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Historical Origins of International Criminal Law: Volume 5

Morten Bergsmo, Klaus Rackwitz and SONG Tianying (editors)



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*Dedicated to the memory of
Håkan Friman and Christopher K. Hall,
for their contributions to the work that led to this book*

EDITORS' PREFACE

This book seeks to make two contributions. First, the development of national capacity to investigate and prosecute core international crimes – genocide, crimes against humanity, war crimes and aggression – will continue for several decades into the future. We would like to offer those who engage in such capacity-construction a clear overview of the relevant thinking invested in the birth of the Office of the Prosecutor of the International Criminal Court ('ICC') in 2002–2003. To this end, the book's detailed table of contents and index may guide readers more easily to materials relevant to their queries. The book has been organised in four autonomous parts: Part I contains 41 individual expert opinions on investigations, prosecutions and questions of management, staffing and operations; Part II has three reports produced by groups of experts; Part III concerns the draft Code of Conduct and Regulations of the Office of the Prosecutor; and Part IV explains some aspects of its first budget. The chapters in Parts 2–4 contain introductions explaining the background to the documents and the main issues involved.

The expert consultations documented by this book are a chief characteristic of the birth of the ICC Office of the Prosecutor in 2002–2003. Together, they amount to an informal, *de facto* hearing process. Upon his election, the first Prosecutor Luis Moreno Ocampo referred several times to this preparatory work to establish his Office as a "miracle". We choose to see the process as a reflection of common sense: many experts combined can offer more nuanced and clearer perspectives than what we can reasonably expect of one, provided they are asked the right questions. When the relevant questions are asked in a timely fashion, leading experts tend to come forward of their own accord, to participate in communitarian discourses. This is what happened in 2002–2003, at a time of great hope for the success of the ICC, an institution based both on a legal infrastructure carefully made by governments between 1996 and 2002 and on the noble aspirations of numerous individuals around the world. The 2002–2003 expert consultations fill a space between these extraordinary aspirations and foundational norms of the Court, on the one hand, and the realities of an institution appropriated by ordinary men and women, on the other.

The second contribution we seek to make with this book is to open up this interesting interregnum to analysis and research, based on sound facts chronicled by first-hand materials. As such, the book contributes towards the institutional history of the ICC Office of the Prosecutor at the time of its birth. It is for this reason that the book appears as Volume 5 of *Historical Origins of International Criminal Law*.

We place on record appreciation to the International Nuremberg Principles Academy for financial support for the completion of this book. We also thank TOAEP Senior Editor Gareth Richards for his copy-editing, other TOAEP editorial team members – primarily Moritz Thörner, Till Thörner, Alf Butenschøn Skre and, at an early stage, Kiki A. Japutra – for their contributions, and the International Association of Prosecutors for assistance with information for two of the chapters.

Morten Bergsmo, Klaus Rackwitz and SONG Tianying

PREFACE BY TOR-AKSEL BUSCH

In the autumn of 2002 and spring of 2003, I visited the interim premises of the International Criminal Court ('ICC') in The Hague on several occasions, as a participant in an expert consultation process that Professor Morten Bergsmo had commenced through the preparatory team for the establishment of the Office of the Prosecutor of the Court. Our mandate was to prepare the draft Regulations of the Office. You find the result in Annex 1 to Chapter 46 of the present volume, alongside the Regulations *ad interim* from late August 2003 (Annex 2). The draft Regulations were made publicly available ahead of a hearing that took place following the ceremony in the Peace Palace in The Hague on 16 June 2003 to swear-in the first Prosecutor of the Court, Mr. Luis Moreno Ocampo.

Having served as Deputy Director General and Director General of Public Prosecutions in Norway for 30 years, I have some familiarity with public and government interest in the work of prosecution services. One thing that struck me when attending the swearing-in ceremony was the high number of governments in attendance, and the extent of interest by a great variety of stakeholders, including a strong civil society. This reinforced my sense of the fundamental importance of a strong legal framework around the exercise of prosecutorial discretion at the ICC, to avoid a contaminating critique of lack of independence.

At that time, we were starting the process to establish a Norwegian National Authority for Prosecution of Organised and Other Serious Crime responsible, *inter alia*, for the prosecution of cases of genocide, crimes against humanity and war crimes investigated by the National Criminal Investigation Service (Kripos) and the Police Security Service (Politiets sikkerhetstjeneste, PST). Participating in the process to prepare the draft Regulations – and learning about the other expert consultation processes that were underway at the time – gave me food for further thought on which steps we should take to ensure that Norway will not be a safe haven for individuals suspected of having committed such serious crimes abroad. Our National Authority was officially launched on 1 August 2005.

This form of synergy between the processes to establish the ICC Office of the Prosecutor and a national criminal justice authority illustrates the value of this book. The editors have compiled, edited and struc-

tured a wealth of experience and insights of dozens of leading criminal justice experts from around the world. This will have considerable value to those who construct or work to strengthen national capacity to investigate and prosecute core international crimes. The complementarity principle – on which the ICC rests – means that for the foreseeable future, national jurisdictions will remain the frontline of criminal justice for genocide, crimes against humanity and war crimes. This book reminds us of that fact, just as it provides a comprehensive historical overview of the thinking that was invested in the birth of the ICC Office of the Prosecutor.

The book speaks for itself: it gives lasting testimony to the systematic intellectual approach taken by Professor Bergsmo who conceived and co-ordinated these consultation processes, and his deep understanding of the complex legal, institutional, political and operational processes involved. I thank the three editors for their efforts.

Tor-Aksel Busch
Director General of Public Prosecutions, Norway

FOREWORD BY ALEXANDER MULLER

In mid-summer 2002, I requested Carla Del Ponte – the Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) – to release Professor Morten Bergsmo, then a Legal Adviser in her Office, so that he could join the Advance Team of the International Criminal Court (‘ICC’) with the responsibility to co-ordinate the establishment of its Office of the Prosecutor. The delegates of states parties overseeing the Advance Team – which I led – had agreed to this, and so did Del Ponte. Professor Bergsmo was the natural choice for this task: he had worked for the 1992–1994 United Nations Commission of Experts for the former Yugoslavia; he was the first lawyer hired by the ICTY Office of the Prosecutor; he had been the official representative of the ICTY and the International Criminal Tribunal for Rwanda to the ICC negotiating process from 1996 to 2001, making important contributions to Articles 15, 42, 53, 54 and 99 of the ICC Statute; and he had been asked to prepare the first budget of the ICC Office of the Prosecutor. He joined the Advance Team on 1 August 2002, and became a staff member of the ICC on 1 November 2002. Professor Bergsmo led the preparatory team for the Office of the Prosecutor from the first day, working in partnership with a co-editor of this book, Mr. Klaus Rackwitz, a German judge who served as a consultant for the ICC Advance Team during August–September and November–December 2002, and joined the Court full-time on 2 January 2003. Two other prominent members of the preparatory team were the young consultants Dr. Markus Benzing and Mr. Salim A. Nakhjavani, the latter being the author of Chapter 47 of the present volume. Professor Bergsmo enjoyed broad autonomy in the co-ordination of the preparatory team, but formally he reported to me as head of the ICC Advance Team until 1 November 2002, then to Judge Bruno Cathala as director of Common Services, until he assumed his duties as the Senior Legal Adviser to the first ICC Prosecutor upon his swearing-in on 16 June 2003.

This book is about the work undertaken by the preparatory team led by Professor Bergsmo between 1 August 2002 and 16 June 2003, including some processes started during this period but only completed by the team during the subsequent months, the latest in November 2003. It was a period of extraordinary optimism, participation, creativity and unity of purpose. I look back to those months as some of the most energetic

months in my professional life to date. Whereas my responsibilities concerned mostly the Chambers and Registry, I observed closely the remarkable efforts of Professor Bergsmo and his team, universally respected and appreciated among the colleagues, from security guards and administrative support staff to President Philippe Kirsch.

Professor Bergsmo instituted a series of consultations on topics reflecting his analysis of the needs and challenges that would face the Office of the Prosecutor: how to deal with the principle of complementarity in practice; how to ensure that the Office would have adequate access to potential evidence in territorial states; how to address the problem of length of proceedings before the Court; the need for an advanced code of conduct to avoid personal misconduct in the Office; the need for Regulations guiding the exercise of prosecutorial discretion; and the need to ensure adequate quality of staff and a proper role for professional expertise such as that of analysts. This book contains the outcome of these consultation processes. Professor Bergsmo did what every smart justice innovator should do: he engaged experts widely, drawing on more than 75 leading experts, most of whom had longer professional experience than him. Neither did he place himself at the centre of the consultation processes. Rather, he carefully crafted their mandates, composed the expert groups, and defined the topics they should address, and then gently herded the processes along.

Looking back on the topics chosen and papers produced, we see the foresight of Professor Bergsmo, based on his clear understanding of the role of international criminal law and justice. In our internal discussions at the Court in 2002–2003, he coined terms such as ‘impunity gap’ and ‘positive complementarity’, years before the adoption of the resolution at the 2010 ICC Review Conference on positive complementarity and wider recognition of the importance of national capacity development. It is exactly in this area of rule of law activity that there has been so much development since the Court became operational.

The past 14 years have shown that setting up a new international jurisdiction is very challenging. In the first months, the media often asked me whether the ICC ‘would work’. My answer to that somewhat naive question was always: “We’ll know in about 10 years”. When I was asked the same question in 2012, I still did not feel I could fully answer it. What I do know is that knowledge-gathering initiatives like the work of Professor Bergsmo are key. Judge Cathala (the first ICC Registrar) and I liked to say both in-house and externally that in setting up the ICC we wanted to make new mistakes, not the same errors others made before us.

I have just come back from Mali, where I held exchanges on reforming the justice system at the highest level. In the past year, I have had similar exchanges in the Ukraine. What is evident from such discussions is that the ICC can only do so much when it comes to formulating an adequate response to mass atrocity crimes. With the knowledge I now have, I would even say it is less than I thought possible 14 years ago. National capacity is the key. A prosecutor serves a community and that is where the most effective justice response can be forged and implemented. The so-called ‘international community’ is still only a ‘community’ in a very limited way. The real communities exist much closer to the ground.

This volume is of critical importance to build that national capacity. It contains the lessons of people who made many mistakes and who hope others will make only new ones, so that the words of the preamble of the ICC Statute become a reality: “that the most serious crimes of concern to the international community as a whole [...] not go unpunished and that their effective prosecution [is] ensured by taking measures at the national level and by enhancing international cooperation”.

Mr. Rackwitz remained in the ICC Office of the Prosecutor for a number of years, becoming a mainstay and pillar of the Office during difficult times. For several years, he was the person in the Office who states parties and civil society would trust and rely on. Later he brought this credibility to Eurojust, before he assumed the directorship of the International Nuremberg Principles Academy in 2016.

Professor Bergsmo had already advised me in November 2003 of his intention to leave the ICC. He felt that his integrity was at risk. The leadership of the Registry stood fully behind Professor Bergsmo and pleaded with him to delay his departure, as did key actors from outside the Court. He did so, and during the next two years the Legal Advisory Section which he led oversaw the drafting of more than 70 memoranda and produced the ICC Legal Tools which later revolutionised open access to legal sources in international criminal law. Since his departure from the Court at the end of 2005, Professor Bergsmo has exercised intellectual leadership in the field of international criminal law, most recently through the publication of the first four volumes of *Historical Origins of International Criminal Law*. He directs the Centre for International Law Research and Policy which, among other qualities, is the first international law institution that systematically seeks to broaden discourse communities to include younger Chinese, Indian and other non-Western actors.

The younger colleagues he brought into the preparatory team – Dr. Benzing and Mr. Nakhjavani – already left the Court in 2003 and 2004. I

have sometimes asked myself what the Court would look like if it were composed of persons such as Dr. Benzing, Professor Bergsmo and Mr. Nakhjavani – highly talented and with sterling integrity. This book shows some of the work their small preparatory team accomplished in just over one year. I hope it will serve as a guide, not only for the ICC going forward, but also when working on other international justice mechanisms. The world needs them.

Dr. Alexander (Sam) Muller
Director, The Hague Institute for the Internationalisation of Law

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PART 1
BUILDING CAPACITY TO INVESTIGATE
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PART 4

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Institutional History, Behaviour and Development

Morten Bergsmo*

1.1. Recent Institutional History, Relevant to Institution-Builders

This book contributes towards a history of the Office of the Prosecutor of the International Criminal Court ('ICC'), and provides a broad and structured collection of analyses for those who construct national capacity to investigate and prosecute core international crimes.¹ In a way, this two-fold objective looks both to the past and to the future. It reminds us of Janus of two faces, or his namesake, the month of January, which concurrently looks at the past year and the one that has started. Among the main beneficiaries of its historical chronicling are institution-builders in national jurisdictions. Whereas the ICC Office of the Prosecutor has largely been built – albeit still youthful, in search of its full powers – the construction of national capacity to investigate and prosecute core international crimes may just have started.

Two of the co-editors – Mr. Klaus Rackwitz and the present writer – dedicated several years of intense work to the construction of the ICC Office of the Prosecutor. With this book, we hope to make a modest contribution to those who are and will be similarly engaged at the national level. This is one of the core functions of the International Nuremberg Principles Academy which Mr. Rackwitz currently directs. It is also a primary function of the Case Matrix Network ('CMN') department of the

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¹ For the purposes of this volume, the term 'core international crimes' includes the categories of war crimes, crimes against humanity, genocide and crimes of aggression.

Centre for International Law Research and Policy ('CILRAP') of which the present writer is Director.²

The book appears as Volume 5 in the series *Historical Origins of International Criminal Law*. The chronology of the first edition of Volumes 1–4 ends the analysis of international criminal law and justice with the *ad hoc* Tribunals for ex-Yugoslavia and Rwanda, before the establishment of the ICC. Volume 5 is focused on the birth of the ICC Office of the Prosecutor. More specifically, it concerns a 15-month period from 1 August 2002 onwards, during which time a preparatory team for the ICC Office of the Prosecutor conducted a series of expert consultation processes and drafted several foundational documents for the Office, among other activities.

The ICC Statute entered into force on 1 July 2002, and the Advance Team set up by States Parties to facilitate the establishment of the Court immediately commenced its work. This is the starting point of the book. The Team was led by Dr. Alexander (or Sam) Muller who has written the Foreword to this book. With the consent of the States Parties overseeing the Advance Team, it formed a preparatory team for the ICC Office of the Prosecutor. I was asked to co-ordinate the preparatory team and, to this end, I was released on loan by Chief Prosecutor Carla Del Ponte of the International Criminal Tribunal for the former Yugoslavia ('ICTY'),³ whose Office of the Prosecutor I had served as a legal adviser since May 1994. On 1 November 2002, the designated ICC Director of Common Services, Judge Bruno Cathala, commenced his work and I was employed by the ICC as the Senior Legal Adviser of the Office of the Prosecutor, an appointment confirmed by Prosecutor Luis Moreno Ocampo both after his election in April and swearing-in in June 2003. As co-ordinator of the preparatory team, I reported to Dr. Muller until 1 November 2002, to Judge Cathala from 1 November 2002, and to the Prosecutor from his assumption of office on 16 June 2003. Dr. Muller and Judge Cathala gave me full autonomy as co-ordinator of the preparatory team. They were singularly supportive of the work of the team from its start. The first Prosecutor, Mr. Moreno Ocampo, gave me autonomy in the co-ordination of the completion of the expert consultation processes started by the prepara-

² The CMN – directed by Mr. Ilia Utmelidze – has undertaken capacity-development and knowledge-transfer projects in more than 20 countries. It also runs several online services in the CMN Knowledge Hub, primarily for national practitioners.

³ The tribunal is frequently referred to as the “ex-Yugoslavia Tribunal” in this chapter.

tory team, while I naturally assumed new tasks for him directly as Senior Legal Adviser from his first day in office. The last of the expert groups set up by the preparatory team worked through the month of October 2003, submitting its report in November 2003 (as discussed below in Chapter 45, “The Principle of Complementarity in Practice”). That marks the end of the temporal scope of the book.

It is the work of the preparatory team that the book addresses, not new actions that started in the Office of the Prosecutor from the summer of 2003 onwards. For example, the book does not deal with the “Paper on Some Policy Issues before the Office of the Prosecutor” released by the Office of the Prosecutor in September 2003.⁴ The preparatory team had not initiated or been responsible for this paper (although input was given⁵). It was prepared under the supervision of the Prosecutor and his Chef de Cabinet at the time, Judge Silvia Fernández de Gurmendi.⁶ The preparatory team never suggested that the ICC Office of the Prosecutor should issue institutional ‘policy papers’ on any topic.⁷ We did not consider this an important tool to ensure high quality in the performance of core functions of the Office.

⁴ International Criminal Court (‘ICC’), “Paper on Some Policy Issues before the Office of the Prosecutor”, 5 September 2003 (<http://www.legal-tools.org/doc/f53870/>).

⁵ For example, the notion of an ‘impunity gap’, which had been coined in the preparatory team in late 2002 (see section 1.3.8. below), found its way into this policy paper and later became a term of common use in the field.

⁶ At the time of writing, she was the President of the International Criminal Court.

