

# Comment

## ON SOME ASPECTS OF PROSECUTORIAL DISCRETION IN THE INTERNATIONAL CRIMINAL COURT

by John L. Washburn

The insightful and stimulating article by Professor Jens David Ohlin in the Winter/Spring 2007 issue of the *Whitehead Journal* is unfortunately marred by a serious misreading of the Rome Statute of the International Criminal Court (ICC).<sup>1</sup> In his argument, Ohlin writes that "...the ICC is *required* to take cases referred to the prosecutor by the Security Council..." (emphasis supplied).<sup>2</sup> The author then bases an important part of his argument upon this assertion. In its support, he cites Article 13 of the Statute.<sup>3</sup>

However, Article 13 lists several situations where "the Court *may* exercise its jurisdiction" (emphasis supplied), including a Security Council referral (subparagraph (b)). Article 53 of the Statute designates the prosecutor as the main actor in the Court's decision on whether or not it will act on a Security Council referral.

In Article 53, sections 1 and 2 establish the discretion of the prosecutor to decide whether or not he will proceed with a case in various circumstances. Section 2 provides that "if the prosecutor concludes that there is not sufficient basis for a prosecution..." he shall inform "the Security Council in a case under Article 13, subparagraph (b) of his or her conclusion and the reasons for the conclusion." Moreover, section 3 (a) provides that "at the request of the Security Council," concerning a referral under Article 13(b), "the Pre-Trial Chamber may review a decision of the prosecutor not to proceed and may request the prosecutor to reconsider that decision." Finally, section 3(b) provides that, if the prosecutor decides not to proceed on a Security Council referral "in the interests of justice," the Pre-Trial Chamber may on its own initiative review that decision, which "shall be effective only if confirmed by the Pre-Trial Chamber."

In the case of Darfur, on June 1, 2007, the prosecutor informed the Pre-Trial Chamber by letter that "following receipt of the [Security Council] referral..." his office had carried out an analysis and review "...to determine whether the criteria to initiate an investigation are satisfied."<sup>4</sup> The letter advised the Pre-Trial Chamber that he had determined that there was a reasonable basis for an investigation. It is quite clear that the prosecutor would not accept Professor Ohlin's claim that "[t]he referral preempted [his] discretion in the matter and directed him to conduct an investigation and commence prosecutions for any wrongdoing."<sup>5</sup>

I leave it to the readers to draw their own conclusions about the effect of Professor Ohlin's misreading of the Rome Statute on his argument in the rest of the article. My own interest here is not with that argument, but rather in ensuring an

accurate understanding of the Court in the United States, and challenging an assertion often used by opponents of the ICC against my organization's advocacy for it.

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### Notes

<sup>1</sup> Jens David Ohlin, "On the Very Idea of Transitional Justice," *Whitehead Journal of Diplomacy and International Relations* 8, no. 1 (Winter/Spring 2007): 51–68.

<sup>2</sup> Ohlin, "On the Very Idea of Transitional Justice," 61.

<sup>3</sup> "Rome Statute of the International Criminal Court," July 17, 1998. Available at: <<http://www.un.org/law/icc/statute/romefra.htm>> (accessed June 2, 2007).

<sup>4</sup> Luis Moreno Ocampo, *Letter to Judge Claude Jorda* (June 1, 2005). Available at: <[http://www.icc-cpi.int/library/cases/ICC-02-05-2\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-2_English.pdf)> (accessed June 2, 2007).

<sup>5</sup> Ohlin, "On the Very Idea of Transitional Justice," 61.

## Response

### INTERNATIONAL LAW AND PROSECUTORIAL DISCRETION

by Jens David Ohlin

In his learned commentary, John Washburn argues that I have misread the Rome Statute and the discretion it affords the ICC prosecutor in cases referred to the Court from the Security Council. However, I maintain my position that the ICC prosecutor has no such discretion, *pace* Washburn, *pace* even the Rome Statute. Moreover, this issue is more than just a disagreement over treaty language; it implicates fundamental principles of international law. A fuller explanation of my argument follows.

