160.

<sup>72</sup> Akinseye-George (n 71 above) 168.

<sup>73</sup> As above.

<sup>74</sup> Akinseye-George (n 71 above) 170.

<sup>75</sup> VO Nmehielle 'Development of the African human rights system in the last decade' (2004) 11 *Human Rights Brief* 6 11.

<sup>76</sup> Viljoen (n 30 above).

<sup>77</sup> African Commission on Human and Peoples' Rights Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art 11 [http://www.achpr.org/english/\\_info/court\\_en.html](http://www.achpr.org/english/_info/court_en.html) (accessed 28 January 2007).

<sup>78</sup> n 31 above.

'cases concerning massive or serious violations'.<sup>79</sup> Today, the African Commission coincides with the African Court. As one writer explained, the regional African Court is composed of two reinforcing bodies; the African Commission is the 'quasi-judicial human rights institution', while the African Court is the 'main judicial institution'.<sup>80</sup> Together, these two bodies create an operable judicial system for Africa.

It is to the ICC's benefit to bolster the African Court. Currently, there are just too many cases for the ICC to handle alone.<sup>81</sup> The African Court provides a forum for the rising case load. This would also encourage ICC standards to be implemented in the African Court and hopefully be filtered into national laws. However, the AU, the African Commission and, most importantly, the African Court, all need support from the international community and the ICC. First financial support needs to be addressed. 'The provision of adequate financial and human resources for the African system is a *sine qua non* for the effective functioning . . . of the African Commission and African court.'<sup>82</sup> Second, the Court lacks a case. No one will argue that the regional African court system is untested, unknown and in its infancy. However, given an opportunity, it is likely that the regional court would work. It is precisely for these reasons that the ICC and African nations should refer cases to the African Court — in order to give the African Court a trial run, notoriety, authority, and the chance to function fairly and effectively.

## **6 Regional courts should have secondary jurisdiction rather than the ICC: The African Court**

The African Court is a fledgling institution that requires support not only from its own member states, but from the international community as well. That said, institutions like the ICC directly undermine the impact of the African Court, African Commission, and African Charter. Therefore, the ICC should be careful not to overshadow, or indeed de-legitimise regional courts' authority.

As mentioned previously, all three of the main cases currently under ICC jurisdiction come from Africa. Given that the African Court is a continuation of the African Charter and that the current cases could all fall within its auspices, all three cases could and should be tried in the African Court. First, the countries of DRC and Uganda, which referred their cases to the ICC, might both have referred their cases to the

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<sup>79</sup> Viljoen (n 30 above) 7, citing *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

<sup>80</sup> Viljoen (n 30 above) 65.

<sup>81</sup> M Sterio 'Seeking the best forum to prosecute international war crimes: Proposed paradigms and solutions' (2006) 18 *Florida Journal of International Law* 896.

<sup>82</sup> Nmeielle (n 75 above) 11.



African Court instead. Under the African Charter, a state party whose citizen is a victim of a human rights violation may submit its case to the African Court.<sup>83</sup> However, this did not happen. With the knowledge that the African Court might also have jurisdiction over cases, the ICC should refrain from asserting primacy.

Second, it is possible that the ICC could defer the Sudan case to the jurisdiction of the African Court. Because the Sudan case was referred to the ICC by the UN Security Council, it might seem to fall more legitimately within the ICC's jurisdiction. Nonetheless, there is nothing prohibiting the prosecutor of the ICC from making a referral to the African Court. The ICC should consider this option.

### 6.1 The African Court will help national governments and judiciaries

The African Court is a good development for all of Africa and for the world in general. The African Court could strengthen the rule of law in African countries by creating regional judicial norms which are more culturally appropriate. It could also encourage inter-reliance between nations and their co-operation towards democratic governance. One writer contends that the African Court 'would place Africans, individuals and non-governmental organisations (NGOs) alike, in a better position to defend democratic rule in their countries'.<sup>84</sup> Where people feel that they are engaged in their own destiny, they will be much more apt to encourage national reform. 'In this way the Court possesses the potential to strengthen the rule of law and help consolidate African democracies.'<sup>85</sup>

Indeed, the development of the African Court will help everyone, not only the governments of Africa. If used, it will serve especially in the area of civil society empowerment.<sup>86</sup> Previously, 'African human rights NGOs used to work only with NGOs based in Europe and America ... However, the Charter ... has created a platform for NGOs to meet twice every year ...'<sup>87</sup> Therefore, African governments will have the opportunity to listen to African NGOs and *vice versa*. In this way, the African Court will create a forum of communication between governments and civil society that the ICC cannot replicate.

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<sup>83</sup> African Commission (n 30 above) art 11.

<sup>84</sup> Akinseye-George (n 71 above), citing F Viljoen 'Arguments in favour of and against an African Court on Human Rights' (1998) 22 *Proceedings of the American Society of International Law* (ASIL Proc) 10.

<sup>85</sup> As above.

<sup>86</sup> Akinseye-George (n 71 above) 169.

<sup>87</sup> As above.

## 6.2 Misallocated funds

While the benefits of the African Court are easy to recognise, the African Court lacks financial support. By funding the ICC rather than regional courts, the world community is damaging regional efforts towards judicial reform. Instead of funding the ICC alone, international allocations should first fund the development of regional courts and second finance the ICC. Instead, international funding is presently being misallocated.