⁷ The reports of the expert groups created by the preparatory team were reports by *external* experts, for the benefit of the ICC Office of the Prosecutor, ICC judges, and for those building relevant investigation and prosecution capacity in national jurisdictions. The preparatory team never suggested that these reports should commit the Office of the Prosecutor. The only institutional governance instruments the team put forward for the consideration of the first Prosecutor were the draft Regulations of the Office of the Prosecutor (Chapter 46), a draft Code of Conduct (Chapter 47), budgetary submissions for the second budget (Chapter 48), and human resources tools such as vacancy announcements and job descriptions. When the idea of the initial policy paper surfaced, I thought to myself that the Office should first prove that it could successfully select, investigate and prosecute cases. The gain the Office may enjoy in certain constituencies if it publicly articulates policies is of little consequence if it does not perform its core criminal justice functions impeccably. In my experience, responsible States Parties understand this, especially those who end up paying most of the bill. Add to this the difficulty the Office may face should it decide that it no longer wants to stand behind a policy paper: it obviously has the power to undo policy papers, but doing so may come at a price.

Chapter 48 does address one significant activity that the preparatory team did *not* do, namely the preparation of the first budget of the ICC Office of the Prosecutor and what some of the central considerations at the time were. The first budget was prepared before the preparatory team was established, even before the ICC Statute entered into force. I was requested to do this, in my personal capacity and not as a Legal Adviser at the ex-Yugoslavia Tribunal.⁸

The book does not deal with everything that the preparatory team did. For example, we have not included the work undertaken for the two-day hearing on policy questions relevant to the ICC Office of the Prosecutor held on 17–18 June 2003 in the Peace Palace. That event remains under-researched. So is the work of the preparatory team more generally, which makes it difficult to properly understand the early history of the ICC Office of the Prosecutor, since the work of the preparatory team was the basis on which the Office started and it influenced aspects of its subsequent operations.⁹

⁸ This needs to be said because in his book chapter on the evolution of the Office of the Prosecutor, Professor Jens Meierhenrich correctly recognises that a “first sketch for the institutional design of the OTP appeared as an annex to the ICC’s first budget and was unveiled in September 2002”, but he erroneously assumes that the ICC Advance Team was behind the proposal; see Jens Meierhenrich, “The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory”, in Martha Minow, C. Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints. Law, Meaning, and Violence*, University of Michigan Press, Ann Arbor, 2015, pp. 105–6. It is a pity that he had not been properly informed on this point, because he makes it a central rhetorical device in his argument: “The work of the Advance Team merits a closer look because it throws into sharp relief the gradual emergence of contending visions of institutional design”, with reference being made to the creation of the Jurisdiction, Complementarity and Cooperation Division of the ICC Office of the Prosecutor (pp. 104, 106–10). In fact, neither the ICC Advance Team nor the preparatory team for the ICC Office of the Prosecutor ever put forward any “institutional design” for the Office. The very idea of the Jurisdiction, Complementarity and Cooperation Division came from one of the expert groups established by the preparatory team. There was never any controversy between the Prosecutor and the preparatory team about this or the “international dimensions of the OTP” (p. 106). Quite the contrary, Prosecutor Louise Arbour and I had pointed out the weaknesses in the fact-finding and state co-operation regimes of the ICC in the first publication on the topic already in 1999, hence the decision of the preparatory team to establish the expert group on fact-finding and state co-operation, as discussed in Chapter 44 below (see Louise Arbour and Morten Bergsmo, “Conspicuous Absence of Jurisdictional Overreach”, in *International Law Forum du Droit International*, 1999, vol. 1, no. 1, pp. 13–19 (<http://www.legal-tools.org/doc/d4cfaf/>)).

⁹ The 34-page “Report on the Activities Performed during the First Three Years (June 2003–June 2006)” issued by the ICC Office of the Prosecutor on 12 September 2006

1.2. Proximity to the Preparatory Team for the ICC Office of the Prosecutor

The persons behind this book have a particular responsibility to ensure that the work of the preparatory team for the ICC Office of the Prosecutor is understood and represented on an accurate factual basis. They were involved in the work processes at the time and can attest to them first-hand. Their proximity to the preparatory team could not be closer. This has some advantages in terms of knowledge of relevant facts. But it inevitably risks perceptions of self-consciousness with which we have to live.

The co-editor of this volume, Mr. Rackwitz, a former German judge, served as a consultant in the preparatory team in August–September and in November–December 2002, and joined the Court full-time on 2 January 2003. Mr. Salim A. Nakhjavani, author of Chapter 47 below (“The Origins and Development of the Code of Conduct”), also served as a consultant-member of the preparatory team. Mr. Carlos Vasconcelos, author of Chapter 46 (“Draft Regulations of the Office of the Prosecutor”) and one of the top federal prosecutors of Brazil, was consulted by the preparatory team on several issues and was a member of the expert consultation group on draft Regulations of the Office of the Prosecutor.¹⁰ Dr. Markus Benzing, who gave input during the preparation of

(<http://www.legal-tools.org/doc/c7a850/>) refers to the preparatory team’s work in paragraphs 55 and 56. It mentions the “expert consultation processes” and the “draft Regulations that [...] establish a code of conduct for its members and provide guidelines and standard operating procedures”, in the context of “the process undertaken by the Office to develop its policies”.

¹⁰ Mr. Vasconcelos, who had served as deputy prosecutor in the United Nations Transitional Administration in East Timor, was one of the shortlisted candidates to be the first ICC Prosecutor. The story of how his candidature was derailed in a meeting of the Bureau of the ICC Assembly of States Parties in early 2003 is interesting and yet to be publicly told. Given the serious challenges faced by the ICC Office of the Prosecutor during the period of the first Prosecutor, Mr. Moreno Ocampo, it is surprising that academics have not produced more penetrating analyses of the process that led to his election in the first place. What is important for the future is to understand the quality control failures in the decision-making process, including which actors sought to exercise influence over it. There is considerable material available for interested researchers. For example, during a subsequent meeting called by the Bureau in New York in early 2003 for representatives of States Parties, the German representative, Ambassador Christian W. Much, several times raised concerns about the sole candidate presented, Mr. Moreno Ocampo. The late Judge Hans-Peter Kaul explained to some colleagues at the ICC that the German Embassy in Buenos Aires had prepared a report for the German Foreign Ministry that was unfavourable about the candidate. But Germany was not heard at the key meeting, although Germa-

Chapter 46, was the consultant-member of the preparatory team who worked specifically on the draft Regulations, in support of the designated expert group. Dr. Vladimir Tochilovsky, co-author of Chapters 43 (“Measures Available to the International Criminal Court to Reduce the Length of Proceedings”) and 44 (“Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation”), was the member of the expert groups on length of proceedings and on fact-finding who co-ordinated the drafting of both reports. Finally, Mr. Tor-Aksel Busch, author of the Preface to this book, was a member of the expert group on draft Regulations of the Office of the Prosecutor, and was consulted on the report on length of proceedings. It was indeed an honour to co-ordinate a preparatory team that could draw on such distinguished colleagues of high integrity. Mr. Busch is perhaps the prosecutor in Europe who is most highly respected for his professionalism and rectitude, having served as Director-General and Deputy Director-General of Public Prosecution of Norway for more than 30 years. He was a pillar of support in 2002–2003.

The team behind this book has also consulted the authors of the chapters in Part 1 of the volume, who include the former Director of Public Prosecutions of Ireland, Mr. James Hamilton, and Chief Justice of Tanzania, Mr. Mohamed C. Othman. Earlier, I had discussed the idea of the book with late Mr. Christopher K. Hall and Judge Håkan Friman, both of whom participated actively in the expert consultation processes described in Parts 1 and 2 below and later shared information and documents on their interaction with the Court with me. This book is dedicated to their memory, both of whom passed away prematurely. Mr. Hall had been a trusted collaborator of the present writer since the start of the ICC negotiations in 1996. Judge Friman had been a fellow Scandinavian with whom I worked closely when he later joined the ICC negotiations.

1.3. Risk Assessment in August 2002

What are the main risks that will confront the ICC Office of the Prosecutor? This was the first real question I asked myself after joining the preparatory team for the Office on 1 August 2002. It was a question inviting

ny was the main financial contributor to the Court at the time and had played a vital role during the making of the Court.

careful reflection, as my intention was to let the answer guide the work of the team.

I considered the question in light of input received from several sources. I started out with what I had observed during my service at the ICTY Office of the Prosecutor between May 1994 and July 2002, including strengths, bottlenecks and weaknesses. I had joined the Tribunal's Prosecution rather than Chambers because I expected that it would be the weakest link of the organisation.¹¹ Arguably, this held true until the Tribunal's judges started issuing surprising decisions in 2012.¹² Furthermore, I considered input that I had received from government delegates during the ICC negotiations, many of whom had served in national criminal justice or had opinions about the ways the ex-Yugoslavia and Rwanda Tribunals had functioned up until that point in time.¹³ I had also received invaluable input through conversations with some leading prosecutors and judges such as Mr. Busch. And I made several visits to the Serious Fraud Office in London and the Oberlandesgericht in Cologne, to study their work on fact-rich cases, and to the Generalbundesanwalt beim Bundesgerichtshof in Karlsruhe. Finally, in the autumn of 2002, we also started to receive input in the general expert consultation process covered by the elaborate Part 1 of this book.

1.3.1. Perceived Lack of Independence

The main threat to the ICC Office of the Prosecutor that I could see in August 2002 was the risk of a perceived lack of independence on the part of the Prosecutor or senior members of his or her Office *vis-à-vis* a small

¹¹ See Morten Bergsmo, "Foreword", in Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Florence, 2013, pp. iii–x (<http://www.legal-tools.org/doc/5b59fd/>).

¹² See, for example, Gunnar M. Ekeløve-Slydal, "ICTY Shifts Have Made Its Credibility Quake", FICHL Policy Brief Series No. 49, Torkel Opsahl Academic EPublisher, Brussels, 2016 (<http://www.legal-tools.org/doc/18ba48/>). He quotes Mr. Carl Bildt, former Foreign Minister of Sweden: "It is becoming increasingly difficult to see the consistency or logic in the different judgments"; see "War Crimes in the Former Yugoslavia: Two Puzzling Judgments in The Hague", in *The Economist*, 1 June 2013.

¹³ I was the official representative of the ICTY to the ICC negotiations between 1996 and 2001, serving in effect as a technical adviser to delegates on the law and practice of the *ad hoc* tribunals. I was called upon to comment on many questions, in particular issues linked to the provisions in the ICC Statute on the powers, function and organisation of its Office of the Prosecutor.

number of powerful governments. There is a broad spectrum of reasons why such perceptions could take hold. For one, the process to establish an international prosecution service necessarily entails a period of searching for and trying different approaches. Such dynamic circumstances increase the opportunity for states to influence the Office.¹⁴ More generally, the history of the ex-Yugoslavia Tribunal shows that there is no shortage of actors who would like to promote perceptions of lack of independence in order to weaken the effect of prosecutorial action directed against what they see as their interests. At times, governments in the former Yugoslavia played such political games. Furthermore, there is the relative factor of professionalism: learning the proper language of international prosecution services – in informal settings, in personal e-mail and telephone communication, or when on mission – does not come without effort and has been difficult for some leaders of international prosecution services. There are also some leaders of international criminal justice institutions who have their clear country preferences, sometimes linked to simple cultural bias.

Further from the centre of the spectrum would be an international criminal justice leader who thinks that the Office of the Prosecutor or the Court cannot be without protection from one or more national governments – that the question is only which governments it should be. This view – which I have witnessed more than once – considers it naive not to recognise that the continued existence of international criminal justice institutions depends on such protection. Fully equal treatment of all governments is therefore not considered realistic. This view is sometimes combined with a clear personal preference for one or a few governments – perhaps because the international justice leader in question has not yet developed a genuine global identity or, of greater concern, because those governments have helped to make his or her international career. This combination can create perceptions of instrumentalisation or facilitate actual instrumentalisation.

This was the greatest risk I saw for the ICC Office of the Prosecutor in August 2002. That is also why – in a lecture on the occasion of the end

¹⁴ During such establishment processes, “the range of plausible choices open to powerful political actors expands substantially and the consequences of their decisions for the outcome of interest are potentially much more momentous”; see Giovanni Capoccia and R. Daniel Kelemen, “The Study of Critical Junctures: Theory, Narrative and Counterfactuals in Historical Institutionalism”, in *World Politics*, vol. 59, no. 3, 2007, p. 343.

of term of the first ICC President, Mr. Philippe Kirsch – I called for a deeper form of “fraternity of international criminal justice, whereby international justice institutions seek an equal measure of protection from all States Parties”.¹⁵

1.3.2. Lack of Balance Between Civil and Common Law Staff

A second risk facing the ICC Office of the Prosecutor concerned the related need to ensure a balanced composition of its staff from different legal systems and traditions, regions, language spheres and countries. The main divide characterising international criminal justice between 1994 and 2002 was not one between North and South or East and West, but between common and civil law. As I wrote in 2009:

This tension had some roots in facts and others in fiction. Regrettably, by 2002, some 85% of managers in the ICTY Office of the Prosecutor came from four countries: the United States, the United Kingdom, Canada and Australia. More than 50% of the lawyers in the Office were from the same four countries, as were approximately 75% of its GTA lawyers. Add to that, transparent layers of information showing who was assigned to which cases, to which witnesses and which legal questions, and the contours of the topography of power start to emerge with some clarity.¹⁶

This had of course not gone unnoticed in various capitals outside the group of leading English-speaking countries, the so-called Anglosphere. The issue was alive during the ICC negotiations. But how could such an abstract distinction between common and civil law become a real dividing line?

Did the details of the distinguishing features of common and civil law criminal procedure really have the capacity to mobilise governments and international justice institutions? Or was the common versus civil law divide merely a proxy tension, a smoke-screen? Interests do mobilise – conflict of interests even more. Maximising the national interest by working together with likeminded States or other actors is

¹⁵ See Morten Bergsmo, “The Autonomy of International Criminal Justice”, FICHL Policy Brief Series No. 3, Oslo, 2011, p. 3 (<http://www.legal-tools.org/doc/5fa508/>). The lecture was given on 6 February 2009 at the Dutch Ministry of Foreign Affairs in The Hague.

¹⁶ *Ibid.*, p. 2.

not unknown to multilateral diplomacy and international organization.¹⁷

By August 2002, it seemed clear to me that tension along a civil–common law divide was a real risk for the ICC Office of the Prosecutor, and that this was as predictable as it was avoidable. This concern was echoed late in 2002 and early 2003 by various experts whose input is included in Part 1 of this book.

1.3.3. Inadequate Quality of Staff

The quality of staff in the ICC Office of the Prosecutor was also a risk factor high on my list back in August 2002. This should not require any explanation. The ICC is a permanent international court, the only criminal jurisdiction of its kind. Our sense in August 2002 was that it deserves only the best, being born out of the painstaking efforts by governments, non-governmental organisations, and individuals over a number of years of negotiations, and building on the sacrifices of those who had made the legacy of predecessor institutions such as the International Military Tribunals in Nuremberg and Tokyo and the *ad hoc* Tribunals for ex-Yugoslavia and Rwanda.

The challenge was not only to find the most highly qualified candidates for positions in the ICC Office of the Prosecutor, but also to define the right skill sets required for each position. By 2002, it was manifest to discerning minds in the field of international criminal justice that suitable core international crimes cases for international(ised) criminal jurisdictions are normally fact-rich, involving multiple crimes or incidents that implicate persons in positions of leadership (who could have prevented or stopped the crimes from occurring). Fact-rich cases may have more in common with serious fraud cases than, for example, ordinary murder or rape cases. Fact-rich cases – sometimes involving an evidence-base of more than one million documents and several thousand potential witnesses – require staff who can process large volumes of material fast. Such staff may not perform well in a domestic murder or rape case, but they have what large corruption or war crimes cases require.

When I visited the Serious Fraud Office in London shortly after joining the preparatory team for the ICC Office of the Prosecutor, I was told that they would hardly employ traditional police officers in their staff

¹⁷ *Ibid.*

of several hundred, but rather borrow such officers from local districts for operations such as search, seizure and arrest.¹⁸ The practice at the Tribunals for ex-Yugoslavia and Rwanda had differed fundamentally on this point: a large percentage of the members of their Office of the Prosecutor were domestic violent crime investigators. There was a real risk in 2002 that the ICC Office of the Prosecutor would repeat the same mistake without first learning from highly competent national criminal justice agencies working on large, fact-rich cases with work processes that resemble typical core international crimes cases.¹⁹

1.3.4. Lack of Analysis Capacity

A related risk was that the ICC Office of the Prosecutor would not have adequate analysis capacity from the start of its work to undertake proper pattern and other analysis to guide decision-making on the selection and prioritisation of cases, incidents, crimes and suspects, and help develop information and evidence on systemic facts (such as the existence of the context of an armed conflict or the *de jure* and *de facto* authority of a superior in a complex organisation).