While Washburn faithfully and accurately transcribes multiple passages from the Rome Statute governing the powers of its prosecutor,<sup>1</sup> nowhere does Washburn analyze the legal relationship between the treaty and the UN Charter, the highest expression of international law, which explicitly takes precedence over all conflicting treaties.<sup>2</sup> Especially important to this analysis is Chapter VII, which reserves to the Security Council in Article 39 the power to take actions to restore international peace and security—the most compelling and central goal of our post-World War II international legal order.<sup>3</sup> These powers include, of course, military measures under Article 42, but also non-military measures under Article 41.<sup>4</sup>

My position is that when the Security Council issues a directive in accordance with its Chapter VII authority to restore international peace and security, these directives carry the force of law and are in no way optional.<sup>5</sup> Indeed, when the Security Council referred the Darfur case to the ICC prosecutor, it did so by explicitly invoking its Chapter VII authority and finding that an ICC investigation was necessary for international peace and security. It is for this reason that I have written elsewhere that such referrals transform the ICC from a criminal court into a “security court,” dedicated to fulfilling the Security Council goals of restoring peace and security.<sup>6</sup> In many ways, this is the defining feature of international criminal justice: judging individual criminal liability because the fate of nations and peoples depends on it. While my interpretation is admittedly a vanguard one that departs from the received wisdom of lawyers working at the new international court, it is nonetheless more consistent with basic principles of international law and the structure of UN institutions.

Washburn cites a number of Rome Statute provisions listing the discretion of the ICC prosecutor. He also notes that it is “quite clear that the prosecutor would not accept” my conclusion that the Security Council Chapter VII referral removed his discretion. On this we can agree. I also concede that the drafters of the Statute believed that the prosecutor could retain discretion in the face of Security Council referrals. Nevertheless, parties to a multi-lateral treaty cannot, through a voluntary treaty commitment, reserve for themselves powers that the UN Charter reserves under Chapter VII for the Security Council. Thus, the parties of the Rome Statute never had authority to grant discretion to the ICC prosecutor in the first place. The failure of the prosecutor and the drafters to appreciate the Security Council’s authority under international law in no way means that they are right. Institutional players always have an interest in believing that they have more discretion than the law endows them with.

Of course, it is necessary to distinguish different kinds of discretion. When the Security Council referred the Darfur case to the ICC prosecutor, the UN Commission of Inquiry for Darfur also handed him a sealed list of fifty-one persons of interest.<sup>7</sup> It is certainly possible that there might be insufficient evidence to prosecute a particular defendant.<sup>8</sup> If the defendant committed no crime, he need not—nor should not—be prosecuted. No one is suggesting that the prosecutor does not have this level of discretion. What I am suggesting is that the prosecutor does not have discretion to determine whether he should commence an investigation. Although this sounds obvious, this is precisely the level of discretion that the prosecutor apparently believes he has.

Let us distinguish the Darfur case as a *general investigation* and the Darfur case as against *particular defendants*. After the Security Council decided that an investigation was necessary to restore peace and security, the prosecutor is required as a matter of international law to conduct it, regardless of what the Rome Statute says. Nevertheless, the prosecutor wrote in his letter to the Pre-Trial Chamber that his office had conducted a review “to determine whether the criteria to initiate an

investigation are satisfied.”<sup>9</sup> While the prosecutor alone can determine the *outcome* of his investigation as against particular defendants, the decision to commence an investigation is not his to make. In my view, the Security Council preempts this usual process by making a binding referral under its Chapter VII authority.<sup>10</sup>

Of course, if the prosecutor were to conduct the investigation required by the Security Council and decide that not a single individual should be brought to trial, this would effectively collapse the distinction between the Darfur case as a general matter and the Darfur case as a collection of individual prosecutions. Were the prosecutor’s reasons for deferring prosecutions unconvincing and insincere, the Security Council might have something to say about this. It is particularly noteworthy that the Rome Statute is ambiguous here. It purports to give the prosecutor discretion to make these decisions with regard to the “interests of justice,”<sup>11</sup> although it is unclear what this means. If the phrase “interests of justice” means the culpability of individual defendants—a question that all criminal prosecutors must consider—then this discretion would not interfere with the Security Council’s authority to deal with matters of collective peace and security. If, however, the “interests of justice” means something more collective,<sup>12</sup> such as what is best for the victims and aggressors as *groups*, then this, I submit, is precisely the kind of global diplomatic concern that international law, and the UN Charter, reserves for the Security Council.