The African Court is especially in need of financial support. 'A preliminary report on the financial implications of the African Court already indicates that the Court will not have adequate resources to meet its needs.'<sup>88</sup> For example, financial backing for legal representation in the African Court is limited. In order to deal with the problem, one commentator recommends that 'either a special fund should be established to provide legal aid or states should assume responsibility for providing it'.<sup>89</sup> Perhaps those funds could come from the ICC or be withdrawn from African nations' regular judicial budgets. Regardless of where the money comes from, without it, the African Court cannot function as it potentially could.

Instead of the ICC ciphering the money away from African nations and international donors, the African Court should have first claim to financial support from its members and from the international community. Without this support, the African Court as a regional authority will fail. 'First and foremost, the African Court must not become a white elephant — all institution and no cases to decide.'<sup>90</sup> This white elephant syndrome is a definite possibility. Without money and without cases, the African Court will again lose its legitimacy and move from being a potentially strengthened and independent force for judicial autonomy and African democracy to being a lackey or, worse yet, a leach of the ICC.

## 7 The ICC's loose interpretation of complementarity sets a poor precedent

Now that the case has been made for the importance of local and regional court jurisdiction, one must understand how the ICC is taking this power away. The ICC has taken jurisdiction from national and regional African courts by a principle known as complementarity. Complementarity, under article 17 of the Rome Statute, makes a case inadmissible if it is 'being investigated or prosecuted by a state which has

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<sup>88</sup> Viljoen (n 30 above) 64, citing 'Practical issues relating to the African Court' reprinted in C Heyns (ed) *Human rights law in Africa* (1999) 293.

<sup>89</sup> Viljoen (n 30 above) 50.

<sup>90</sup> Viljoen (n 30 above) 65.

jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution'.<sup>91</sup> The theory of complementarity is that individual nations should have primary jurisdiction. As one writer explains, '[t]he ICC Statute recognises the primacy of national courts, since one of its guiding principles is that the International Criminal Court (ICC or Court) shall be complementary to national criminal jurisdictions'.<sup>92</sup> However, the ICC has loosely and flagrantly interpreted the principle of complementarity thus far. By this loose interpretation, the ICC has set a poor precedent for its future use of the principle of complementarity.

### 7.1 Failure to define better standards than 'unwilling or unable' creates an unchecked universal jurisdiction

One critical problem with the ICC is that when or how to determine an instance of complementarity is not clearly defined. Generally, complementarity is understood to mean 'that cases will only be admissible before the ICC if and when states are unwilling or unable genuinely to carry out investigations or prosecutions'.<sup>93</sup> However, no set of standards explains how to determine 'unwillingness' or 'inability'. As suggested by Burke-White, an authority such as ICC member states should implement a set of standards to determine when the complementarity principles apply. Key categories might include policing power,<sup>94</sup> ability of the judicial system to function impartially,<sup>95</sup> potential for outside or international interference, the ability of the international community to support and reinforce the given country's rule of law, or other applicable standards.

However, as it currently stands, no such standards are used. Only the vague terms of 'unwillingness' and 'inability' come into play. Based on the prosecutor's interpretation alone, virtually any country could fall within the loose purview of the 'unwilling' or 'unable'. This gives the prosecutor considerably more leeway in claiming jurisdiction than any other agent of justice.

The lack of clear guidance as to the use of the 'unwilling or unable' standard creates a number of problems. As Morris points out, 'under complementarity, the ICC is the ultimate judge of whether the territorial state has genuinely exercised jurisdiction over a case'.<sup>96</sup> Through

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<sup>91</sup> Art 17 Issues of admissibility, Rome Statute of the International Criminal Court, <http://www.un.org/law/icc/statute/romefra.htm> (accessed 4 February 2007).

<sup>92</sup> Concannon (n 50 above) 202.

<sup>93</sup> JK Kleffner 'The impact of complementarity on national implementation of substantive international criminal law' (2003) 1 *Journal of International Criminal Justice* 86-87, citing Preamble, para 10 arts 1, 17 & 20(3).

<sup>94</sup> See Burke-White (n 24 above) 557.

<sup>95</sup> As above.

<sup>96</sup> Morris (n 57 above) 594.

complementarity, the ICC is more powerful than national courts. Morris notes that the ICC has ‘genuinely “supra-national” powers — which are to be used in those particular instances where a state is unable or unwilling to render accountability at the state level’.<sup>97</sup> Morris sums up the problem quite succinctly:<sup>98</sup>

What is ultimately at stake, beneath the heated controversy concerning ICC jurisdiction over non-party nationals, is a tension embodied in the Rome Treaty between the human rights embodied in humanitarian law (rights to freedom from genocide, war crimes, and a crimes against humanity) and the human right to democratic governance.

Granted, the ICC’s jurisdiction is currently limited to genocide, war crimes or crimes against humanity. However, there is no reason to doubt that the ICC will not gain from customary international law and extend its reach to more crimes as its power and authority increase. ‘The simple substitution model of complementarity suggests that the ICC will merely step in when domestic courts are unable or unwilling to act.’<sup>99</sup> Unchecked complementarity, without limits, is a danger to national jurisdiction everywhere.