The *ad hoc* tribunals did not have such capacity initially which had adverse consequences for the strategic planning of investigations and case portfolio. I had taken several initiatives inside the ICTY Office of the Prosecutor to redress this problem, *inter alia*, by suggesting that the Office ask the Government of Norway for the secondment of a demography-statistics expert. This and other ideas contributed to the development of a

¹⁸ At the time of writing this chapter, the website of the Office prominently announced that “[o]ur staff includes investigators, lawyers, forensic accountants, analysts, digital forensics experts and a variety of other people in specialist and support roles” (see <https://www.sfo.gov.uk/about-us/#ourpeople>, accessed on 10 March 2017). In January 2016, this highly competent Office had “a full time equivalent of around 380 permanent staff. When we take on very big cases we expand our capacity with temporary and fixed term staff” (*ibid.*). This should be a matter of interest to the ICC States Parties.

¹⁹ The Director of the Serious Fraud Office, and various managers, extended the utmost cooperation during our visits. They expressed appreciation that someone from the international criminal jurisdictions in The Hague would make such study visits to the Office. It surprised me to learn this, as leaders of investigations at the ICTY Office of the Prosecutor had often gone to London for meetings between 1994 and 2001. I was told that those visits had been to the Metropolitan Police Service (Scotland Yard) and not the Serious Fraud Office. In March 2016, the Metropolitan Police Service had more than 48,000 full-time personnel and a very different organisational culture than that of the Serious Fraud Office and what international prosecution services can afford to develop.

strong analytical capacity within the Office, including for civilian chains of authority,²⁰ thanks in no small measure to the quiet support of the Norwegian Foreign Ministry.

Prior to joining the preparatory team for the ICC Office of the Prosecutor, I had drafted the first budget of the Office. As discussed in Chapter 48 below, I wrote an Analysis Unit (with several professional posts) into the budget to ensure that the ICC would take on board relevant lessons from the *ad hoc* tribunals. I could not be certain in August 2002 that this would be upheld by the Prosecutor upon assuming Office.

1.3.5. Perceived Bias in Exercise of Prosecutorial Discretion

I was concerned with the further related risk that the exercise of discretion by the ICC Office of the Prosecutor would be seen as biased or lacking in independence, which could weaken the credibility of the Office. The urge to get started with the first case – or, later, the temptation to select a case that places the ICC Prosecutor in a peacemaker’s role, even if there may not be sufficient gravity in the case – could set a standard which the Office cannot easily apply equally in subsequent cases. This is the story of the ICTY’s first case, against Duško Tadić. There is a need to shelter the Prosecutor’s exercise of discretion, by a proper framework of criteria for selection and prioritisation as elaborated in Chapter 43 below,²¹ and by investigation management tools (Chapter 46).

1.3.6. Lengthy Proceedings

Another risk identified in August 2002 was the probability of long proceedings before the ICC. Several States Parties had already expressed dissatisfaction with the length of proceedings before the *ad hoc* Tribunals for ex-Yugoslavia and Rwanda. States have a human rights concern that suspects wait too long for trial,²² and an economic concern that proceedings

²⁰ For an overview of the development and contributions of the demographic analysis capacity at the ICTY, see Helge Brunborg, “The Introduction of Demographic Analysis to Prove Core International Crimes”, in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2014, pp. 477–512 (<https://www.legal-tools.org/doc/740a53/>).

²¹ Section 43.3. Criteria for the Selection of Cases.

²² United Nations General Assembly, International Covenant on Civil and Political Rights, 19 December 1966, Article 14(3)(c) (<http://www.legal-tools.org/doc/2838f3/>) guarantees the right to “be tried without undue delay”, and the 1791 Sixth Amendment to the United

are too costly. The credibility of, and political support for, international criminal jurisdictions depend on their proceedings not being too lengthy and costly. I am not sure this is generally recognised within international organisations such as the ICC. But their activities are largely bound by elaborate formal or statutory procedures – their hands are quite tied – so these institutions are not easy to manage efficiently. There is a standing risk of lack of innovation in the administration of proceedings and their preparation – hence the critical importance of those discretionary steps in the work processes that can have a significant impact on judicial economy (see, for example, section 43.5. below). There is also a risk of aggregated personal interest in dawn-out proceedings among participants in international(ised) criminal jurisdictions.

Either way, it was our feeling in the late summer of 2002 that the ICC should excel in relation to other international(ised) criminal jurisdictions both in terms of the time it takes to prepare trials and the duration of proceedings. Its high officials should turn every stone not to develop a problem of lengthy proceedings. As a permanent international criminal jurisdiction, the ICC should differ from those *ad hoc* jurisdictions that have been criticised for lengthy proceedings.

1.3.7. Weak Fact-Finding Powers

A seventh risk that could affect the ICC Office of the Prosecutor, as we saw it in the preparatory team in August 2002, concerned the relatively muted state co-operation regime in the ICC Statute and its implications for the fact-finding powers of the Office. Prosecutorial decisions on charging and sentencing require access to all relevant information, or miscarriages of justice may occur. Chapter 44 elaborates how the Office has a weaker ability to obtain information and evidence than the *ad hoc* Tribunals for ex-Yugoslavia and Rwanda. The latter acted pursuant to the ultimate power of Chapter VII of the United Nations Charter – their legal basis – when seeking information from or in states, while the ICC depends on the co-operation of States Parties. It does not have the power to collect evidence on the territory of states in an autonomous and effective manner, unless the government concerned agrees or the United Nations Security Council so decrees in a referral to the Court.

States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial” (<http://www.legal-tools.org/doc/2bd122/>).

This risk had been identified in a 1999 publication by Justice Louise Arbour and the present writer,²³ so it was clear to the preparatory team from the start that it would conduct a careful expert consultation process to see whether any solutions could be found to this architectural constraint built into the ICC Statute.

1.3.8. High Expectations and Perceived Impunity Gap

Finally, I already feared in August 2002 that expectations of what the ICC Office of the Prosecutor could do would be too high. Even with optimal management and work processes, the ICC can only do a few cases in every situation it opens. The national capacity to do additional cases in any given situation before the ICC will be limited, at least initially. A contrast between the shiny but narrow justice of the ICC, and the limited or absent national justice could well become visible to the public. I coined the term ‘impunity gap’ for this phenomenon in the early autumn of 2002, and made the illustrations in Figures 1 and 2, which later found their way into the second budget of the ICC.²⁴

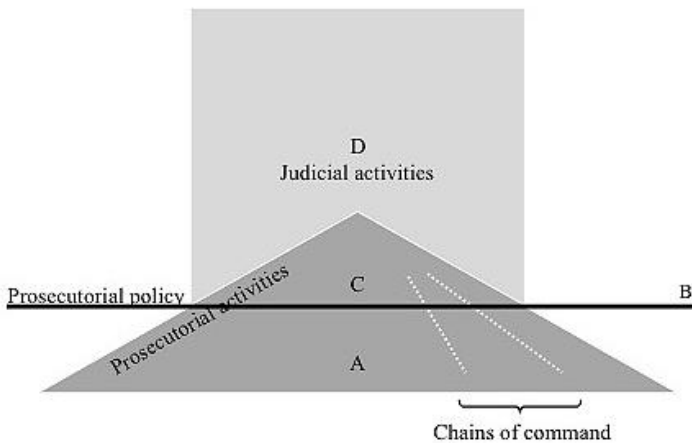


Figure 1: The effect of prosecutorial policy on resource needs. Scenario 1: Broad target selection (C), widening the scope of judicial activities (D).

²³ Arbour and Bergsmo, 1999, see *supra* note 8.

²⁴ See Programme Budget for 2004, ICC-ASP/2/10, para. 16.

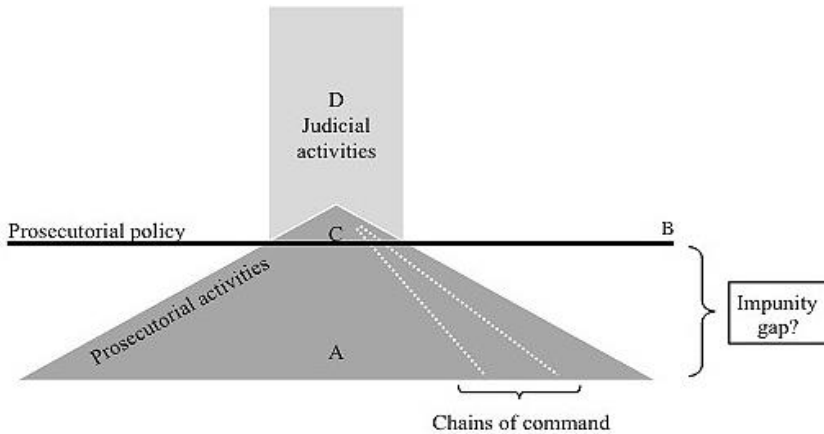


Figure 2: Scenario 2: Narrow target selection. C shows the potential cases selected, opening an ‘impunity gap’.

The articulation of the idea of the impunity gap started the discussions on what can be done to address this gap. I suggested that a positive approach to the development of national capacity to investigate and prosecute core international crimes was required, and introduced the term ‘positive complementarity’. For a number of years, there was not much interest in commencing a practice of positive complementarity. The ICC Legal Tools Project became the first platform on which national investigators and prosecutors were engaged in discussions about their needs to strengthen their ability to work on core international crimes. The Project undertook visits to more than 25 countries from 2006 onwards. The CMN supported the ICC Legal Tools Project, and started the development of several online services seeking to assist national investigators and prosecutors in this field.²⁵ At the Review Conference in Kampala in 2010, a resolution on positive complementarity was adopted.²⁶ That triggered a number of actors to start projects in support of national capacity building in the area of international criminal law. This is a very positive development, where actors are gradually gaining expertise related to the activities

²⁵ These services were later assembled in the online CMN Knowledge Hub.

²⁶ It was actually the first resolution adopted by the Review Conference, see resolution RC/Res.1, Complementarity, 8 June 2010 (<http://www.legal-tools.org/doc/de6c31/>). See, for example, para. 8, where the Review Conference “[e]ncourages the Court, States Parties and other stakeholders, including international organizations and civil society, to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern [...]”.

and services they offer or facilitate towards capacity development. But it would take a long time for this to reduce the impunity gap where it exists.

1.3.9. Map of Perceived Risks

Figure 3 shows an approximate map of the risks perceived by the preparatory team in August 2002, their relative seriousness, and how they relate to each other. As indicated, the length of proceedings (discussed in section 1.3.6. above) was seen to pose the greatest overall risk by a good margin, followed by weak fact-finding powers (1.3.7.), perceived lack of independence (1.3.1.), staff balance (1.3.2.) and quality (1.3.3.), and perceived imbalances in the exercise of prosecutorial discretion (1.3.5.). The actual developments in the Office of the Prosecutor during 2004–2012 would show that this risk assessment had overlooked three factors that turned out to be important. We will see how below.

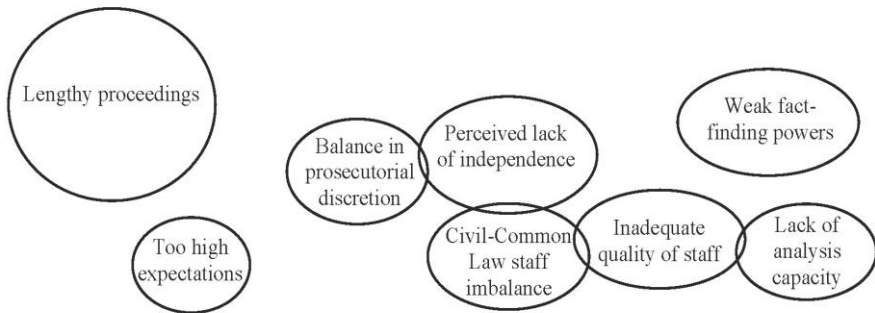


Figure 3: Risks facing the ICC Office of the Prosecutor upon its establishment, as seen in August 2002 by the preparatory team for the Office (discussed in section 1.3.).

1.4. The Strategy of the Preparatory Team for the ICC Office of the Prosecutor

On the basis of this tentative risk analysis, the preparatory team for the ICC Office of the Prosecutor designed its strategy of activities and started the planning. The first substantive activity was the establishment of a group of experts to consider the measures available to the Office and the Court as a whole to reduce the length of proceedings before the Court. This corresponded to what had been identified as the greatest risk facing the Office upon its establishment (see Figure 3 above). The expert group

was established in October 2002, and it had completed the first draft of its report by early January 2003, at which time it was circulated for comment among additional experts. This activity is described in more detail in Chapter 43 below which explains that this risk continues to challenge the standing of the Court and its Office of the Prosecutor. It is perhaps one of the areas that requires the most careful and creative attention during the coming years. Not only does the report prepared by the experts in early 2003 remain relevant, but recent Court practice goes against important advice offered at that time.

Second, the preparatory team started a broadly based expert consultation on general questions concerning the effective exercise of prosecutorial powers under the ICC Statute. The activity was based on the premise that it is “important to contribute to giving full effect to [the] statutory authority” of the Prosecutor over the management and administration of all resources of his or her Office as provided in Article 42 of the Statute.²⁷ Between 29 November 2002 and 2 April 2003, 85 experts were invited to “prepare some thoughts in writing relevant to the establishment and operation of the ICC Office of the Prosecutor for the benefit of the future ICC chief prosecutor. [...] In this way the chief prosecutor will be presented with written input prepared by key experts with relevant experience in a neutral and objective manner, at a time when he or she is likely to be approached from many sides”.²⁸ Of the experts invited, as many as 42 submitted papers, 41 of which are reproduced as Chapters 2 to 42 in Part 1 of this book. Among these authors are the leading practitioners and experts on questions linked to the investigation and prosecution of core international crimes in 2002–2003. It is quite an extraordinary assemblage of advisers whose combined experience exceeds that of any one prosecutor. Their preparation and submission of papers amount to a *de facto* hearing process, pursuant to an invitation to write “on the subjects and issues of your choice relevant to one or more aspects of the powers of the ICC chief prosecutor (and their exercise)”,²⁹ with individualised suggestions

²⁷ From communication addressed to the late Mr. Christopher K. Hall, one of the experts involved, dated 24 February 2003. As stated earlier in this chapter, after 1 November 2002, the preparatory team acted through the Director of Common Services, Judge Cathala, in terms of written communications concerning new activities such as this expert consultation process.

²⁸ *Ibid.*

²⁹ *Ibid.*

for specific topics based on the profile of the expert. “Differences of views in the submissions received or, alternatively, corroboration of views through like-minded observations by two or more experts”³⁰ were encouraged, as that would “simply be beneficial to the future chief prosecutor. It will illustrate the complexity of the challenge before him or her”.³¹ As they came in, I carefully read every chapter. The wealth of advice offered was duly presented as a whole, and in various distilled ways, to the first ICC Prosecutor upon his election. The chapters have been organised in three sections in Part 1 of this volume. We have developed quite a detailed table of contents and index to help readers make use of this wealth of thinking. My co-editors and I are particularly concerned that actors who are engaged in building capacity to document, investigate and prosecute core international crimes in domestic jurisdictions, especially in materially less resourceful countries, benefit from this potential guidance, among other available resources.

Third, the preparatory team established an expert consultation group in January 2003 on “Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation”. This concerned the risk linked to the weak fact-finding powers of the ICC Office of the Prosecutor described in section 1.3.7. above. Chapter 44 below discusses the background to this activity, the mandate and composition of the expert group, its work processes, and main issues addressed by its report. Among its suggestions were the establishment of a capacity akin to the Jurisdiction, Complementarity and Cooperation Division, and the active use by the Office of the Prosecutor of memoranda of understanding to enhance the fact-finding powers of the Office. The report has had a significant impact on practice.

The third expert group process set up by the preparatory team concerned the “Principle of Complementarity in Practice”. This refers in part to the risk discussed in section 1.3.8. on high expectations, perceived impunity gaps, and the need to give proper effect to and strengthen national investigation and prosecution of core international crimes. Chapter 45 discusses this process and the main issues involved. The internal coordinator of the work of the group joined the Jurisdiction, Complementarity and Cooperation Division as its senior legal expert at the time the re-

³⁰ *Ibid.*

³¹ *Ibid.*

port was completed, and another group member served as a consultant-adviser to the Division and Office more broadly for quite some time. The report could hardly have had greater impact of the Office's thinking on complementarity.

Part 3 of this volume contains two chapters on regulatory instruments. Chapter 46 concerns the draft Regulations of the ICC Office of the Prosecutor, prepared by a further expert group set up by the preparatory team, based on a tentative draft drawn up by the team. Dr. Markus Benzinger, consultant-member of the preparatory team, did most of the work on the team's draft. An abridged version of the draft Regulations was adopted by the Prosecutor on 5 September 2003 as the Regulations *ad interim* of the Office of the Prosecutor (Annex 2 to Chapter 46). They were in force until 23 April 2009 when new Regulations were adopted. Chapter 46 discusses the statutory background and mandate of this expert group, how it relates to risk 1.3.5. above on perceived bias in the exercise of prosecutorial discretion (especially with regard to situation, case, incident, and crime selection and prioritisation), and how the draft Regulations, Regulations *ad interim*, and 2009 Regulations relate to each other. The author of the introduction to Chapter 46, Mr. Vasconcelos, was a member of the expert group on the draft Regulations, alongside the Chief Prosecutor of Norway and other eminent experts.