The legal and political relationship between the Security Council and adjudicatory bodies has always been a matter of legal controversy.<sup>13</sup> The International Court of Justice (ICJ) has, on occasion, sought to maintain its independence from the Security Council. These issues arose in the *Nicaragua*, *Lockerbie*, and *Wall* cases, and are well traveled in the legal literature.<sup>14</sup> There is a not-so-subtle tug of war between the Security Council and the ICJ over allocation of legal authority. The question of authority between the ICC prosecutor and the Security Council is an instance of this same general institutional question.

One might be inclined to argue that the Security Council is ill-equipped to handle quasi-adjudicative powers and that legal bodies such as the ICJ and the ICC are more appropriate institutions to exercise legal discretion. But the Security Council already exercises several adjudicative functions allocated to it by the UN Charter, and these functions are central to its mission to maintain international peace and security.<sup>15</sup> The structure of the UN Charter therefore makes clear that the Security Council is, already, a quasi-adjudicative body. Also, when situations involve international peace and security, it is precisely the Security Council—not the ICC prosecutor—that is endowed with the institutional resources to handle them.

One might also object that legal institutions created by the Security Council are nonetheless independent from it, and by extension the ICC should be no less independent even when cases are referred by the Council. For example, the ad hoc tribunals for Yugoslavia and Rwanda were created by Security Council resolutions under its Chapter VII powers, but decisions from these courts are not subject to review by the Security Council.<sup>16</sup> But this judicial independence can be distinguished

from our present discussion. In the case of the ICC, I maintain, the prosecutor cannot exercise his own discretion about whether the interests of justice require an investigation. Once the Security Council has decided that an investigation is necessary for the maintenance of international peace and security, the prosecutor is, in my view, constrained by international law to follow this ruling, and cannot decide for himself whether an investigation is in “the interests of justice.” This would be like the prosecutor of the International Criminal Tribunal for Yugoslavia (ICTY) deciding—for herself—that international peace and security did not necessitate the creation of ad hoc tribunals and, thus, closing up shop.

Of course, the ICTY Appeals Chamber in *Tadić* considered the Security Council’s authority under Chapter VII to create the ICTY in the first instance.<sup>17</sup> However, that was a special case where the court was required, through the very demands of adjudication, to determine for itself whether it had jurisdiction to decide the merits of the case—i.e. what the ICTY referred to as “*la compétence de la compétence*.” But the ICTY Appeals Chamber did not—nor could not—substitute its own judgment about whether a tribunal was an appropriate response to the crisis in Yugoslavia,<sup>18</sup> just as I submit the ICC prosecutor cannot substitute his own judgment about whether an ICC investigation is an appropriate response to the crisis in Darfur or elsewhere.<sup>19</sup>

A determination of this issue will have to wait until the ICC issues its first decisions. However, this will not be the final word. I have no doubt that the ICC, as a legal institution, will find greater discretion for itself and its prosecutor at the expense of the Security Council. As a matter of institutional *Realpolitik*, this should not be surprising. The issue will most likely remain happily unresolved, unless the Security Council is faced in the future with an ICC prosecutor who blatantly refuses to act, “in the interests of justice,” on a Chapter VII referral. Given that the ICC prosecutor has, indeed, initiated an investigation of the Darfur situation, it is clear that the time has not yet arrived.

## Notes

<sup>1</sup> See “Rome Statute of the International Criminal Court,” July 17, 1998, Article 13(b) and Article 53(2). Available at: <<http://www.un.org/law/icc/statute/romefra.htm>> (accessed June 2, 2007). Also relevant is Article 16, which recognizes the power of the Security Council to suspend an ICC investigation by using its Chapter VII powers.