## 7.2 The DRC’s case defeats the ‘unwilling or unable’ standard

Even if the ICC prosecutor claims that the Rome Statute clearly defines unwillingness and inability, these two prerequisites of complementarity have not been met in regard to the DRC case. First, a self-referral inherently cannot meet an ‘unwillingness’ standard. As noted before, one of the ways that the ICC’s jurisdiction is retained is through a self-referral. A self-referral, however, automatically shows some degree of willingness from a national government to prosecute an alleged criminal. If article 17 of the Rome Statute mandates that ‘unwillingness’ is one of the ways to assert jurisdiction, but the country has already exhibited its willingness to prosecute, then the self-referral related to unwillingness to prosecute is essentially nugatory. The unwillingness standard for self-referrals goes against its own wording. It should either be further

<sup>97</sup> As above.

<sup>98</sup> Morris (n 57 above), citing Symposium ‘The United States and the International Criminal Court’ (2001) 64 *Law and Contemporary Problems* 1; art 21 Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217A (III), UN Doc A/810 71; art 25 International Covenant on Civil and Political Rights, adopted 16 December 1966, GA Res 2200A (XXI), UN GAOR, 21st session, Supp No 16, UN Doc A/6316 (1966), 999 UNTS 171.

<sup>99</sup> Burke-White (n 24 above) 568. For a commentary on the complementarity provisions of the Rome Statute based on the substitution model, see J Holmes ‘Complementarity: National Courts versus the ICC’ in A Cassese (ed) *The Rome Statute of the International Criminal Court. A commentary* (2002) 667. See also F Lattanzi ‘The International Criminal Court and national jurisdictions’ in M Politi & G Nesi (eds) *The Rome Statute of the International Criminal Court* (2001) 177.

defined or removed from the Rome Statute in relation to the self-referral-by-nations provision for the ICC.

In addition, the DRC has the ability to prosecute. Therefore, the 'unable' provision of article 17 is not met for the ICC to retain jurisdiction. In the case of the DRC, commentators such as Burke-White argue that the government might be able to prosecute Lubanga or others similarly positioned.<sup>100</sup> As noted previously, there are plenty of trained lawyers and judges.<sup>101</sup> Granted, the government has gone through tumultuous transitional years; however, the DRC is able to prosecute Lubanga.

### 7.3 Different criteria are needed

Burke-White criticised the Rome Statute for its lack of specified criteria on when complementarity principles arise.<sup>102</sup> Instead of using the 'unable or unwilling' standard, Burke-White used article 17 of the Rome Statute and other sources of international law to create four judicial 'best practices'.<sup>103</sup> These 'best practices' could determine when judicial systems are capable of functioning or not.<sup>104</sup> Burke-White's best practices included having 'experienced and unbiased judicial personnel, the presence of a viable legal infrastructure, the existence of adequate operative law, and a sufficient police capability . . .'.<sup>105</sup>

ICC member states must develop these or similar criteria in order to protect nations from the prosecutor's over-zealous seizing of jurisdiction. However, one criterion is missing: potential for change. The prosecutor must fairly analyse whether the given nation is capable of experiencing enough change to be able to hold a case itself. Before the ICC establishes jurisdiction, it must analyse the country's current reform movements towards judicial strengthening. The ICC must also offer its own support and resources to reinforce the changing local judicial system before the ICC damages the local system by taking away its authority.

### 7.4 Court of last resort

Before prosecuting further cases, the ICC should consider whether it has met its burden of being the court of last resort. In the three cases currently on the ICC's docket (all concerning African nations), the court has not met this burden. The ICC should either remove jurisdiction to the nation itself or to the regional African Court. If not possible

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<sup>100</sup> Burke-White (n 24 above) 577.

<sup>101</sup> n 64 above.

<sup>102</sup> Burke-White (n 24 above) 575-76.

<sup>103</sup> Burke-White (n 24 above) 576.

<sup>104</sup> As above.

<sup>105</sup> As above.

with current cases, future cases should not be accepted by the ICC if the national or regional court might have a primary assertion of jurisdiction and thus a better forum for justice.

## **8 Benefits and drawbacks of ICC jurisdiction**

While the presumption of the Rome Statute's 'complementarity' principle gives the ICC jurisdiction as a last resort, there are numerous benefits and drawbacks of ICC jurisdiction to be weighed for any case. The following refer to benefits and drawbacks specific to the ICC case with the DRC. These might be applicable to other nations upon further analysis. Taken together, however, they prove that the DRC case and other similar cases before the ICC have more drawbacks than benefits when weighing the assertion of ICC's international jurisdiction.

### **8.1 The ICC charges criminals — Benefit**

Primarily, the ICC prosecutes the world's most heinous criminals. Obviously, the world's most dangerous men and women need to be stopped. If the ICC is the only way to stop them, then the ICC provides a great benefit to the world at large.

### **8.2 Criminals escape charges — Drawback**

The ICC does not prosecute criminals who might otherwise be charged. Because of its small size and limited capability, the ICC may only prosecute a few of the many potential cases concerning violations of international law. While the person accused of hundreds of murders is prosecuted, the one accused of only ten murders is not.

Because the ICC prosecutes those charged with the most heinous crimes, national governments lose their incentive to prosecute the great majority of wrongdoers. Only if the ICC reinforces national judicial systems will all the guilty be brought to justice. That is, to prosecute most if not all of the guilty, it must be done nationally.

### **8.3 Deterrence — Benefit and drawback**

Proponents of the ICC would presumably argue that ICC action and presence create a deterrence against would-be criminals. The ICC does have some deterrent effect. In the DRC case, 'Lubanga was not alone among Congolese warlords to recognise the ICC's possible deterrent effect'.<sup>106</sup> However, the ICC's deterrent effect is placed in the wrong judicial body.