Chapter 47 concerns the draft Code of Conduct which the preparatory team crafted, in consultation with various experts. The draft Code was an integral part of the draft Regulations of the Office of the Prosecutor, but the first Prosecutor did not want to adopt a Code. As Chapter 47 shows, the Code of Conduct that was finally adopted by the second Prosecutor, Mme. Fatou Bensouda, on 5 September 2013 builds in large part on the draft Code from 2003. Mr. Nakhjavani, consultant-member of the preparatory team for the Office, did most of the drafting for the draft Code of Conduct. He is the author of Chapter 47.

Finally, Chapter 48 discusses the preparation of the first budgets of the ICC Office of the Prosecutor and their significance. The chapter considers how the budgets sought to mitigate risks such as those mentioned in sections 1.3.4. and, to a certain extent, 1.3.2. and 1.3.3. above. Co-editor Mr. Rackwitz became responsible for the preparation of a number of budgets of the Office from the second budget onwards. He has co-authored the introduction to Chapter 48. As mentioned in section 1.1. above, the first budget of the Office was prepared by the present writer,

prior to the establishment of the preparatory team and even the ICC Advance Team, and neither team ever proposed an institutional design or structure for the Office.³² Chapter 48 explains which capacities the first budget sought to provide for, and to which extent the Prosecutor agreed. The budget was not a rigid blueprint; it simply met the requirements of specificity for budgets of international organisations, including by giving carefully considered and concise reasons for the proposals put forward.

In other words, the main activities of the preparatory team were closely related to the risk assessment we undertook in August 2002. They were not dictated by any actor outside the team or rigid, preconceived ideas. Rather, they were shaped by a commonsensical, precautionary analysis of risks. We tried to achieve as much as possible, and to draw on the best minds available at the time. Figure 4 shows the conceptualisation of the work processes of the preparatory team.

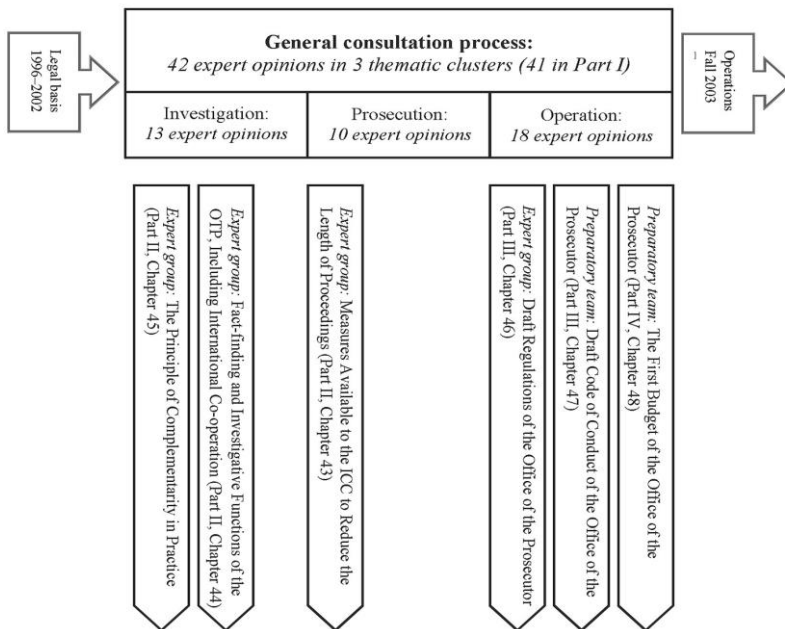


Figure 4: The conceptualisation of the 2002–2003 expert consultation processes and work products of the preparatory team.

³² As mentioned earlier, Professor Jens Meierhenrich had obviously not been correctly informed on this matter when he wrote his book chapter on the evolution of the Office, see *supra* note 8.

1.5. From Early Institutional Construction, to Institutional Practice and the Study of Institutional Behaviour

The front of the dust jacket of this book was chosen as an illustration of how the preparatory team for the ICC Office of the Prosecutor understood its own role. It shows a construction site just outside Hamarikyu Gardens in central Tokyo, where a team of workers is engaged in careful quality control of the steel reinforcement of the ground floor of a new, earthquake-resistant building whose foundations are meticulously thought through. Similarly, the 2002–2003 preparatory team was deployed after the foundations of the Court had already been made from 1996 to 2002 by the states and civil society actors that participated in the assiduous processes of drafting and adopting the ICC Statute, Rules of Procedure and Evidence, and Elements of Crimes document. If you like, the team’s modest task was to check the steel reinforcement of the ground floor, to ensure that risks and deficiencies were uncovered and addressed, before concrete would be poured following the swearing-in of the first Prosecutor. The picture on the back of the dust jacket shows the opposite scenario: an enchanting Dutch pavement being made by tilted bricks in the fish-bone pattern, built on a foundation of fluffy sand, just a few hundred metres from the interim seat used by the ICC until 2015. Like the workers on the Hamarikyu site, the preparatory team aspired to contribute to as solid foundations of the Court as possible, without in any way exaggerating our role. Building on sand was simply inconceivable to us.

How did it go? Immediately after his election by the ICC Assembly of States Parties on 21 April 2003, Prosecutor-elect Moreno Ocampo referred several times to the work done by the preparatory team as a “miracle”, and he described the start-up team as his “dream team” (Judge Silvia Fernández de Gurmendi, himself and the present writer), also at the press conference at the United Nations Headquarters following his election. He invited Judge Fernández de Gurmendi and myself for a pleasant three-day retreat at his house in Cambridge outside Boston immediately after his election, at which time we discussed informally a string of strategic and organisational questions.³³ He requested the preparatory team to complete

³³ At one stage, the Prosecutor-elect and I were enjoying a spring moment on the porch of his house in Cambridge, and I was prodded to articulate my most central advice to him. I responded that the first ICC Prosecutor should do everything in his power not to be seen as seeking the protection or favour of any government in particular. I maintained that, in my considered opinion, we had reached a level of evolution of international criminal justice

all work it had started, and the results were fed to him in unabridged and abridged versions until the final report on complementarity in practice was finalised in November 2003. He requested that the materials be made available online in connection with the public hearings organised in the Peace Palace on 17–18 June 2003, and for the general purpose of receiving further feedback from experts and members of the public. The team showed due diligence in completing what it had started, and in communicating the outcome in practical formats.

It is difficult to precisely measure the impact of the work of the preparatory team on the Office of the Prosecutor. It is for future historians to do that. What we can say is that the experts engaged by the team gave the Office a wellspring of practice-based, intellectual input, some of which is still fermenting in the Office's thinking and policy-making. Some work products only had an impact after many years: the Code of Conduct of the Office, which relies heavily on the draft prepared by the team, was only adopted by the second Prosecutor in 2013. Other contributions saw more immediate implementation: the Regulations *ad interim* were an abridged version of the draft Regulations, and the expert reports on complementarity and on fact-finding and state co-operation significantly shaped Office practice. The important, near-invisible work done on vital human resources instruments such as job descriptions and vacancy announcements set the standards that were mostly followed in later practice. Overall, the Prosecutor seemed more content than we could have expected. The mood in the Office was very positive during the summer of 2003. The Office was embraced by the human warmth and outstanding social skills of the Prosecutor.

The situation started to change in late September 2003. The first highly qualified colleagues left the Office of the Prosecutor that autumn and in 2004, leading to a broader exodus of top professionals from the Office in the subsequent years on a scale unprecedented in the history of international criminal justice. Among the professionals who left the Office at the time were Dr. Markus Benzing, Mr. Gilbert Bitti, Dr. Serge Brammertz, Mr. Ewan Brown, Mr. Andrew T. Cayley, Dr. Sangkul Kim, Mr.

where it would be possible for the ICC Prosecutor to treat all States Parties equally, and to give governments the sense of predictability that some of them may be seeking through outstanding professionalism, consistency, transparency and even-handedness in the actual work of the Office. The advice corresponded to the risk described in section 1.3.1. above. The Prosecutor-elect seemed to listen attentively.

Bernard Lavigne, Ms. Paula Matilda, Ms. Aurelie Merle, Mr. Salim A. Nakhjavani, Mr. Peter Nath, Mr. Eliseo Neumann, Mr. Peter Nicholson, Professor Christian A. Nielsen, Mr. Enrique Carnero Rojo, Mr. Christian Palme, Professor Darryl Robinson, Mr. Nicolas Sebire, Mr. Paul Seils, Dr. William H. Wiley, Mr. Ekkehard Withopf and Mr. Martin Witteveen.³⁴ Those who departed were from a wide diversity of backgrounds.³⁵

This chapter does not require that I add further details on this most unfortunate exodus. This book is not about what transpired within the ICC Office of the Prosecutor from 2004 onwards. That is another story yet to be articulated in a balanced manner. A history of the Office will be written, hopefully by fair-minded persons who are not themselves instrumentalised, and without a leading role being played by Prosecutors in the writing projects.³⁶ The previous paragraph is required to place the work of the preparatory team – the object of study of this volume – in a realistic context. That is the sole purpose of its inclusion.

³⁴ I have never publicly disclosed the circumstances leading to my own departure from the Court on 31 December 2005. I decided to leave in late September 2003, when observing the response of the Prosecutor to a detailed report submitted to him by Dr. Guido Hildner (then Chief of Human Resources of the Court), Mr. Gilbert Bitti and me, dated 21 September 2003. This matter – a critical juncture in the evolution of the ICC Office of the Prosecutor – constitutes the first and last disagreement between the Prosecutor and me during my time at the ICC. It is correct, as Dr. Alexander Muller states in his Foreword to this book, that I decided to leave out of concern to preserve my integrity. The leaders of Registry and several judges, as well as some key external stakeholders of the Court, asked me to stay on for some time as the Office was at the most sensitive phase of its establishment. I decided to do so for two years. When I commenced my position as Senior Researcher at the Peace Research Institute Oslo (PRIO) on 1 January 2006, the position had been on hold for me for more than one year. Professor Jens Meierhenrich makes a double error of fact when he says that I left the Court in October 2003, and that my departure was linked to the creation of the Jurisdiction, Complementarity and Cooperation Division (see Meierhenrich, 2015, p. 106, *supra* note 8).

³⁵ It is therefore not correct to explain the departures by reference to cultural differences, as one well-intentioned civil society defender of the Court did at the time.

³⁶ In the preparation of this volume, the co-editors have made sure to avoid discussions with the ICC Office of the Prosecutor about its contents, subject-matter or positions. As regards the chapters written by persons who were members of the Office when the book was finalised in 2017 – Mr. Xabier Agirre (Chapter 2), Dr. Fabricio Guariglia (Chapter 16), and Mr. James K. Stewart (Chapter 35) – their chapters were written in 2003 when they were not members of the Office, and we have communicated individually with each one of them directly about the editing of their chapters, not with the Office. The 2015 anthology *The First Global Prosecutor: Promise and Constraints. Law, Meaning, and Violence* takes a very different approach, where, according to his “Prologue”, Mr. Moreno Ocampo was involved in the project leading to the book over a three-year period (see *supra* note 8, pp. 3–4).

But I realise that the paragraph may have other, unintended consequences. A number of former colleagues in the ICC Office of the Prosecutor have confided in me a sense of fear – even shedding tears in my presence – at what they have described as intimidation. If the paragraph above resonates with them and provides some relief, then I think that would be a welcome side-effect, also for the Office itself and its relationship with colleagues who helped to build it. This would be in the interest of the moral standing of the Office. It should also be in the interest of those professionals who chose not to leave the Office during the critical years or who have joined it later, whose legacy may have become dimmed by perceptions of opportunism or wavering integrity. Such perceptions in the community of peers outside the Court would be unfair to those who worked hard to uphold basic standards of professionalism and helped the Office through the difficult period.

By the time of writing in March 2017, Prosecutor Bensouda had put in place a leadership team that was seeking to rectify the situation within the Office. Her efforts seemed to have had conciliatory effects within the Court and *vis-à-vis* some exacting but sincere States Parties. But the Office also needs to reconcile with those highly competent professionals who were part of the unprecedented exodus described above. Without truthful acknowledgment, trust in the Office will not be fully restored. Only then can the Office come fully to terms with itself.

Looking back at our risk assessment in August 2002 – which informed the work of the preparatory team – how did its predictions hold up during 2004 to 2012? Figure 5 attempts to map the relevancy and weight of the same eight risks identified in August 2002. It shows a different map, where most of the risks have less importance, except the length of proceedings. But three risks which we had not foreseen in the preparatory team – or during the ICC negotiations of Article 42 and other provisions of the Statute for that matter – feature prominently: the problem of inadequate leadership of an institution as fundamentally important to the international legal order as the ICC Office of the Prosecutor; its corrosive effect on trust in the Office (also among judges of the Court, who in some periods would rule against the Office on almost every third motion); and its negative consequences for the organisational culture of the Office. The

second Prosecutor has since 2012 made significant progress in overcoming these problems.³⁷

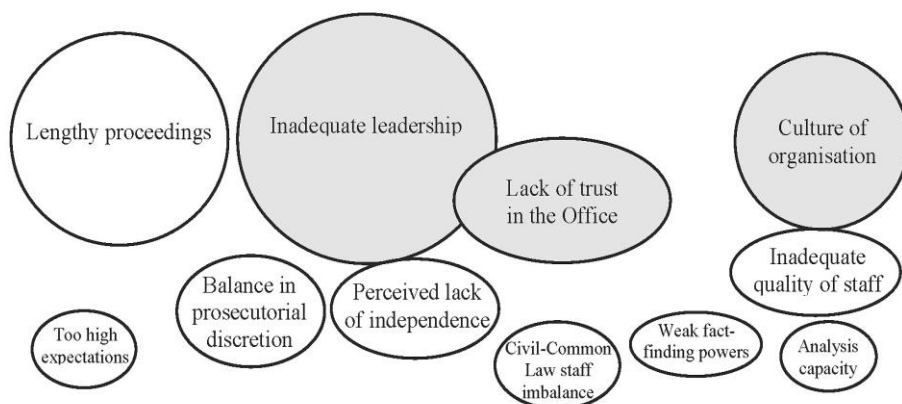


Figure 5: Actual risks faced by the ICC Office of the Prosecutor during 2004–2012. Risks not foreseen by the preparatory team for the Office are in grey.

This begs the question how this could happen. The birth and making of the ICC Office of the Prosecutor lends itself well to deeper studies of the limits of international law and organisations. It is an intriguing case study of the sharp contrast between the elaborate legal infrastructure of the ICC and the limitations of those individuals who were elected to first run the Court. On the one hand, the legal infrastructure was developed through a massive, collective effort of the international community. On the other hand, the first Prosecutor of the Court was elected in an almost careless manner. The legal infrastructure and the idea of the Court speak to the noble aspirations of individuals, civil society actors and governments around the world. These aspirations have so far been let down. Why does the international community allow such a fundamental contrast between the making of the law and the making of the institution to occur? Are we really unable to reduce this contrast? The law on institutions such

³⁷ Professor Jens Meierhenrich places this in a political science context: “The long and winding road of institutional development in the OTP has given rise to virtuous as well as pathological dynamics in the investigation and prosecution of international crimes. Or, to use the language of political science, the downstream effects of institutional development in the early stages of the OTP have substantially increased the costs of institutional adaptation in more recent years. Over the next decade, Bensouda will have to contend with these costs” (see Meierhenrich, 2015, p. 98, *supra* note 8).

as the ICC contains standards of requisite integrity. Are these standards taken seriously enough when constructing international organisations, international criminal jurisdictions included?

To address these questions properly, our knowledge-base on the organisations in question needs to be sound. The very limited work done on the early history of the ICC Office of the Prosecutor has been interesting for me to read, although it deserves to have had better access to accurate and more adequate information.³⁸ The promising sub-discipline of history of international criminal law should include in its scope international justice institutions, not just the decisions they produce, treaties and other sources of international criminal law.³⁹ This volume is only a tentative beginning of a history on the birth of the ICC Office of the Prosecutor in 2002–2003. It will hopefully encourage others to make more detailed and profound contributions in years to come, based in part on further analysis of materials contained in this book and some of the other materials that remain untapped. Time permitting, there may also be a second, expanded edition of this volume. Professor Jens Meierhenrich wisely recognises in his book chapter on the evolution of the Office of the Prosecutor, that “[f]uture research is required – preferably on the ground, not from hundreds of thousands of miles away – on the *specific* paths or trajectories down which the OTP travelled during the first decade of its operation”.⁴⁰

As he seems to recognise, the study of the behaviour of the international criminal justice institutions is just as important as their history. We need a sociology of international criminal justice. Not only is international criminal justice strong enough to withstand the kind of scrutiny that sociology of law requires, but the institutions can benefit greatly from serious

³⁸ I enjoyed Professor Meierhenrich’s chapter, 2015, see *supra* note 8, despite its factual errors and gaps concerning the time period of 2002–2003, surely caused by lack of access to relevant materials at the time of writing.

³⁹ *Historical Origins of International Criminal Law: Volumes 1–4* do contain several chapters on the contributions made by institutions to the development of international criminal law, but with an emphasis on the doctrinal development of the discipline of international criminal law. The historical study of the institutions of international criminal justice called for here goes wider. The inclusion of this book as Volume 5 in the series *Historical Origins of International Criminal Law* signals a willingness to make an initial contribution towards addressing this lacuna in the literature.