<sup>2</sup> See the Charter of the United Nations, UN General Assembly, June 26, 1945, Article 103. Available at: <<http://www.un.org/aboutun/charter/>> (accessed June 2, 2007). “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

<sup>3</sup> See UN Charter, Article 1(1); “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” Article 39; “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

<sup>4</sup> See UN Charter, Article 41; “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the

United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

<sup>5</sup> All member states are required to follow binding decisions of the Security Council, a legal obligation that extends to the international institutions to which they belong. See UN Charter, Article 25 (requiring member states to follow Security Council decisions); Article 48 (requiring that Security Council decisions “shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members”).

<sup>6</sup> For a full discussion of the legal consequences of this referral, see George P. Fletcher & Jens David Ohlin, “The ICC—Two Courts in One?” *Journal of International Criminal Justice* 4, no. 3 (July, 2006): 428–433.

<sup>7</sup> See United Nations Security Council Res. 1593 (March 31, 2005); see also Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (2005) (recommending referral to ICC prosecutor after finding evidence in Darfur suggesting war crimes and crimes against humanity).

<sup>8</sup> This is contemplated by Article 53(2)(a) of the Rome Statute.

<sup>9</sup> See Luis Moreno Ocampo, *Letter to Judge Claude Jorda* (June 1, 2005). Available at: <[http://www.icc-cpi.int/library/cases/ICC-02-05-2\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-2_English.pdf)> (accessed June 2, 2007).

<sup>10</sup> For further discussion, see Giuliano Turone, “Powers and Duties of the Prosecutor,” in *The Rome Statute of the International Criminal Court: A Commentary* ed. Cassese et al. (New York: Oxford University Press, 2002), 1140; (“the Statute of the ICC was drafted paying very careful attention to the principle of national sovereignty and to the political primacy of the Security Council, in such a way as to limit, in a significant way, the power, and to affect the independence itself, of the Prosecutor”).

<sup>11</sup> See Rome Statute, art. 53(2)(c).

<sup>12</sup> This interpretation might be supported by the fact that Article 53(2)(c) refers to the “gravity of the crime and the interests of the victims.”

<sup>13</sup> See Jose E. Alvarez, “Judging the Security Council,” *American Journal of International Law* 90, no. 1 (January 1996): 1–39.

<sup>14</sup> See *Military and Paramilitary Activities in and Against Nicaragua*, 1986 ICJ 14; *Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie*, 1992 ICJ 114; *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, 2004 ICJ 136. For a discussion, see Kathleen Renée Cronin-Furman, Note, “The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship,” *Columbia Law Review* 106, no. 2 (March 2006): 435–463.

<sup>15</sup> Articles 33, 34, and 35 explicitly give the Security Council dispute resolution powers. Although Article 36 contemplates that these disputes will sometimes be referred to the ICJ, Article 37 contemplates that the Security Council can recommend its own resolution to the dispute when necessary to maintain international peace and security. And, of course, there are the more familiar extraordinary powers under Chapter VII.

<sup>16</sup> Individual defendants may not, for example, petition the Security Council to “overrule” the ICTY—a procedure that, if allowed, would turn the Security Council into a de facto appeals chamber resembling the House of Lords.

<sup>17</sup> See *Prosecutor v. Tadić*, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction § 12 (Oct. 2, 1995); “In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit.”

<sup>18</sup> See *Tadić*, at § 20 (“There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own ‘creator.’ It was not established for that purpose, as is clear from the definition of the ambit of its ‘primary’ or ‘substantive’ jurisdiction in Articles 1 to 5 of its Statute.”).

<sup>19</sup> These questions of allocating legal authority within the United Nations system all stem from the decision of the original framers in 1945 to refrain from granting any one institution authority to determine these questions and, thereby, definitively interpret the UN Charter. A proposal to grant this authority to the International Court of Justice, in a similar model to the United States Supreme Court, was rejected. See Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States, 1940–1945* (Washington, DC: Brookings Institution, 1958), 925–927.