That is, even if the threat of international prosecution provides a deterrent effect on rebel leaders, it would be much more effective to

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<sup>106</sup> Burke-White (n 24 above) 588.

have the rebels feel that threat from their own government rather than from the international community. While the ICC sets a standard, governments such as the DRC must be able to follow through with that standard for all of the alleged criminals. Only in that way will all national criminals be deterred. Otherwise, Lubanga's ICC trial operates as a mere token gesture and does little to create a long-lasting deterrent effect in the DRC.

#### 8.4 Universal jurisdiction- Monist/dualist debate — Benefit and drawback

The concept of universal jurisdiction is heralded and harangued throughout the world as both a benefit and a drawback to national jurisdictions. Whether a benefit or a drawback, the ICC is a step towards universal jurisdiction. As Kleffner notes, 'the ICC would fill the void that underlies the concept of universal jurisdiction'.<sup>107</sup>

In order to decide whether universal jurisdiction is a benefit or a drawback, one must take either the monist or dualist perspective. According to the monist perspective, 'the Law of Nations and the law of each nation form an integrated, universal legal order. International law is inherently woven into the legal fabric of every nation . . .'.<sup>108</sup> If the world were perfect and everyone lived by the same rules and values, then the monist system would be ideal. However, this perspective is dangerous.

The monist position functions on the belief in some type of natural law, or some type of right or wrong for any given situation. No country, including the DRC, could find that its customary rules and laws match the rights and wrongs of every nation. To immediately take a monist perspective would subjugate the DRC to any customary international law that the ICC adopts. To accept this would be to delegitimise the values of the DRC people, and to adopt international community standards as better than one's own. This monist view threatens the strength of the DRC's culture and nationhood. Therefore, the monist belief in universal jurisdiction creates a tremendous drawback for countries like the DRC.

Instead, the DRC and all countries should accord themselves with the ICC using the dualist approach. Under dualism, international and national law are separated. 'Each nation retains the sovereign power to integrate or isolate the norms of international law. National and international law are *not* parts of a unified whole.'<sup>109</sup> As it stands, DRC law is uniquely customised to the history and culture of its people. By recognising the needs of the DRC people as people of a sovereign nation, the DRC

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<sup>107</sup> Kleffner (n 93 above) 108.

<sup>108</sup> WR Slomanson *Fundamental perspectives on international law* (2003) 38-39.

<sup>109</sup> Slomanson (n 108 above) 39.

will retain some of its own unique attributes. The DRC's current monist approach to the ICC must be replaced with a dualist approach.

### 8.5 Encouragement of judicial reforms — Benefit and drawback

In many ways, countries whose sovereignty is threatened by the ICC may feel encouraged to reform. As Burke-White notes, to avoid an ICC investigation, a state may be encouraged to prosecute at home. 'For states with failed domestic institutions, such an assertion of primacy will often involve significant domestic reform.'<sup>110</sup> In the DRC's case, significant reform did begin to some extent. For instance, when the ICC prosecutor announced that he would follow the DRC situation, some Congolese government elements 'responded by launching reforms of the national judiciary and establishing a truth and reconciliation commission'.<sup>111</sup> This reform was largely driven by nationalistic pride and the country's desire to manage its own problems. Nonetheless, the ICC still chose to step in.

By stepping in, the ICC disrespected the DRC's people in their ability to control judicial reform. Efforts which might work better for the DRC, such as a truth and reconciliation commission, rather than a trial were thwarted. Minister of Justice Honorius Kisimba-Ngoy's words summed up his feelings on the matter: 'Congolese citizens should be tried in Congo.'<sup>112</sup> In other words, the ICC should stay out of national affairs.

In addition, the ICC weakened the potential for any future judicial reform in the DRC as the ICC's actions have created a dependency-type situation. The DRC no longer has a reason to attempt to reform its judicial system. As Burke-White noted, if the DRC 'does seek ICC action, there is no need to reform the judiciary in an attempt to assert primacy'.<sup>113</sup> This is tied to the previous mention that the need to prosecute criminals is diminished. An ICC proceeding 'could serve to discourage national prosecutions by decreasing the pressure on the state to prosecute'.<sup>114</sup> The DRC is now dependent on the ICC for its law, rather than being in a position to create its own judicial reforms. Therefore, little will be done to change the current judicial system or to prosecute additional criminals. The ICC has discouraged rather than encouraged initial attempts at judicial reform in the DRC.

<sup>110</sup> Burke-White (n 24 above) 569.

<sup>111</sup> Burke-White (n 24 above) 570, citing Luis Moreno-Ocampo, Second Assembly of State Parties to the Rome Statute of the International Criminal Court. Report of the Prosecutor of the ICC, Luis Moreno-Ocampo, 8 September 2003 [http://www.icc-cpi.int/otp/030909\\_prosecutor\\_speech.pdf](http://www.icc-cpi.int/otp/030909_prosecutor_speech.pdf) (accessed 30 September 2007). For a discussion of how an enhanced judiciary could serve this purpose, see Holmes (n 99 above).

<sup>112</sup> Burke-White (n 24 above) 570.

<sup>113</sup> Burke-White (n 24 above) 569.

<sup>114</sup> Concannon (n 50 above) 240.