⁴⁰ Meierhenrich, 2015, pp. 122–23, see *supra* note 8. Perhaps he should suggest a second edition of the anthology in which his chapter appears, to correct some of its fact-sensitive errors (which undermine his otherwise important contribution).

research on patterns in the power relations in and around the courts in question, in the country- and social-backgrounds of those who serve the institutions, and in decisions made by judges and prosecutors. Such scholarship is the converse of tabloidised exposure of individual failures or scandals, which may not help institutions or their main stakeholders to affect real change. Durable sociology of law goes deeper and can generate insights that help us to improve the institutions. A follow-up project to this volume is concerned with exactly that.

1.6. Hammarskjöld, Integrity and the Election of Prosecutors

For the more immediate horizon, I reiterate the common wish of the three co-editors that this book will help those who are engaged in developing national capacity to investigate and prosecute core international crimes. They face many practical and resource constraints, and they need all the support they can get. This book gives them access to the thinking of more than 50 leading practitioners and experts from around the world, who all advised the construction of the ICC Office of the Prosecutor. Some of the features of that Office are unique and do not correspond to the jurisdictional and political realities of national criminal justice. But the overwhelming majority of the advice offered concerns issues specific to criminal justice for core international crimes or has some general applicability in fact-rich cases. The index should guide users quickly to issues of interest, and the table of contents also gives a subject-matter overview of what the book contains. The chapters on the group-expert reports, the draft Regulations and Code of Conduct, and the first budget of the ICC Office of the Prosecutor all contain an introduction that identifies the main issues involved in the report or governance document in question. As explained above, Chapter 43 concerns the principle of complementarity in practice and it touches the idea of ‘positive complementarity’. In a sense, one of the two objectives of the co-editors of this book is exactly to make a modest contribution towards so-called positive complementarity or facilitation of national capacity development.

We are fortunate to co-edit texts written by distinguished practitioners and experts, colleagues who have not only made sacrifices to keep the wheels of justice turning in different jurisdictions, but who are behind the main war crimes cases prosecuted in recent decades. Part 1 is really the combined product of this circle of peers.

Indeed, one of the main rewards of my service to the ICC was to work with the colleagues first in the preparatory team for the Office of the Prosecutor and then in the Legal Advisory Section of the Office.⁴¹ I have already mentioned my co-editor Mr. Rackwitz, with whom I had the pleasure of working for the duration of my time at the Court, and Dr. Benzing and Mr. Nakhjavani, two younger and highly intelligent lawyers. Other colleagues in the Legal Advisory Section during 2003–2005 included Dr. Claudia Angermaier, Mr. Gilbert Bitti, Mr. Enrique Carnero Rojo, Dr. Sangkul Kim, Dr. Philippa Webb and Ms. Anna Wijsman-Ivanovitch, and a solid group of interns from around the world.⁴² Between 2003 and 31 December 2005, the small team of the Section had, among other results, drafted 73 memoranda,⁴³ completed the first version of the Legal Tools,⁴⁴ and implemented a training programme of 40 guest lectures at the Office of the Prosecutor.⁴⁵

⁴¹ As mentioned above, the author was the Senior Legal Adviser and Chief of the Legal Advisory Section until 31 December 2005.

⁴² During this period, the Section benefited from working with 50 Law Clerks from more than 30 countries, including Brazil, Cambodia, Egypt, Ghana, India, Indonesia, Japan, Mexico, Russia, South Korea, Sri Lanka and Uzbekistan. The gender representation was 54 per cent female and 46 per cent male. Half the Clerks had a civil law background, 35 per cent common law, and 15 per cent possessed trans-systemic expertise. Many of these Law Clerks have moved on to become leaders in the field of international criminal law and justice.

⁴³ These included 38 memoranda of law and 35 other memoranda, amounting to almost 700 pages. The legal memoranda touched on the full range of legal issues before the Office of the Prosecutor during this period. A number of interesting questions were subjected to analysis. Academia would find this an interesting resource if it were made available.

⁴⁴ This included the alpha version of the Case Matrix application, rudimentary Elements and Means of Proof Digests, and a Proceedings Commentary. All but the Proceedings Commentary have later been made public and have attracted large user-communities. The Proceedings Commentary covered pre-trial proceedings and certain procedural issues that arise at various stages of proceedings. It consisted of in-depth analyses of articles, rules and regulations relevant to the proceedings of the Court. It adopted an impartial approach in the analysis of the provisions, so that, if differing interpretations of a provision existed, all of them would be reflected in the text. In particular, Mr. Bitti, Dr. Angermaier and Mr. Carnero Rojo worked on this tool. By 31 December 2005, it was recognised within the ICC Office of the Prosecutor that the Legal Tools should be made available to the general public, as most people do not have access to the privileged resource environment of the Court. For more information on the ICC Legal Tools Project, see Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, Torkel Opsahl Academic EPublisher, Oslo, 2011, 572 pp. (<http://www.legal-tools.org/doc/2cc0e3/>).

⁴⁵ The Legal Advisory Section created a Guest Lecture Series to attract distinguished academics and practitioners in relevant fields to facilitate the exchange of views between

In my remarks at a farewell dinner hosted by the Norwegian Ambassador to the Netherlands in December 2005, on the occasion of my departure from the ICC and The Hague, I quoted Mr. Dag Hammarskjöld: “Be grateful as your deeds become less and less associated with your name, as your feet ever more lightly tread the earth”.⁴⁶ The words were sincerely felt, not self-congratulatory. Why are they relevant to this chapter? They were written by an economist and former politician who at the time of writing had been United Nations Secretary-General for three years. Capturing the value of detachment, the sentence concerns the deeper purpose of international civil service – but are we fully conscious of its relevance? Mr. Hammarskjöld did write about integrity in ways that are closer to the conflicts of interest we discuss when we occasionally touch upon the subject of integrity in the daily practice of international organisations: “if integrity in the sense of respect for law and respect for truth were to drive him into positions of conflict with this or that interest, then that conflict is a sign of his neutrality and not of his failure to observe neutrality – then it is in line, not in conflict, with his duties as an international civil servant”.⁴⁷ This is directly relevant to the risk of perceived

Court members from all organs and external experts on topics relevant to the work of the Court, thereby providing a common learning environment beneficial to the whole Court. The lectures covered a broad range of issues, from theoretical topics of international criminal law to more practical matters related to the investigation and prosecution of core international crimes. Among the guest lecturers were Professor Philip Allott, Professor Kai Ambos, Justice Louise Arbour, Professor M. Chérif Bassiouni, Emeritus Professor Theo van Boven, Professor Sydney M. Cone III, Professor Eric David, Professor Mireille Delmas-Marty, Professor John Dugard, Judge Chile Eboe-Osuji, Professor George P. Fletcher, Justice Hassan B. Jallow, Professor Emeritus Frits Kalshoven, Professor Martti Koskeniemi, Professor LIU Renwen, Mr. Ken Macdonald QC, Professor Allison Marston Danner, Judge Theodor Meron, Professor Daniel Nsereko, Professor Diane F. Orentlicher, Colonel William K. Lietzau, Sir Geoffrey Nice QC, Professor Philippe Sands QC, Professor James Silk and Dr. Patrick J. Treanor. I was impressed by the anticipation and respect many of these eminent experts displayed towards the Court in connection with their guest lecture. It was a valuable reminder of the extent of trust placed in an international organisation such as the ICC, and the corresponding responsibility of its high officials and staff not to betray this trust which is, at one and the same time, the guardian of the Court and the adjudicator of its legitimacy.

⁴⁶ Dag Hammarskjöld, *Markings*, Ballantine Books, New York, 1983, p. 125. The quoted entry is dated 31 December 1956. The Swedish original – *Vägmärken* – was first published by Albert Bonniers Förlag AB in 1963. Dag Hammarskjöld was Secretary-General of the United Nations Organisation from 1953 to 1961.

⁴⁷ Dag Hammarskjöld, quoted in W.H. Auden, “Foreword”, in *ibid.*, p. xviii.

lack of independence in dealings with governments, as discussed in section 1.3.1 above.

But this was only the starting point of Mr. Hammarskjöld's understanding of integrity in international civil servants. He saw service as "self-oblivion", as striving towards "an unhesitant fulfilment of duty".⁴⁸ When a team of international civil servants recognises this higher dimension of the customary requirement of "persons of high moral character",⁴⁹ it leaves no stone unturned to make the foundations of their organisation as strong as possible. Such recognition creates a sense of unity of purpose, reducing the energy and time spent on conflict. Power is perceived more as the cumulative efforts of the team and the results they yield, rather than a personal stick to wield. This was the situation in the preparatory team for the ICC Office of the Prosecutor and during the first months of the life of the Office. This was the situation during the first years of operation of the Office of the Prosecutor of the ex-Yugoslavia Tribunal.⁵⁰ This is how the United Nations Organisation was built during difficult years in the late 1940s and 1950s. Mr. Hammarskjöld provided a credible moral leadership to the Organisation, combined with high competence and extensive practical experience.

If States Parties do not elect persons of adequate integrity, a young international organisation may be stillborn for many years and taxpayers' money may be wasted before it meets basic expectations of functionality. Even if a government doubts the integrity of a candidate for Prosecutor of the International Criminal Court, it may still be tempted to back him if it predicts that he will be sympathetic to its interests, perhaps out of indebtedness for being elected or established co-operation over some years. Worse, a government may possess information that the candidate does not have the requisite integrity, but nevertheless support him – or fail to raise objections when his candidacy is discussed – because it expects that he will be weak or compromised and therefore a pliant instrument should its

⁴⁸ *Ibid.*, p. vii.

⁴⁹ Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001 ('ICC Statute') Article 42(3) (<http://www.legal-tools.org/doc/7b9af9/>).

⁵⁰ That Office not only enjoyed well-known leaders such as Chief Prosecutor Richard J. Goldstone (see Chapter 38 below), but it was guided by unassuming giants of the practice of international criminal justice such as Mr. Terree A. Bowers, Mr. Mark B. Harmon (Chapter 21), Ms. Teresa McHenry, Mr. John Ralston (Chapter 5) and Dr. Patrick J. Treanor (Chapter 4).

interests become threatened during his term. Both modes of thinking are short-sighted. In effect, both make a mockery of the statutory requirements of “high moral character”,⁵¹ “integrity”⁵² and “the highest standards of [...] integrity”.⁵³ If States Parties do not take these standards for what they are – binding legal requirements – we cannot expect that the high officials of international organisations like the International Criminal Court will give them proper effect when they fill the organisation with staff. If we want international organisations to work according to their design, ethics cannot be an afterthought in their construction and management.

⁵¹ ICC Statute, Articles 36(3)(a) and 43(3), see *supra* note 49.

⁵² *Ibid.*, Article 36(3)(a).

⁵³ *Ibid.*, Article 44(2).

Part 1

Building Capacity to Investigate and Prosecute Core International Crimes

Section 1: Investigation

The Role of Analysis Capacity

Xabier Agirre*

2.1. Introduction

On 2 December 2002 I was kindly invited by the Director of Common Services to submit a contribution on areas of my expertise for the benefit of the Prosecutor of the International Criminal Court ('ICC').¹ I am pleased to respond to this invitation by way of the present memorandum on the role of analysis in the investigation of war crimes, including a proposal for the functioning of the Analysis Section of the Office of the Prosecutor. This contribution is based on the experience of the author in the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), as well as different international investigations and training programmes, and the available specialised academic literature. As for the legal parameters considered, due attention has been paid to the ICC normative processes (Statute, Rules of Procedure and Ev-

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¹ Letter from Mr. Bruno Cathala, Director of Common Services, re. DCS/021202-3/mb.

idence, Elements of the Crimes, Budget for the First Financial Period) and the jurisprudence of the United Nations ('UN') *ad hoc* tribunals.²

The memorandum was intended exclusively for submission to the Prosecutor of the ICC and internal use within his or her office. Opinions are expressed in the private capacity of the author, and do not necessarily represent the views of the ICTY or the United Nations.

2.2. Basic Principles of Methodology for War Crimes Investigations³

Based on his experience at the Nuremberg proceedings of the International Military Tribunal, the American prosecutor Telford Taylor observed that the issue of war crimes “was far bigger and far more difficult of solution than anyone had anticipated” and “those who were dealing with the war crimes problems could not escape the conclusion that the root causes of the crimes were far deeper and more far-reaching than had been suspected”.⁴

The experience of contemporary prosecutions can only confirm that investigating crimes under international humanitarian law is far more complex and painstaking a duty than what public opinion and policy makers generally think when the call for justice is made.

A war crime may create the impression that, being a “big crime”, it must be easy to investigate, because of its mere size and blatant manifestation.⁵ This is conceptually wrong. Under the impression that “big is blatant”, the idea may arise that it is enough “to go out there” into the field and gather evidence. This is methodologically wrong. The criminal event in itself may be blatant, because of the large number of victims, perpetra-

² For a commentary by the author on similarities and differences between the UN *ad hoc* tribunals and the ICC, see Xabier Agirre, “Penalización Internacional de las Infracciones al DIH. La Experiencia de los Tribunales de Ruanda y Yugoslavia y el Surgimiento de la Corte Penal Internacional”, in A. Gómez Méndez (ed.), *Sentido y Contenidos del Sistema Penal en la Globalización*, Fiscalía General de la Nación, Bogotá, 2000.

³ Xabier Agirre, *Basic Principles for the Investigation and Prosecution of Crimes under International Humanitarian Law*, Kluwer Law International, 2003.

⁴ Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10*, US Government Printing Office, Washington, DC, 1949, pp. 104–5. Taylor was one of the US prosecutors at the International Military Tribunal in Nuremberg, and the chief of counsel (chief prosecutor) of the subsequent Nuremberg trials (12 trials held from 1946 to 1949).

⁵ “War crimes” is used as a synecdoche or figure of speech for crimes under international humanitarian law, comprising war crimes, crimes against humanity and genocide.

tors and resources involved, but not necessarily so for the individual responsibility, particularly for the responsibility of the higher echelons, which requires far more complex conceptual thinking and investigative effort. The greatest investigative challenges are not related to the occurrence of the crime as such, whose manifestation is typically blatant and notorious, but to the questions of causality and individual responsibility.⁶

Having a solid methodology of investigation is all the more important for crimes under international humanitarian law for various reasons. The very definition of the offence is often open to discussion. There are not only material elements of the crime to be proved but also jurisdictional elements, those that justify the intervention of international law. Domestic crimes are typified against the background of a given monopoly of violence, which is a defining element of the state (Max Weber), and implies the presumption that violence outside of that monopoly is illegal. In international humanitarian law such a presumption is not applicable; violence may or may not be illegal, depending on a range of factors that will need to be specifically investigated, analysed and proven beyond reasonable doubt.

As has been noted by experienced practitioners, “the differences between an international tribunal and state jurisdictions of criminal justice show themselves in almost every aspect of the investigatory and prosecutorial processes”.⁷ As the ICC Assembly of State Parties has indicated, the elements of the crimes under ICC jurisdiction “refer to systematic facts which differ fundamentally from the crime-specific facts with which criminal investigators normally work in national jurisdictions”.⁸ International jurisdictions have their own potential and shortcomings *vis-à-vis* national jurisdictions, which are summarised in Table 1.

⁶ For a commentary on the practical difficulties of war crimes investigations, see Morten Bergsmo and Michael J. Keegan, “Case Preparation for the ICTY”, in *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, Norwegian Institute of Human Rights, Oslo, 1997, ch. 10, particularly the sections “The process and organization of investigations” and “Some problems and issues encountered in the investigations”.

⁷ *Ibid.*, p. 4.

⁸ See International Criminal Court, Assembly of State Parties, Report, “Budget for the First Financial Period of the Court”, 3–10 September 2002, ICC-ASP/1/3, p. 270.

Stable domestic jurisdiction	International jurisdiction
Prompt notice of the criminal event	Delay in the notice and reaction
Immediate action and control of the scene of the crime	Operational and political difficulties to gain access to the scene of the crime
Seizure on the spot of the elements of evidence	Difficulties in seizing the means of the crime, physical evidence
Direct identification and summons of witnesses through official records and channels	Difficulties in identifying witnesses and summon them
Longstanding, stable jurisdictional framework	Innovative, developing jurisdictional framework
Support of a state, as a permanent, stable political structure	Varying degree of political support, depending on the state and the juncture

Table 1: Domestic and International Jurisdictions.

International jurisdictions are not triggered because they are *per se* better than national jurisdictions, but because they may actually be the only alternative to impunity in cases when the national systems are unable or unwilling to fulfil their obligations. In principle, the national institutions may be in a better position to conduct the investigations, due to their closer access to the facts and their context of meaning, their knowledge of the language, the society and the available resources. Nevertheless, dysfunction in the systems of investigation and judicial adjudication are usually inherent to the context that where the crime originated. If the crime occurred precisely because the state structures, including the judiciary, were not performing their functions or were actively involved in the crime, domestic investigations may not be an option.