## 8.6 Financial costs — Benefit and drawback

The ICC places the financial burden on outside countries when national governments should be paying for the bulk of their internal affairs. For example, while Europeans might be concerned with justice in Africa, citizens of African nations are undoubtedly more concerned and directly affected by the outcome of any judicial decision. However, the Europeans will be the ones paying for the ICC trials. The most significant burden will fall on the European Union, especially since neither the United States nor Japan have adopted the Rome Statute. Without the United States and Japan, 'one NGO estimates that the European Union could be responsible for funding up to 78,17% of the total cost of the ICC'.<sup>115</sup> This is a tremendous drawback for, and unfair burden upon Europeans.

In the same way, this lack of prosecutorial costs is of tremendous benefit to the DRC. That is, much of the financial burden for the *Lubanga* case will be transferred to countries other than the DRC. Taking the case out of the DRC and into the ICC's forum, transfers the financial burden to the wrong people. If a nation is legitimately interested in prosecuting domestic war criminals, that country should face the primary financial burden. This is not to say that the ICC cannot reinforce a struggling judiciary's financial stability. Instead, the ICC's funds should primarily serve as a back-up for training local systems on effective judicial matters.

In addition, the ICC's assertion of jurisdiction increases the overall cost of any case. As there is a tremendously increased cost for the transportation and care of the accused, witnesses, investigators, and such, the trial's cost shoots upward. The total financial cost might be significantly diminished if local authorities serve as the primary decision makers.

## 8.7 Subservience — Benefit and drawback

The ICC system does provide a benefit to the developed world in that it ensures that developing countries follow developed world standards. It correspondingly furthers a dependency on developed countries' aid and jurisprudence. Developing countries are encouraged to submit their problems to an international forum rather than dealing with their own issues. In this way, the developed world maintains its control over the internal affairs of developing countries such as the DRC.

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<sup>115</sup> MA Newton 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court' (2001) 167 *Military Law Review* 24, citing 'Project on international courts and tribunals, financing of the International Criminal Court' annex III (undated discussion paper distributed at the meeting of the Preparatory Commission in June 2000) (on file with author) (Hypothetical Scale of Assessment for the ICC).

However, this can create a tremendous drawback for developing countries. One commentator argues that the ICC acts as a check against foreign interference. 'Across the developing world, participation in the ICC represents the possibilities of having a voice in international affairs and more peaceful regional development.'<sup>116</sup> Unfortunately, this is incorrect. Rather than equalising the rule of law among nations, the ICC actually delegitimises developing national governments and makes them subservient to government standards of the developed world. This is because the ICC imposes universal law standards that are not necessarily implemented or followed in developing countries.

The imposition of ICC rules is an imposition of Western values as to right and wrong. When developing countries sign on to ICC jurisdiction, they might not realise the future ramifications of their signing and instead continue in a subservient relationship to Western values. By retaining jurisdiction, the ICC is not only creating a system of subserviency, but also a system of dependency. That is, African nations must become dependent on the international community to mete out justice. This system of subservience is the wrong approach.

### 8.8 Political manoeuvrings — Drawback

Depending on whose side one is on at the moment, prosecutions at the ICC may be beneficial or detrimental. 'The ICC Statute, as it is currently written, creates substantial risks of unfair trial proceedings and politically motivated prosecutions.'<sup>117</sup> The ruling government, in having the power of self-referral, has the political upper hand in any prosecution. If one is in power, then that is good. If not, then that is very bad. Many countries have hesitated to join the ICC for these very reasons. Walker claims that governments in countries such as Columbia or Mexico, 'that have active rebel forces, may want to resist joining the ICC out of concern that its governance could allow prosecution upon the recognised government'.<sup>118</sup> If overthrown and removed from political control, these government leaders might have a good chance of being prosecuted by the ICC.

Instead of promoting unbiased justice, the ICC encourages prosecutions of developing country leaders against their enemies rather than against enemies of the world. The DRC exhibits an excellent case study of the political benefits inherent in the ICC system. President Kabila's referral of the *Lubanga* case to the ICC was a political manoeuvre:<sup>119</sup>

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<sup>116</sup> AJ Walker 'When a good idea is poorly implemented: How the International Criminal Court fails to be insulated from international politics and to protect basic due process guarantees' (2004) 106 *West Virginia Law Review* 245 255.

<sup>117</sup> Walker (n 116 above) 259.

<sup>118</sup> Walker (n 116 above) 255.

<sup>119</sup> Burke-White (n 24 above) 564.

The existence of the Court sufficiently shifted the incentive structure for the national government such that President Kabila perceived it to be in his own interests to refer the case.

President Kabila realised that national prosecution would be difficult due to the fact that two of his vice-presidents in the transitional government could have potentially been charged under the ICC.<sup>120</sup> In order to assert control of the factions surrounding him, he used international force. As Burke-White surmises, Kabila's referral might indicate a 'phenomenon of weak states self-referring situations to the ICC, when sitting governments can benefit from prosecutions but the political costs of prosecuting at home are too great'.<sup>121</sup> This means that, instead of dealing with the problems directly, Kabila used the ICC as a political tool to slowly tear away at his enemies.

Burke-White's comprehensive study into the implications of the ICC's investigation in the DRC noted the prosecution's political ramifications. Primarily, 'the existence of the ICC has offered a politically expedient solution for the Congolese president to deal with potential electoral rivals'.<sup>122</sup> Kabila might legitimately be accused of using the ICC as a political weapon to eliminate any rivals. Wielding the power of international prosecution, Kabila has undoubtedly benefited. Those on the other side have likewise suffered.

While this might be good for Kabila's political power, it is not good for the democratic functioning of the DRC. In effect, the international community is politically propping up one man while the DRC's political problems remain. In effect, a regime may<sup>123</sup>

use compulsion at the international level as a cover or an excuse to undertake its own domestic policies that may undermine legitimate opposition groups and violate citizens' rights.

Kabila's political policy is using the ICC as a weapon.

## 8.9 Conclusion about benefits and drawbacks

In conclusion, the DRC's use of the ICC shows more drawbacks than benefits. The fact that one man, Lubanga, is prosecuted, is outweighed by the fact that untold other criminals escape prosecution. The view that the ICC acts as a deterrent against would-be criminals is outweighed by the reality that to be effective, deterrence must come nationally. The monist belief in the benefits of universal jurisdiction is overcome by the differing values and rules of every nation which require a dualist system.

<sup>120</sup> Burke-White (n 24 above) 565.

<sup>121</sup> Burke-White (n 24 above) 567.

<sup>122</sup> Burke-White (n 24 above) 559.

<sup>123</sup> A Slaughter & W Burke-White 'The future of international law is domestic (or, the European way of law)' (2006) 47 *Harvard International Law Journal* 327 347.

The hopes for encouragement of judicial reforms are dashed as soon as the ICC asserts jurisdiction. In addition, while the individual nation's costs are reduced by ICC jurisdiction, the costs to the rest of the world, especially Europe, unfairly increase. The truth that the ICC creates a beneficial subservient relationship to developed countries creates a tremendous drawback for dependent developing nations. Finally, while one political group benefits by submitting its enemies to the ICC, the people of that country, and the world in general, suffer from the use of the ICC as a political tool. Therefore, the drawbacks of the DRC's and other countries' use of the ICC significantly outweigh the value of any benefits.

## 9 No more DRC cases

In light of the analysis of all the benefits and drawbacks of the ICC, the prosecutor should consider deferring back some of his present cases to their home countries or to the African Court. Even though the *Lubanga* case might already have proceeded too far, the prosecutor should be encouraged to return or defer any future DRC cases. The exact opposite has happened.

In its August 2006 report to the UN General Assembly, the ICC report noted that the prosecutor<sup>124</sup>

opened a second case in the continuing investigation into the situation in the Democratic Republic of the Congo. The Office also continued to analyse the possibility of opening a third case.

The opening of additional cases in the DRC is not necessary or helpful. As stated previously, the DRC has sufficient control of its judicial system. By continuing to extend itself into different cases, the ICC delegitimises both the judicial and executive powers currently operating in the DRC.

## 10 The Uganda case should be referred back to Uganda

In addition, the LRA referral to the ICC should be referred back to Uganda or to the African Court. First, Uganda defeats the 'unwilling or unable' standard of article 17 complementarity. As one analyst believes, taking into account Uganda's recent amnesty policy, 'Uganda is no longer "unwilling" to prosecute LRA leaders, though, as indicated previously, such willingness is based on the availability of an ICC

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<sup>124</sup> The Secretary-General, Report of the International Criminal Court, 19, delivered to the General Assembly, A/61/217 (3 August 2006).

referral'.<sup>125</sup> This means that the ICC can still function as a back-up of international law to Uganda, but Uganda itself can take care of its national cases.

Uganda is also 'able' to prosecute. 'Uganda also possesses a judicial system that is recognised for its independence and that has not collapsed as a result of the armed conflict in the north.'<sup>126</sup> Uganda has the capacity to handle its own problems through its judicial system.

If the ICC retains jurisdiction over the LRA leaders charged in the Uganda case, it creates three major effects. First, it delegitimises the government and judiciary of Uganda in the eyes of the people. Second, it transfers the costs of a national trial to the international community. Third, it makes Uganda unnecessarily more dependent on the international community, rather than dependent on itself. Therefore, where the possibility to prosecute in the home country of Uganda is available, the ICC should relinquish its jurisdiction.

## **11 The ICC should show more restraint in its acceptance of cases and instead pursue alternative methods of bolstering national judiciaries**

### **11.1 The ICC should be a teacher first and an enforcer second**

The ICC must first function as a teacher and second as an enforcer. The old popular adage is particularly appropriate for this situation. 'Give a man a fish, and he eats for a day; teach a man to fish, and he eats for a lifetime.' In this instance, the ICC's control of the *Lubanga* case serves only to stop the temporary hunger of a nation needing a strong national judiciary. Instead, the ICC should act as a teaching institution.

As Stromseth contends, ICC-type proceedings impact the rule of law.<sup>127</sup> One critical component of the ICC's impact on the rule of law is 'the extent to which systematic and meaningful efforts at domestic capacity-building are included as part of the accountability process'.<sup>128</sup> While the ICC might not have a mandate declaring that it specifically must build domestic judicial processes, an implied responsibility exists. The ICC exists to encourage laws, to punish law-breakers, and to

<sup>125</sup> Akhavan (n 40 above) 415, citing ICC Press Release 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' (29 January 2004). For a general discussion of Uganda's intent to prosecute LRA leadership, see Integrated Regional Information Networks, UN Office for the Co-ordination of Humanitarian Affairs 'New amnesty law to exclude top LRA leaders' (16 December 2003) <http://www.irinnews.org> (accessed 28 January 2007).

<sup>126</sup> Akhavan (n 40 above) 415, citing US Department of State 'Background note on Uganda' (January 2005) <http://www.state.gov/r/pa/ei/bgn/2963.htm> (accessed 28 January 2007).