**2.2.1. Investigations Management and the Operations
– Analysis Tension**

The complexity of war crimes investigation is rarely understood and foreseen, which may necessitate a constant adjustment and revision of the plans. Speaking about the subsequent Nuremberg proceedings, Taylor explained that “all of the trials took considerably longer than I or my colleagues has estimated and this, of course, meant that fewer individuals

were brought to trial”.⁹ Because of “budgetary and time limitations, and particularly the difficulty of obtaining enough additional judges to try six more cases”, by the summer of 1947 it was clear that the programme had to be “scaled downwards”.¹⁰ Five decades later the United Nations *ad hoc* tribunals have faced similar difficulties.

War crimes proceedings require strategies of investigation of the highest cost-efficiency because of the sheer scale of the matter and the very limited resources available. Procedural economy, so as to optimise the procedural benefit of every project and every piece of evidence, needs to be a primary guiding principle.

The management of limited investigation resources constantly calls for critical decisions. For example, organising an operation and travelling to the scene of a crime often mean that only a fraction of the witnesses that might be necessary can be interviewed because there are insufficient resources to interview them all. In such cases, the right choice of witnesses is likely to determine the quality of the findings and the success of the investigation.

It is also a common occurrence that different investigating officers, teams or prosecutors find themselves competing for limited resources. When putting their requests before higher managerial levels they may tend to exaggerate their case, or else they have difficulty assessing the broader needs and priorities. Such is the “syndrome of the selfish officer”, interested in the success of his or her case, where personal prestige is at stake, and reluctant to assume the restraint necessary for the success of the collective investigative effort. In order to make decisions of strategic value, such as choosing sources and deciding investigative priorities, systematic analysis of the context, the state of the evidence and the potential sources is indispensable.

2.2.1.1. The Investigation Cycle

The necessity of organising the investigation process by tasks and phases is evident, just as for any activity involving limited resources and a given purpose, and has been identified in different fields and theories of research.

⁹ Taylor, 1949, p. 76, *supra* note 4.

¹⁰ *Ibid.*, p. 81.

An early formulation of an investigative method was presented by Sherman Kent in 1949, when he proposed to apply the methodology of social sciences to intelligence research. In his view “truth is to be approached, if not attained through research guided by a systematic method”, and “in the social sciences which very largely constitute the subject matter of strategic intelligence, there is such a method”.¹¹ The method would operate like a cycle, consisting on “the development of new concepts from observations and that the new concepts in turn indicate and lead to new observations”.¹² Kent proposed seven methodological steps: 1) the appearance of the problem, either identified by the researcher or by demand of a client; 2) preliminary analysis of the reported problem, based on the available information; 3) collection of relevant data, either already available or to be newly acquired; 4) critical evaluation of the data; 5) formulation of hypotheses; 6) further collection of data to test “the more promising hypotheses”; 7) “establishment of one or more hypotheses as truer than others” and “presentation”.¹³

Subsequently, similar conceptions have gained currency in police and intelligence agencies under the name of “intelligence cycle”, such as British military intelligence (since the 1950s) and in Europol (formalised in the late 1990s) (see Table 2).¹⁴ The value of the intelligence cycle is to impose a logical discipline and standard procedure on the investigation process, so that the activity is carried out step by step, guaranteeing coherence in the findings and the use of resources. Nevertheless, it needs to be noted that the intelligence cycle has been conceived for intelligence and police agencies, and not for judicial bodies. In contrast to police or intelligence organisations, legal officers may have a leading role at every step of the process in judicial investigations; the whole exercise is committed to a trial and regulated by procedural law. The use of the very term ‘intelligence’ in a judicial setting may be misleading, since it is usually

¹¹ Sherman Kent, *Strategic Intelligence for American World Policy*, Princeton University Press, Princeton, NJ, 1949, p. 156.

¹² *Ibid.*, p. 157.

¹³ *Ibid.*, pp. 157–58.

¹⁴ For the British military model, see Don McDowell, *Strategic Intelligence: A Handbook for Practitioners, Managers and Users*, Istana Enterprises, Pambula, NSW, 1998, p. 18. For the Europol model, see Europol, *Analytical Guidelines*, Europol, The Hague, 1999, insert 2. For an advanced formulation of the intelligence cycle, see Howard Atkin, “Criminal Intelligence Analysis: A Scientific Perspective”, in *Journal of the International Association of Law Enforcement Intelligence Analysis*, 2000, vol. 13, no. 1, pp. 1–15.

understood as opposed to ‘evidence’ (a distinction that does not apply to the agencies that originated the intelligence cycle). Criminal proceedings, contrary to police and intelligence research, imply litigation, which has direct epistemological consequences. The dynamic of the litigation may affect the cycle, since evidence needs to be disclosed (disseminated) to the defence, and information may be collected at the latest stage of the cycle by submission from the defence. As a result, the particular features of judicial investigation would need to adapt the concept more appropriately called an investigation cycle.

	Kent	British Military Intelligence	Europol
1	Appearance of the problem	Task planning	Tasking
2	Preliminary analysis	Data collection	Data collection
3	Data collection	Data collation	Data evaluation
4	Data evaluation	Data evaluation	Data collation
5	Formulation of hypotheses	Integration, analysis, synthesis and interpretation	Analysis
6	Further data collection to test the hypotheses	Briefing and reporting	Dissemination
7	Definition of final hypotheses and presentation	Task review	

Table 2: The Intelligence Cycle.

Be as it may, an investigation cycle or similar discipline is indispensable, the alternative being the cycle of Sisyphus, condemned to repeat again and again the same effort *ad eternum*.

2.2.1.2. The Centrality of Analysis in Complex Investigations

The tension between operations and analysis is inherent to any criminal investigation. Operations are conceived to gather the evidence, and analy-

sis to evaluate and integrate it consistently in the case. The operations–analysis tension revolves around the basic question: do we have enough evidence? The only way to know or estimate if the collected evidence is sufficient is by analysing it systematically, which then prompts the subsequent question: do we need to wait until the analysis is completed to collect more evidence? Or, in other words: do we use our time and resources in analysing or in collecting? The answers to these questions depend on a number of factors, related to the complexity of the case, the type of evidence available, the phase of the investigation, and other issues that may be beyond the control of the investigative authority (such as given opportunities of co-operation or arrests of suspects).

Operations and analysis are two different kinds of activity, usually attributed to different types of specialised officers (investigators and analysts). To optimise the use of resources and successfully complete the investigation, it is essential to understand the requirements and dynamics of both operations and analysis, and to integrate them in the most coherent and mutually beneficial manner.

The relative importance of operations *vis-à-vis* analysis is related to the size and complexity of the event to be investigated. The investigation of domestic non-organised crime, with a limited number of victims and responsibility restricted to the direct executioners, may be relatively focused and straightforward, so that operations (along with forensic expertise) tend to prevail and be sufficiently conclusive, while analysis may play a supportive role of lesser importance.

More complex forms of criminality require a stronger component of analysis in the investigations. An overview of the analytical practice in investigations of non-organised crime suggests an average ratio of one analyst to twelve investigators or detectives, while “in agencies specialising in sophisticated crime, the ratio could be one analyst to five investigators”.¹⁵ By 2002 the ratio in ICTY’s Office of the Prosecutor was close to one analyst (comprising research officers, strategic, criminal and military analysts) to two investigators.

War crimes certainly belong in the category of the most “sophisticated crime”, particularly concerning superior responsibility, and call for

¹⁵ Marilyn B. Peterson, Leo M. Jacques and Ritchie A. Martinez, *Starting an Analytic Unit for Intelligence Led Policing*, International Association of Law Enforcement Intelligence Analysts, Lawrenceville, NJ, 2001.

a special rapport between operations and analysis, where the prevalence of the latter is essential for the efficient conduct of the former.

Based on the impressionistic view of war crimes as a “big and blatant” event, the imagination of the lay audience may be seduced by the picture of an investigation led by an operational strike force, as a sort of paratroop unit, moving hurriedly to the scene of the crime to respond to the crime and seize the evidence. Such a model may be attractive as it conveys an image of a tough and prompt response (like a military rapid reaction force), with an undeniable romantic, adventurous appeal. However, in the real world of war crimes investigations this approach implies serious risks.

Putting field operations at the forefront of the investigation tends to underestimate the fundamental importance of the legal and analytical criteria that need to be defined prior to the fact-finding mission. From the viewpoint of procedural and managerial cost-efficiency, an operations-led model is likely to result in a lack of focus and waste of resources. So, as it is not only very expensive to fly in the ‘paratroopers’ for possibly little useful result, it furthermore tends to develop an addiction to such an exciting and rewarding exercise. Travelling is an attractive prospect for most people, like any experienced manager knows. Travelling to the field allows one to meet new people and to see different places, and so it is often more interesting and rewarding than staying in the office long hours studying the evidentiary materials.

The *paratrooper syndrome* may cause a vicious circle, the antithesis of an effective investigative cycle: unfocused collection without proper analysis provokes notorious gaps in evidence and faulty hypotheses and allegations; the urge to fill the gaps of inadequate hypotheses leads to more collection, which often is merely reactive and of unclear evidentiary purpose; and the more operations and missions conducted, the more operational inertia and addiction is developed, in further detriment of proper analysis.

This scenario may lead to an investigative *cul-de-sac*, a situation where there is more information than is manageable, of lower quality than is needed. There is a risk of evidentiary hypertrophy: a situation in which an excessive volume of evidence may hamper or block the effective functioning of the investigative machinery. This would resemble certain tactics of disclosure *en bloc*, when one of the litigating parties presents its opponent with a submission that contains the relevant items within a mass

of irrelevant information, with the intended effect of imposing an extra burden of work upon the adversary. This is a sort of a sabotage or distraction tactic that one party may try to use against its adversary (jurisdiction permitting), but which the accusing party certainly should not inflict on itself through blind or indiscriminate gathering of evidence.

Additionally, such an approach betrays a shadow of neo-colonial bias, since it presumes that the investigator embodies a superior force, jumping on a region considered as a mere passive subject of his or her investigation, like a modern Dr. Livingstone, with large disregard of the local cultural and social resources.

The tension between operations and analysis reflects a dilemma common to any enterprise of learning, from the student tempted to keep gathering more and more paper as a way of dodging the hard study of the materials, to intelligence agencies driven by the inertia of gathering without being able to analyse what has been gathered. The problem is often that the investigating organisation “has invested heavily in improved collection systems while analysts lament the comparatively small sums devoted to enhancing analytical resources, improving analytical methods, or gaining better understanding of the cognitive process in making analytical judgements”.¹⁶

If the analogy of an army is to be used, a war crimes investigation force needs to work in a way closer to an intelligence cell than to a paratroop brigade. As a small group of highly trained professionals, methodologically sophisticated, able to process large amounts of information (often conflicting information) from different kinds of sources (of varying reliability), and to work with insiders from the targeted criminal group, while utilising advanced technological tools. This is essentially an analytical profile, and it must be central to the investigative effort.

The “centrality of analysis” is a concept that has been suggested based on experience in the fields of both intelligence and criminal investi-

¹⁶ Richards J. Heuer, “Cognitive Biases: Problems in Hindsight Analysis”, in *Studies in Intelligence*, 1978, vol. 22, no. 2, pp. 21–28, originally unclassified and published in H. Bradford Westerfield (ed.), *Inside CIA's Private World: Declassified Articles from the Agency's Internal Journal, 1955–1992*, Yale University Press, New Haven, 1995, pp. 333–43. For a comprehensive study see Richards J. Heuer, *Psychology of Intelligence Analysis*, Centre for the Study of Intelligence, Langley, VA, 1999.

gation.¹⁷ The controversy in the domain of intelligence between a traditional espionage model and a new analytical model resembles the tension between operations and analysis in criminal investigations. It was Sherman Kent who pioneered the idea of giving a central role to analysis, based on the experience of the Research and Analysis Branch of the Office of Strategic Services (‘OSS’). As Kent observed in 1949, in the investigation process “the difficulty is likely to lie not so much in gathering the raw data [...] as in evaluating the information correctly” and the bulk of the relevant knowledge shall be generated through “unromantic open-and-above-board observation and research”.¹⁸ In the field of criminal investigations, the development of analysis as a specialised discipline in the 1990s has established a trend “to move from a peripheral, support function to become the key central driving force of all policing”. The reasons for such a trend are related mainly to the growing complexity of criminal activity and the need to optimise limited investigative resources.¹⁹

An example of the need to update investigative strategies with a higher emphasis on analysis is provided by the changes adopted by the Federal Bureau of Investigation (‘FBI’) after the attacks of 11 September 2001. The failure of the US security agencies to prevent the attacks resulted in a broad discussion about their organisation and efficiency. It was observed that “information at the disposal of the services has been poorly analysed” and “the CIA and FBI are good machines for collecting information, but not to analyse it” or, in the words of a FBI agent, “we didn’t know what we knew”.²⁰ The director of the FBI acknowledged that “to be able to do the work of prevention and analysis that is necessary today, we need to integrate information much better than in the past”.²¹ Urged by public and congressional criticism, the FBI announced changes in doctrine and organisation to “substantially enhance analytical capabilities”, create a new Office of Intelligence with an advisory role and new Analyt-

¹⁷ See “The Centrality of Analysis” in Abram N. Shulsky and Gary J. Schmitt, *Silent warfare: Understanding the World of Intelligence*, Brassey’s, New York, 1993, pp. 179–84.

¹⁸ *Ibid.*, pp. 180–82.

¹⁹ See Atkin, 2000, p. 1, *supra* note 14. Atkin focuses on the development of criminal analysis in Britain in the period 1993–2000, and refers in support of this view to several cases.

²⁰ *Le Monde*, 16 June 2002.

²¹ *Ibid.*

ical Sections (parallel to the Operations Sections), and recruit some 400 new analysts.²²

Experience in war crimes investigations confirms that systematic analysis must be central for a successful and cost-efficient investigative cycle, in order to formulate sound factual hypotheses, to guide the collection effort accordingly, and to provide coherent interpretation of the collected evidence to the legal officers in charge.

2.2.2. Logic and Epistemology beyond Reasonable Doubt

Epistemology or the theory of knowledge, as one of the main branches of philosophy, has for centuries addressed the basic question of “how do we know”.²³ The methodology of war crimes investigation amounts to a type of applied science, consisting in the application of the scientific parameters of epistemology to a lower level of abstraction for the specific purposes of the criminal proceedings.

There is a certain kind of methodologically primitive view according to which simply “facts are out there to be discovered”, as if the items of evidence were physical objects that only admit one true weighting or measurement by a virtuous and “neutral” fact-finder. Such a view, which in terms of epistemology would be known as positivism or empiricism, should be carefully avoided.

The idea of the investigation starting from a pristine *tabula rasa* has been rightly dismissed from the viewpoint of criminal law as a plain “methodological illusion”.²⁴ It is a fallacious proposition because factual findings are always the result of legal and operational choices, further to a process of analysis and decision-making that needs to be duly addressed and regulated. What has been observed in reference to scientific method is equally valid for criminal investigations: “it is not only impossible to avoid a selective point of view, but also wholly undesirable to attempt to do so; for if we could do so, we should get not a more ‘objective’ descrip-

²² See presentation Robert Mueller, *FBI Strategic Focus*, Federal Bureau of Investigation, April 2002. The total “Intelligence Research Analyst Staffing” of the Counterterrorism Division before 11 September 2001 was 153 persons, and the objective announced for 2004 was 682.

²³ For an encyclopaedic overview on the matter, see Jacobo Muñoz and Julián Velarde, *Compendio de Epistemología*, Editorial Trotta, Madrid, 2000.

²⁴ Luigi Ferrajoli, *Derecho y razón: Teoría del garantismo penal*, Trotta, Madrid, 2001 (translation of the original in Italian, 1989), p. 57.

tion, but only a mere heap of entirely unconnected statements”.²⁵ Absent any pre-existing focus, the observer would be trapped in a meaningless *poussière de faits*.²⁶

Historically, credit for subduing positivism is due in particular to Immanuel Kant, who “gave up the untenable ideal of a science which is free from any kind of presuppositions”.²⁷ Instead, Kant explained that there are always premises that operate as tools for generating knowledge, which he called the “categorical apparatus”. The same applies to the knowledge of war crimes, where the investigation needs its own apparatus of normative and factual categories prior to any fact-finding effort. Such categories would consist in the legal elements that need to be proved (on jurisdiction, crime and liability), as well as the factual hypothesis derived from the original *notitia criminis* and contextual knowledge. These legal and factual *a priori* construed categories are indispensable, their primordial importance needs to be acknowledged, and their formulation as guiding principles is essential to avoid investigative miscarriage.

In addition to epistemology, the reasonable production of knowledge has been the subject matter of logic since the times of Aristotle. While epistemology tends to be a *material* discipline about how to apprehend a given matter, logic is a *formal* field about the coherence among formal statements. Logic is defined as the domain of reason and reasonable thinking, and Aristotle has been considered indeed “the inventor of logic”.²⁸

Since the objective of criminal proceeding is to establish facts on the strongest basis of reason “beyond a reasonable doubt”, the time-tested principles of logic become indispensable. There are three main tools of logical thinking known since Aristotle: *induction*, which is reasoning from the particular to the general; *deduction*, from the general proposition to the particular; and *analogy*, which is comparative thinking.