<sup>127</sup> JE Stromseth 'Pursuing accountability for atrocities after conflict: What impact on building the rule of law?' (2007) 38 *Georgetown Journal of International Law* 257.

<sup>128</sup> As above.

develop systems of justice which will work. Therefore, the ICC must work to strengthen national judiciaries and law-making authorities.

Burke-White identifies four keys by which the ICC may be effective beyond prosecution. These include modifying the 'preferences and policies of the national government [*sic*] catalysing reform efforts; offering benchmarks for judicial effectiveness; and providing a deterrent from future crimes'.<sup>129</sup> This is exactly what the ICC should be doing. It should be creating international standards through national implementation. If the ICC really wishes to create reform, it must act as a teacher working with the people who will effect change at the national level.

Concannon gives the right solution to how the ICC can use its jurisdiction as a teaching mechanism. 'The ICC could most effectively aid national judiciaries with human rights cases by hiring and training staff from countries that need the most help, and by providing jurisprudence.'<sup>130</sup> This would encourage judicial reform in the long-run.

The Court's resources would be better spent on reinforcing the judicial systems of implicated nations. The ICC has done this to some extent. In its August 2006 report, the Court noted that in the DRC, it had 'organised workshops and seminars for such groups as judicial authorities, the legal community, non-governmental organisations and journalists'.<sup>131</sup> These efforts should receive more attention. The ICC 'should actively assist local judiciaries trying to prosecute human rights cases, and this assistance should be systematic and central to the Court's work'.<sup>132</sup> Though counterintuitive for a judicial system, this action by the ICC will encourage independence instead of dependence.

## 11.2 Encouraging engagement

Slaughter and Burke-White offer three ways by which domestic institutions can be encouraged rather than discouraged. 'The three principal forms of such engagement are strengthening domestic institutions, backstopping them, and compelling them to act.'<sup>133</sup> While strengthening and compelling are easy to understand, Slaughter and Burke-White refer to instruments such as the ICC's complementarity principle in explaining the concept of backstopping. They offer that complementarity is a perfect example of backstopping. 'The ICC is designed to operate only where national courts fail to act as a first line means of prosecution.'<sup>134</sup> Unfortunately, the ICC's interpretation of complementarity has not involved backstopping. It has utilised a more aggressive

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<sup>129</sup> Burke-White (n 24 above) 590.

<sup>130</sup> Concannon (n 50 above) 230.

<sup>131</sup> n 124 above.

<sup>132</sup> Concannon (n 50 above) 225.

<sup>133</sup> Slaughter & Burke-White (n 123 above) 328.

<sup>134</sup> Slaughter & Burke-White (n 123 above) 340.

approach, making the potentially encouraging reforms of engagement through backstopping inapplicable.

While Slaughter and Burke-White offer ways for the ICC to encourage individual nations, regional court development should also be encouraged. Capacity building is one way to foment the needed development. It can be encouraged 'directly, through training and technical assistance programs, and indirectly, through their provision of information, coordinated policy solutions, and moral support'.<sup>135</sup> Regional institutions can provide the needed locus for capacity-building dissemination.

In addition to helping through capacity building, international organisations can aid governments, police, and judicial reform across nations through other techniques. 'International institutions can provide aid and assistance specifically targeted for the domestic institutions of the recipient state.'<sup>136</sup> The key is how the ICC approaches the task. If the ICC aims to encourage reform, it can be a guiding force for change. According to the Chayes 'managerial model',<sup>137</sup> encouraging nations to comply with international rules using management rather than enforcement techniques, ensures 'that all parties know what is expected of them, that they have the capacity to comply, and that they receive the necessary assistance'.<sup>138</sup> However, if the ICC's goal is to enforce rules by taking away jurisdiction, it may seriously hurt local institutions.

Based on its experience and effect in the DRC, the ICC should now choose to help governments and the rule of law through encouraging reform rather than by over-extending jurisdiction. The DRC case is a test run for the ICC 'both to learn how it can be used by a national government and, in turn, to provide incentives and guidance to that government to further the quest for domestic and international accountability'.<sup>139</sup> Hopefully, the ICC will learn from the DRC case to become more of a teacher for change.

## 12 The ICC's case load should be bound more by recommendations from the UN Security Council

The ICC has overextended its jurisdictional reach. It should be encouraged to withdraw its over-extensive jurisdictional efforts in favor of becoming more of an encouraging force for national judicial efforts. Therefore, ICC jurisdiction should be limited almost exclusively to Security Council referrals. The ICC's first, and perhaps only reason to

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<sup>135</sup> Slaughter & Burke-White (n 123 above) 335.

<sup>136</sup> Slaughter & Burke-White (n 123 above) 338.

<sup>137</sup> Slaughter & Burke-White (n 123 above) 339, citing A Chayes & AH Chayes *The new sovereignty* (1995) 3.

<sup>138</sup> Slaughter & Burke-White (n 123 above) 339.

<sup>139</sup> Burke-White (n 24 above) 590.

act should come from Security Council referral — not from country referrals or the prosecutor's use of his *proprio motu* powers.

Security Council action requires a degree of necessary reflection not found in a national referral or in the prosecutor's use of his *proprio motu* power. Two steps are required to bring about Security Council action under chapter VII.<sup>140</sup> First, it must find a 'threat to the peace' under article 39 of the Charter.<sup>141</sup> 'Only then may it take action under article 41 (not involving the use of force) or 42 (involving the use of force).'<sup>142</sup> Therefore, Security Council referrals to the ICC are preferable because the Security Council has a set procedure by which to demand international action.

The Security Council will not let crimes go unpunished. Indeed, the Security Council has not been lax in its assertion of power. For instance, Le Mon and Taylor argue that the Security Council has shown an increasing willingness to use chapter VII of the Charter to combat abuses against international peace and security.<sup>143</sup>

For example, the ICC's situation regarding Sudan is under the referral and influence of the Security Council. As noted in the August 2006 report to the UN General Assembly, '[t]he Prosecutor regularly briefed the Security Council on his investigation into the situation in Darfur, pursuant to Security Council Resolution 1593 (2005)'.<sup>144</sup> This reporting to the UN Security Council performs many vital functions. It keeps the ICC on track and responsible to another authority.

For example, in the ICC report on Sudan, 'the prosecutor updated the Council on the status of the investigation, including the selection of a number of alleged criminal incidents for full investigation'.<sup>145</sup> This permits the UN to monitor the actions of the ICC. It also allows the UN to decide whether additional intervention is needed in areas such as Sudan. In this way, the UN can prove more effective as a legislative body while monitoring the ICC as a judicial body. A better transmission of knowledge between the two entities is created, and a check is put against ICC jurisdiction.

In relation to the DRC problems, the Security Council has already shown active intervention.<sup>146</sup>

The Council, in determining a response to atrocities in the DRC, showed little compunction about invoking chapter VII in attempting to halt the violence through multilateral intervention.

<sup>140</sup> C] Le Mon & RS Taylor 'Security Council action in the name of human rights: From Rhodesia to the Congo' (2004) 10 *UC Davis Journal of International Law and Policy* 197 206.

<sup>141</sup> As above.

<sup>142</sup> As above.

<sup>143</sup> Le Mon & Taylor (n 140 above) 200.

<sup>144</sup> n 124 above.

<sup>145</sup> As above.

<sup>146</sup> Le Mon & Taylor (n 140 above) 223.



Also, as evidenced by the Security Council's referral of the Sudan issues to the ICC, there is no reason to doubt that the Security Council would refer an appropriate DRC case to the ICC if necessary. If anything, given its inherent supervision of much of the world's activities, the Security Council is in a superior position to oversee individual countries in order to be able to determine when a case needs ICC attention.

In addition, Security Council action takes care of the ICC's current loose use of the complementarity principle. Because states and the prosecutor will not be able to self-refer, only the Security Council will be able to judge when a country is unable or unwilling to prosecute. This use of complementarity should ensure that states do not lose their jurisdiction to the ICC as quickly as they are currently.

In an ideal world, the only time that the ICC should exercise jurisdiction is where both the national court and the regional court (in this case the African Court) have failed to act, or have purposefully protected a person who has flagrantly violated the Rome Statute. That is, neither a country's self-referral mechanism nor the prosecutor's *proprio motu* powers would be required because each country would have a self-sufficient judiciary, and the Security Council would be unbiased enough that the prosecutor would not need to use his *proprio motu* powers. However, for the present-state of the world and the ICC, the Security Council should be the primary, if not the only referral source for ICC action.

### 13 Conclusion: Scale back the ICC

Thomas Lubanga Dyilo's ICC case might determine the future of the ICC. While the DRC struggles to assert itself and the African Court wishes to try its wings, the ICC has asserted itself as the highest authority and taken away control from potential other sources of jurisdiction.

As nations look to the precedent set by the *Lubanga* case, they should analyse the benefits and drawbacks of giving up their jurisdiction. They should ponder whether nationwide or even regional courts might offer a better alternative. They should realise that it is in the best interests of home countries faced with situations similar to the DRC's, to retain primary jurisdiction or offer secondary jurisdiction to regional courts. The ICC should only be used as a last resort.

The ICC may become a dangerous entity as its understanding of universal jurisdiction, based on a loose application of complementarity, allows for untold reach into national sovereignty. Instead of going unchecked, the ICC should show restraint in accepting cases and opt for efforts meant to teach and enforce the rule of law within the national or regional context. The ICC should also reduce its acceptance of self-referrals and turn instead to the UN Security Council as its primary source of any cases it might accept.

The ICC's *Lubanga* case is a lesson. The ICC is becoming a danger to the world — it is reaching too far. The ICC's power must be scaled back.

## Appendix A: The Central African Republic

The situation regarding the Central African Republic has largely fallen to the wayside. As noted in the prosecutor's report of 15 December 2006, in September 2006, the Central African Republic filed a request 'that the prosecutor provide information on the alleged failure to decide, within a reasonable time, whether or not to initiate an investigation'.<sup>147</sup> A few months later, on 30 November 2006, the Central African Republic demanded an estimate on when the prosecutor's decision might be expected.<sup>148</sup>

In its response, the Prosecutor noted that 'no provision in the Statute or the Rules establishes a definitive time period for the purposes of the completion of the primary examination'.<sup>149</sup> However, given that no time line is required for the prosecutor to finish his preliminary examination nor to decide to prosecute,<sup>150</sup> the Central African Republic case presently sits *in limine*.

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<sup>147</sup> ICC Prosecutor, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 5, ICC-01/05-7 (15 December 2006).

<sup>148</sup> n 147 above, 6.

<sup>149</sup> n 147 above, 10.

<sup>150</sup> n 147 above, 20.