²⁵ Karl Popper, *The Open Society and its Enemies*, Princeton University Press, Princeton, NJ, 1994, p. 467.

²⁶ Using the expression of Maurice Merleau-Ponty, *Phénoménologie de la perception*, Gallimard, Paris, 1945, p. xiv.

²⁷ Popper, 1994, p. 421, see *supra* note 25.

²⁸ *Ibid.*, p. 1. Along with being the inventor of logic, Aristotle should be recognised as the inventor of analysis, as defined in his works *Analytica Protera* and *Analytica Hystera* (prior and posterior analysis).

2.2.2.1. Induction, Deduction and Prosecution

Based in his own experience, Taylor explained the logic of the Nuremberg investigations and proceedings as a combination of induction and deduction. On the one hand, the prosecutor developed an “inductive process” based on the “collection and analysis of evidence”, since the existence of incriminating evidence was *conditio sine qua non* and primary basis for indictment.²⁹ On the other hand, deductive criteria were used to decide the scope and meaning of the evidence. In his own words:

One might assume that the selection of defendants would be governed entirely by “what the evidence showed”, but in fact the problem was not so simple as all that. The available ‘evidence’ of all kinds was infinitely vast and varied, and we could not possibly scan more than a small fraction of it. It was necessary, therefore, to approach the problem of evidence collection with some preconceptions and according to a plan. In short, it was necessary to use *deductive* as well as *inductive* methods of investigation. Accordingly, all professional staff members were expected to familiarize themselves as rapidly as possible with the organization and functioning of that particular part of the Reich with which the staff member in question was most immediately concerned. In addition, a special section was set up to compile a sort of register or “Who’s Who” of leading German politicians, civil servants, military men, business men, etc. From these studies one could draw tentative *a priori* conclusions with respect to the *locus* of responsibility for the crimes and atrocities known to have been committed. It goes without saying that these conclusions were subject to constant revision and check as more evidence came to light. The deductive and inductive methods supplemented and complemented each other. Tentative conclusions reached by deduction from a general knowledge of the structure of the Third Reich provided a guide in approaching the formidable mass of detailed evidence. As the evidence was collected and analyzed, new and more accurate light was shed upon the general organization of German government and business which, in turn enabled us to draw up new and more precise conclusions and inferences.³⁰

²⁹ Taylor, 1949, pp. 74–75, see *supra* note 4.

³⁰ Taylor, 1949, p. 75, *supra* note 4.

The “preconceptions” that the members of the prosecution team used to “familiarise” themselves with the matter were delivered by “a number of able and learned experts on the Third Reich” recruited by the Research and Analysis Branch of the OSS, notably Raphael Lemkin and Franz Neumann.³¹ The contribution of Lemkin, conveyed in his treatise *Axis Rule in Occupied Europe* (1944), focused on the law, with a compendium of Nazi discriminatory legislation, as well as the initial definition and proposal of the term “genocide”.³² Neumann was a lawyer and social scientist, a member of the Frankfurt School, and senior analyst in the Research and Analysis Branch of the OSS. His classic study of the Nazi state, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (1944) is a study belonging to the field of political science.³³

Both Lemkin and Neumann, as Taylor acknowledged, are paradigmatic examples of the importance of political analysis in war crimes prosecutions, an issue to be further discussed in detail below.



Figure 1: Franz Neumann (1900–1954).

³¹ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Alfred A. Knopf, New York, 1992, p. 49.

³² Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington, DC, 1944. For the definition of genocide, see pp. 79–95.

³³ Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944*, Oxford University Press, Oxford, 1944.

2.2.3. Objectivity: Individual and Organisational Safeguards

While the principles of epistemology and logic constitute the basic tools for constructing investigative objectivity, specific safeguards are needed both at the individual and organisational levels.

First, individually, each person involved in the investigation process needs to be committed to objective behaviour and methodological rigour, as a matter of professional ethics and discipline. The main individual safeguards for objectivity include: self-consciousness, restraint, distance, dialectic reasoning and corroboration.

Self-consciousness. Like the classic aphorism *gnothi seauton* (“know thyself”, written at the entrance of the oracle of Delphi), self-consciousness is a requirement for objectivity: it is necessary to be aware of one’s own personal and educational background to observe its influence on the shaping of perception.³⁴ Each individual “must strive for reasoned and impartial analysis”, bearing in mind that “policing their inescapable irrationalities is a twenty-four-hours-per-day task”, since the professionals in the field “are supposed to have more training in the techniques of guarding against their own intellectual frailties” than the lay observer.³⁵

Restraint. Overconfidence – excessive faith in your own ability to understand information correctly – is a very common phenomenon in any professional field, criminal investigations not being an exception. Research in cognitive psychology indicates a recurrent trend of shaping the memory of performance exaggerating the accuracy of past assessments, and remembering more vividly the successful judgments over the mistaken ones. Such self-perception, somehow widely rooted in human nature, may lead easily to a state of overconfidence that could allow the projecting of subjective features into the appreciation of the evidence.³⁶ Awareness of these psychological traits and self-restraint are the necessary correctives for the attainment of objectivity.

Distance. Objectivity calls for an ability to draw a certain distance from the subject matter of the investigation. This distance needs to be

³⁴ See “Self-Knowledge” and “Introspection” in Robert A. Wilson and Frank C. Keil, *The MIT Encyclopaedia of the Cognitive Sciences*, MIT Press, Cambridge, MA, 1999.

³⁵ Kent, 1949, p. 199, see *supra* note 11.

³⁶ Heuer, 1978, pp. 21–28, in Westerfield, 1995, pp. 333–43, see *supra* note 16.

consciously pursued and preserved by the investigating officer. The matter to be investigated is of a very impressive nature, including scenes of devastating human suffering and situations that may affect the emotional balance and intellectual certitudes of the observer. The pressure created by the facts under investigation needs to be controlled and reduced by mechanisms of distancing, in time, space and method. Just like divers need time for decompressing after being exposed to high pressure, staff members need to decompress after intense exposure to the sources of evidence. They should take steps to gain some distance and perspective from the facts, by leaving some lapse of time between evidence-gathering actions, and avoiding drawing inferences and recommendations in the heat of the gathering effort.

Dialectic reasoning. The ability to anticipate and deal with counter-arguments is a key indicator of individual objectivity and professional qualification. Cognitive psychology research indicates that beliefs and assumptions of all kinds may be rooted in the mindset of the staff member in a way deeper and more determining than he or she is aware. Even if distortion is not consciously intended, information that is consistent with a pre-existing mindset tends unconsciously to be perceived and understood easily, while inconsistent information tends to be overlooked or rationalised to fit the mindset. Hence, psychologically, new information always tends to be perceived and interpreted in a way that reinforces existing beliefs.³⁷ There are methods of facing this cognitive inertia that imply confrontation with alternative ways of thinking in order to unveil and challenge the conditioning assumptions. To assist in simultaneously considering multiple or conflicting hypothesis, it is advisable to formulate them explicitly and in written form, so that they can be contrasted systematically. In the context of the criminal process this means that the investigating officer should anticipate the potential lines of defence from the outset.³⁸

Corroboration. In addition to the mental dialogic contrasting of hypothesis, factual contrast with different sources of evidence is a basic safeguard of objectivity for every investigating officer. Reliance on a single source or on too few of the available sources is often an impediment to objective findings. The scope of sources of evidence needs to be suffi-

³⁷ Heuer, 1999, p. 226, see *supra* note 16.

³⁸ *Ibid.*, p. 227.

ciently broad and diverse, avoiding any biased selection of sources that would condition the evidentiary outcome.

Second, organisationally, in addition to and beyond the expertise of the incumbent staff member, organisational safeguards of objectivity need to be established by the investigating institution. It has been observed in reference to science that “what we call ‘scientific objectivity’ is not a product of the individual scientist’s impartiality, but a product of the social or public character of the scientific method”.³⁹ The idea is equally applicable to criminal investigations, where objectivity is to a large extent a product of organisational safeguards such as recruitment, standard procedures, autonomy, supervision and peer review.

Recruitment. Achieving objectivity requires a significant effort to overcome simplistic assumptions, master simultaneously competing or conflicting hypothesis and operate logically with large amounts of information. Thus, the first guarantee for objectivity is to recruit personnel who are sufficiently qualified for such intellectual and professional challenges, and do not bear any notorious subjectivity *vis-à-vis* the subject matter of the investigation. The abilities of listening and teamwork are another key point to take into account, to the extent that objectivity may be the result of a certain inter-subjectivity that requires such capacity to share effort and ideas.

Standard procedures. Standard procedures of investigation and analysis will allow systematic consideration of all aspects of the evidence, comparative assessment between findings that are the product of the same procedures, and hence objective evaluation. Such parameters may include a standard cycle of investigation, particular protocols for analysis, source assessment, standard terminology, standard (non-leading) interviewing techniques and others. (For a proposal of analytical standard procedures, see section 2.4. below.)

Autonomy. A certain degree of autonomy between the different actors within the investigation effort is necessary to allow for some contrast of opinions, distance, perspective and critical review of the findings. Bureaucratic hierarchy tends to prevent critical thinking by the subordinates on the findings of their superiors. This difficulty needs to be taken into account when defining the relationship between operations and analysis, since analytical objectivity may be damaged by subordination to opera-

³⁹ Popper, 1994, p. 220, see *supra* note 25.

tional officers and projects. Togetherness, closeness, may sound attractive in the name of team spirit and common effort, and it may be necessary in moments of urgency, but it may also be detrimental to objectivity. Some functional division of duties may help to gain distance and foster objectivity, tasking different persons or units with gathering the evidence and analysing it. Nevertheless, at the same time the closest interaction and communication between the two aspects are necessary for the consistency of the findings. A reasonable compromise would consist of guaranteeing integrity for the analysis function by granting it organisational autonomy, while implementing every possible method to enhance systematic communication and co-operation between analysts, operations and legal officers.⁴⁰

Supervision. Mechanisms of supervision are essential for purposes of quality checking and co-ordination by officers of higher experience and qualifications. It may be the case that the findings of a particular officer or section may be enhanced in their objectivity by contrasting them with the findings of other fellow officers working on a related area, which may be known only to the common superior. A common problem though is that the dossiers to be reviewed may be of such volume and complexity that reviewing them would require more time than is available to a senior officer absorbed by managerial responsibilities. Solutions need to be found to organise managerial duties in a way that do not overburden senior officers and prevent them from exerting a proper supervision of the investigative work product.

Peer review. No matter how high the professional and ethic standards of the investigating officer are, there is always a risk of losing objective perspective because of long-term involvement in the case, regular contact with victims and their suffering, as well as issues of personal pride and prestige. To overcome these difficulties the assistance of persons that have not been involved in the same way in the investigation may be crucial, with a view of anticipating counter-arguments and neutralising potential subjectivity. In a way similar to what has been suggested for scientific investigation, “science and scientific objectivity do not (and cannot) result from the attempts of an individual scientist to be ‘objective’, but from the *friendly-hostile co-operation of many scientists*”.⁴¹ The indictment review is one such peer review mechanism utilised by the Office of

⁴⁰ See Kent, 1949, p. 200, *supra* note 11.

⁴¹ Popper, 1994, p. 217, see *supra* note 25 (emphasis in the original).

the Prosecutor of the ICTY, where a panel of fellow members of the Office critically reviews a project of indictment submitted by an investigation team and issues recommendations for confirmation or improvement.⁴² In other organisations, the appointment of a devil's advocate has been used to test a project by systematic criticism by fellow officers.⁴³ The role of such a devil's advocate would be similar to the function of the reviewers in the system of indictment review, that is to provide early feedback from an external observer who is not attached to and prejudiced by the investigative effort, and is able to identify the pitfalls of the allegations and anticipate the arguments of the defence.

2.2.4. The Need for a Multidisciplinary Team and Local Expertise

The matter of war crimes investigations is unique. Their purpose is definite and circumscribed like any criminal case, their volume and complexity resemble the subjects of social sciences, and their sensitivity is akin to intelligence research. Because of this uniqueness, war crimes investigations require multi-disciplinary teams that are able to address the concerns and integrate the expertise of these and other fields. The complexity of the matter cannot be overemphasised. It goes well beyond impressionistic perceptions conveyed by the media or other fragmentary reports, and it calls for personnel with the sufficient intellectual ability to understand and handle the vast array of factual, organisational and legal issues in dispute.

Sherman Kent developed a methodology aimed at integrating the discipline of social sciences with the functionality of intelligence work for the Research and Analysis Branch of the OSS. The Research and Analysis Branch was designated as the main investigating agency to support the US prosecution team in Nuremberg, and its leading member Franz Neumann was the chief of analysis for that purpose. In fact the profile that, based in his experience, Kent pictured in 1949 for the evidence-gathering officer is most suitable for war crimes investigations:

thoroughly sensitized to the information requirements [...] he must know what is wanted, what is important and unimportant. Lastly, he must be no mere passive receiver of impressions. He must continually be asking himself embarrass-

⁴² For a summary explanation of the indictment review procedure, see Bergsmo and Keegan, 1997, p. 10, *supra* note 6.

⁴³ Shulsky and Schmitt, 1993, pp. 79–81, see *supra* note 17.

ing questions. He must be imaginative in his search for new sources of confirming or contradicting information, he must be critical of his new evidence, he must be patient and careful in ordering the facts which are unchallengeable, he must be objective and impartial in his selection of hypothesis – in short, although his job is not primarily a research job, he must have the qualities and command the techniques of the trained researcher.⁴⁴

Kent further elaborated on the division of labour between officers in charge of gathering the evidence and others responsible for analysing it. Between the two there is “a large overlap between the qualities”, and as for the analysts,

they must be students highly trained in the matters which make up the problems of that policy, they must have the capacity for painstaking research and impartial objective analysis. [...] The questions which they must answer are obscure and can be reached only by the knowledge of out-of-the-way languages and the techniques of higher criticism developed by the scholar; often they are subtle, and subtle in a way understood only by a man who has lived with them and understands their subtleties almost by intuition.⁴⁵

The investigation and analysis of war crimes for judicial purposes remains a specific exercise, which should integrate techniques and resources from the following fields: domestic crime investigations; social science research; non-judicial reporting; and intelligence research.

2.2.4.1. Domestic Crime Investigations

War crimes investigations have in common with domestic crime investigation essential features. First and foremost, there is the penal teleology – the purpose of adjudication of individual criminal responsibility. Other fundamental common elements are the standards of proof and confidentiality, the combination of analysis and field operations, and the forensic techniques or criminalistics. The differences refer to the generally smaller

⁴⁴ Kent, 1949, p. 70, see *supra* note 11.

⁴⁵ *Ibid.*, pp. 71–72.

scope of the domestic investigation and, accordingly, usually a simpler methodology and management of the investigative effort.⁴⁶

Under the influence of domestic criminal investigation, which is the only criminal investigation known beforehand to most practitioners, it could be assumed that the mere projection of domestic approaches would suffice in dealing with war crimes. This may be problematic, because the matter is inherently different in a way possibly unknown to regular criminal investigations. It is not a mere difference of degree or size, as an aggravated or expanded type of domestic crime. The scale and manner of the commission make the war crime a conceptually different event, whose explanation requires an appropriate understanding, including conventional domestic investigation concepts, but beyond them.

The potential contradictions of applying premises of domestic investigations to a war crimes investigation were observed in reference to the FBI agents that assisted in the International Military Tribunal for the Far East ('IMTFE') Tokyo trials, particularly when they had to interrogate and investigate the responsibility of senior civilian leaders:

As they saw it, a war crime was essentially the same as a murder case: crime was crime, and the same attitude towards it would do in either case. Their experience with Chicago gangs, the Mafia, and so on gave them confidence that they could deal equally well with Japan's 'international political gangsters'. When they actually set work, however, they found that they were dealing with a very different breed of men. Lacking preliminary background knowledge not only of Japanese history but even of the Japanese political structure, they could not help most of their questions being naïve, whether intentionally so or not. In the end, they often found themselves asking the defendants for information.⁴⁷

The experience of different national and international programs indicates that in addition to conventional investigation officers, other types of professionals are necessary. In the case of the Netherlands, the original plan of January 1998 for the Nationaal Opsporingsteam voor Oorlogsmis-

⁴⁶ For work on the methodology of domestic criminal investigation see, among others, Charles Swanson, Neil Chamelin and Leonard Territo, *Criminal Investigation*, 7th ed., McGraw-Hill, Boston, 2000; and Pedro López Calvo and Pedro Gómez Silva, *Investigación criminal y criminalística*, Temis, Bogotá, 2000.

⁴⁷ Saburo Shiroyama, *War Criminal: The Life and Death of Hirota Koki*, Kodansha International, Tokyo, 1977, p. 230.

drijven ('NOVO', National Investigations Team for War Crimes) envisioned a team composed essentially of police officers, with some support of freelance experts, to be called on an *ad hoc* basis, for matters such as international law, military, cultural and social issues, as well as in interviewing traumatised victims. As early as March 1998 it was decided that apart from *ad hoc* experts it was necessary to include in the staff "academic researchers who would provide for the necessary basic knowledge about the above issues", because "experience had already told the team that interviewing witnesses and victims without the necessary background knowledge of the conflict, territory and culture could lead to severe problems".⁴⁸ A report submitted in 2002 before the Ministry of Justice and the Dutch Parliament recommended that "the composition of the NOVO team requires specialisation on the law of war crimes and that other experts are available, such as historians, political scientists, cultural anthropologists, lawyers and language assistants /interpreters".⁴⁹

In the case of the United States, the investigative work of the Office of Special Investigations for war crimes of the Department of Justice was initially entrusted to police officers, with only a minor contribution of historians; experience led in the 1980s to a gradual change of personnel, replacing virtually all the police officers with historians.⁵⁰ The Investigations Division of the ICTY has experienced a similar trend, from a structure based primarily on police officers, with a minor element of researchers and analysts, to a steady increase of the latter and proportional reduction of the former.

⁴⁸ Annemarieke Beijer, André Klip, Marinette Oomen and Martijn van der Spek, *Opsporing van Oorlogsmisdrijven: Evaluatie Van Het Nationaal Opsporingsteam Voor Oorlogsmisdrijven, 1998–2001*, Kluwer, Deventer, 2002, p. 16. Report on the Dutch programme of war crimes investigations prepared upon request of the Dutch Ministry of Justice. NOVO was a continuation of the Nationaal Opsporingsteam Joegoslavische Oorlogsmisdadigers (NOJO, National Investigations Team for the former Yugoslavia) of the Dutch national police team, under the guidance of the public prosecutor in Arnhem, which was established in 1994 specifically for investigations related to the former Yugoslavia. The work of the NOJO until 1998 did not lead to any prosecutions, and in January 1998 it was decided to include other countries and to transform it into the NOVO as a result of evidence that among asylum seekers a number of people were allegedly involved in war crimes.

⁴⁹ *Ibid.*, p. 73.

⁵⁰ I owe this information to Patrick Treanor, former senior historian in the US Department of Justice Special Investigations Unit, and currently senior analyst of the ICTY Office of the Prosecutor Leadership Research Team.

2.2.4.2. Social Science Research

The main contribution from the fields of history, sociology, political sciences and other social sciences is the ability to understand the broad and complex picture of social and institutional phenomena, while handling large sequences of evidence. Mutual support between criminal investigations and social sciences, and particularly historians, has been the rule in every major process for war crimes. The Armenian genocide had among its initial reporters a historian of the reputation of Arnold J. Toynbee, while subsequent historiography on the issue has relied substantially on judicial records. The first historiographical wave on the Holocaust in the 1950s and 1960s used the documentary evidence and findings of the Nuremberg trials (Ritlinger, Hilberg, Poliakov and others), and those authors found themselves utilised by the interrogators of Eichmann. This tradition of co-operation has continued in the investigations of different war crimes commissions (Canada, Britain, Australia, the United States), as well as in the United Nations *ad hoc* tribunals.⁵¹

2.2.4.3. Non-Judicial Reporting

There is a whole field of research comprising reports by human rights organisations (national, international, governmental or otherwise), ombudsmen's offices, state supervision organs, parliamentary or truth commissions.⁵² There are similarities in the matter of the investigations, and in some of the methods used, such as interviewing of victims and analysis of perpetrating structures.

Significant differences appear relating to the standards of proof, in their purposes, generally intending to ascertain institutional, political or disciplinary responsibility (rather than individual criminal responsibility),

⁵¹ For a public work by Ruth Bettina Birn, chief historian in the War Crimes and Crimes Against Humanity Section of the Department of Justice of Canada, see Norman Finkelstein and Ruth B. Birn, *A Nation on Trial: The Goldhagen Thesis and Historical Truth*, Henry Holt and Company, New York, 1998.

⁵² For example, the UN Human Rights Council Special Rapporteurs and Working Groups on specific themes or states; the United Nations High Commissioner for Human Rights reports based on direct fact-finding; the UN Commission of Experts; special reports required by the UN Security Council or General Assembly; International Labour Organisation fact-finding missions; investigative missions by the Inter-American Commission on Human Rights.

and non-litigation process.⁵³ Often the works of these enquiry bodies are preliminary and assist in enabling criminal investigations. Examples of such preliminary roles include the two commission of enquiry on the massacres of Armenians established in 1918 by the Ottoman authorities, which recommended criminal prosecution of the main suspects and forwarded their evidence gathered to the judicial authorities;⁵⁴ the United Nations War Crimes Commission that preceded the prosecution teams in Nuremberg; the commission of enquiry on the crimes committed during the military dictatorship in Argentina, which set the foundations for the case of the prosecution in the trial of the juntas in 1983; the UN Commission of Experts on crimes committed in the former Yugoslavia, that contributed importantly to the ICTY's Office of the Prosecutor's evidence and personnel.

The Procuraduría General de la Nación of Colombia is another example of a national oversight institution that has conducted extensive investigations on crimes under international humanitarian law. Its mandate being the supervision of state organs, investigations are limited to crimes attributable to state agents, for disciplinary purposes. The Defensoría del Pueblo is another non-judicial institution of the same state that has dealt extensively with such criminal matters, receiving evidence from victims, conducting enquiries and producing reports within their competence.

Human rights non-governmental organisations, either national or international, often provide a particularly high cost-efficiency, achieving

⁵³ For methodology of human rights reporting and investigation, see Hans Thoolen and Berth Verstappen, *Human Rights Missions: A Study on the Fact-finding Practice of Non-governmental Organizations*, Martinus Nijhoff, Dordrecht, 1986; Bertrand G. Ramcharan, *International Law and Fact-Finding in the Field of Human Rights*, Martinus Nijhoff, The Hague, 1982; Thomas M. Franck and H. Scott Fairley, "Procedural Due Process in Human Rights Fact-Finding by International Agencies", in *American Journal of International Law*, 1980, vol. 74, no. 2, pp. 308–45; David S. Weissbrodt and James McCarthy, "Fact-finding by International Human Rights Organizations", in *Virginia Journal of International Law*, 1981, vol. 22, no. 1, pp. 1–89; UN Office (Vienna), Centre for Social Development and Humanitarian Affairs, *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Publications, New York, 1991; Kathryn English and Adam Stapleton, *The Human Rights Handbook: A Practical Guide to Monitoring Human Rights*, Essex University, Human Rights Centre, Colchester, 1995, particularly ch. 4, "Monitoring, Reporting and Investigating in a State of Emergency"; and Bergsmo and Keegan, 1997, see *supra* note 6.

⁵⁴ See Vahakn N. Dadrian, *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus*, Berghahn Books, Oxford, 1995, pp. 319–21.

notable results with relatively limited resources. Such efficiency is generally related to the motivation and commitment of their members, an asset that needs to be acknowledged and integrated as much as possible into the investigative process. Co-operation with such organisations has become a usual practice in national and international systems, with mutually beneficial results.

2.2.4.4. Intelligence Research

Intelligence agencies have historically contributed to war crimes investigations, when appropriately instructed by the higher political authorities.⁵⁵ Antecedents are known since the reports of British military intelligence on the massacres of Armenians by Ottoman forces during the First World War.

A particularly interesting experience is, as mentioned earlier, the contribution of the OSS to the Nuremberg proceedings. The Research and Analysis Branch of the OSS recruited intellectuals and professors from the highest academic level (notably Yale and Harvard universities, including Sherman Kent, Franz Neumann, Herbert Marcuse, Arthur Schlesinger, Sheldon Glueck and Raphael Lemkin). Headed by the Harvard historian William Langer, the Research and Analysis Branch assembled some 900 scholars from the fields primarily of law, history, political science, anthropology, psychology and diplomacy.⁵⁶ The combination of excellence of academic research with the most sensitive information produced an analysis of unique depth and quality, which was delivered to the Nuremberg prosecutors for the benefit of their cases.⁵⁷ This is a concept that may serve best the needs of ICC investigations (in accordance to the “highest standards of competency” required by the ICC Statute).

⁵⁵ On methodology of intelligence research see, among others, Kent, 1949, *supra* note 11; Shulsky and Schmitt, 1993, *supra* note 17; and Westerfield, 1995, *supra* note 16.

⁵⁶ See Michael Warner, *The Office of Strategic Services: America's First Intelligence Agency*, Center for Studies in Intelligence, Washington, DC, 2000, ch. 4 “Research and Analysis”.

⁵⁷ Among other examples, see *Miscellaneous Memoranda on War Criminals*, reference R&A no. 3172.2, OSS Research and Analysis Branch, Washington, DC, 17 July 1945, classified “Secret/Control”, copy no. 7 (copy on file with author).

2.2.4.5. Local Expertise

The relevant information needs to be interpreted in relation to its original social, cultural and political context, which is its true context of meaning. Thorough knowledge of the original context is essential for the correct understanding of the sources since, as Kent explained in 1949: “You have to know as much of their psychologies, ruling ideologies, habits of thought, and manner of expressing themselves as you know of your own people”.⁵⁸

Contextual knowledge of this kind that can be provided only by either local people, or persons that have specialised in the particular region and society. In the experience of the Research and Analysis Branch of the OSS and their contribution to the Nuremberg prosecution, a number of key analysts were German nationals, who were familiar with the country and fluent in the language (Neumann, Marcuse, Glueck, Kempner). The division in charge of the interrogations of suspects in Nuremberg also employed officers of German origin, able to speak the language and familiar with the social context of the suspect. The Israeli officer who interrogated Eichmann in Jerusalem was again of German origin, and conducted the interrogation in German. The officers that assisted the prosecution against Eichmann with analysis were chosen by their countries of origin, in order to deal with specific sections of the case that they would know about because of their background (Hungary, Poland, Romania, Yugoslavia and so on).

There are security implications in integrating persons from the region where the crime was committed. These persons may have some subjectivity related to their group identity, or they may be particularly vulnerable to pressure or attack against themselves, their relatives or properties. These security issues need to be addressed on a case-by-case basis, with proper procedures and guarantees, instead to excluding valuable local resource on basis of general categorisations.

⁵⁸ Kent, 1949, p. 72, *supra* note 11.

2.2.5. Evidentiary Strategy

2.2.5.1. Reliability First

Because of the very gravity and dimensions of the matter, the evidence derived from war crimes tends to be impressive and spectacular, in a way that may distract the investigating officer from the basic duty of assessing the reliability of the source before considering its information. Reliability of the source needs to be the primary parameter for the choice and use of evidence. The investigation needs to be orientated towards the most reliable sources, not towards the most impressive or spectacular ones. No matter how impressive or fascinating the information is, if the source is not reliable, it needs to be put aside.

In law enforcement or intelligence agencies there are standard parameters to evaluate both the reliability of the source and the credibility of the information. Such criteria are shared by the officers involved in the investigation. They allow for comparative assessment and determine a standard practice and classification. The assessment of reliability is usually entrusted to officers with extensive professional experience, who are in charge of these duties for sufficient time as to guarantee continuity and consistency in the criteria, and who deal with recurrent sources, originating from the same social context of the investigating agency. These systems are typically applied in domestic jurisdictions for the assessment of informants in schemes of organised crime.

Such methods of assessment generally are not applicable in war crimes investigations for several reasons. Concerning sources, often there is no previous experience with the source in particular or its profile in general to the extent that is available in regular systems and allows for the development of standards of evaluation. Concerning the investigating team, its multi-disciplinary (and eventually international) composition makes it difficult to develop standard criteria of assessment of the sources. Furthermore, when legal officers are involved, they generally prefer to make their own assessment of the source rather than relying on a standardised classification. An attempt to define principles and criteria for source assessment applicable for war crimes investigations is presented further below (see sections 2.2.5.4.3. and 2.2.5.4.4.).

2.2.5.2. Prioritise Documentary Evidence

When asked what should be the priorities for a successful war crimes investigation, an experienced ICTY senior trial attorney explained: “Priority 1: documents. Priority 2: documents. Priority 3: documents”. It is widely acknowledged in legal practice that documentary evidence is “considered more reliable than the evidence supplied by witnesses”.⁵⁹ As in the classic the dictum of Roman jurisprudence, “a good document is better than ten witnesses”.

The reasons to prioritise, when possible, documentary evidence arose from two areas: probative value and procedural economy. The probative value of a document is particularly qualified because, when originally issued by the accused or associates, they may constitute the most immediate reflection of the intent and action of the author. Contrary to witness testimony, a document, once it is obtained, cannot (legally) change its content, and it is not vulnerable to pressure, faulty recollection and other human frailties. Provided its authenticity and admissibility are clear, the document shall remain an enduring and unchanging record of the event. Furthermore, in cases of criminal orders and related written records, the document may be not just a piece of evidence but the *corpus delicti* itself, the instrument that materialised the crime and ultimate proof of its commission.⁶⁰

For whatever concerns procedural economy, as a practical matter, documentary evidence is generally easier and faster to render than witness evidence. In cases of vast scope, when the widespread *actus reus* requires a heavy probative and procedural effort, the accusing party often finds itself obliged to such pragmatic considerations. A practical aspect of no lesser importance is the security of witnesses, since the use of documentary evidence may help limit the need and exposure of witnesses whose security any jurisdiction typically has difficulty guaranteeing.

Documentary evidence was central to the Nuremberg proceedings and provided an essential basis for the judgements. From the beginning Justice Robert Jackson, the chief US prosecutor, wanted to base the cases essentially on documentary evidence. The OSS, which had been tasked

⁵⁹ *Encyclopedia Britannica*, 15th ed., 2002, entry on “Evidence”.

⁶⁰ On documentary evidence considered as *corpus delicti*, see Vahakn N. Dadrian, “Documentation of the Armenian Genocide in Turkish Sources”, in Israel W. Charny (ed.), *Genocide: A Critical Bibliographic Review*, Facts on File, New York, 1991, pp. 86–138.

with assisting Jackson in the investigation and analysis of war crimes, was instructed by April 1945:

The War Crimes Office wants especially to have documents such as military or political orders, instructions, or declarations of policy which may serve to connect high personalities with the actual commission of crimes. Original or certified copies of such documents are needed, together with a full account of their acquisition, location, custody and reproduction.⁶¹

In June 1945 Jackson appointed Sheldon Glueck, a criminologist, professor at Harvard University and author of *The Prosecution of War Criminals* (1944), as a consultant supervising installation of the control system. Glueck devised a control system for managing the evidence based on digest forms to register and classify the relevant items, either interrogation records or documents. Each form was numbered and included the name of the defendant, where and when the evidence was collected, summary of content, cross-references with other items of evidence and OSS materials, points of law or possible defence at issue, and an indication of the relevant counts. Once filled, the forms were dispatched to Colonels Robert G. Storey and Murray C. Bernays who had been appointed by Jackson as associate directors of procurement and classification of evidence. Jackson acknowledged that thanks to Glueck's system "a large mass of material could be readily available on any particular point" and "his original plan is substantially the system pursued throughout the Nuremberg trial".⁶²

The Nuremberg judgment of 1 October 1946 states explicitly the importance of documentary evidence:

Much of the evidence presented to the Tribunal on behalf of the Prosecution was documentary evidence, captured by the Allied armies in German army headquarters, Government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls and in other places thought to be secure from discovery. The case, therefore, against the defendants rests in a large measure on documents of their own making, the au-

⁶¹ OSS, War Crimes Information Memo #2, classified secret, 30 April 1945, copy found in the Glueck Papers collection, Harvard Law Library, as cited in John Hagan and Scott L. Geer, "Making War Criminal", in *Criminology*, 2002, vol. 40, no. 2, p. 245.

⁶² *Ibid.*, p. 251.

thenticity of which has not been challenged except in one or two cases.⁶³

The importance of documents in the findings of the trial chamber is apparent from a reading of the judgment. The following are some of the main documents cited in the judgment: the programme of the Nazi Party issued in 1920;⁶⁴ Hitler's *Mein Kampf* (1925);⁶⁵ several directives issued by Hitler relevant to the crime of aggression;⁶⁶ order by Hitler to take over trade unions;⁶⁷ "Night and Fog Decree" by Hitler for the arrest and disappearance of opponents;⁶⁸ minutes of meetings where criminal plans were discussed;⁶⁹ diaries of Nazi officers (Jodl, Frank);⁷⁰ internal military memorandums;⁷¹ naval military orders on aggression;⁷² Nazi Party report of activities;⁷³ military regulations for inhumane treatment of prisoners;⁷⁴ the "bullet" military decree for the shooting of recaptured prisoners;⁷⁵ Gestapo order for the killing of Soviet prisoners;⁷⁶ correspondence among defendants indicative of knowledge of the crime;⁷⁷ memorandum by Admiral Wilhelm Canaris protesting against the mistreatment of Soviet prisoners;⁷⁸ Gestapo order for "third degree" methods of interrogation, implying torture;⁷⁹ SS order for retaliation on civilians;⁸⁰ directive by Göring

⁶³ International Military Tribunal, *Prosecutor v. Hermann Wilhelm Goring et al.*, Judgment, 1 October 1946, Trial of German Major War Criminals, p. 3 ('IMT Judgment') (<https://www.legal-tools.org/doc/f41e8b/>).

⁶⁴ *Ibid.*, p. 4.

⁶⁵ *Ibid.*, pp. 6, 17, 67, 182.

⁶⁶ *Ibid.*, pp. 36, 41, 43.

⁶⁷ *Ibid.*, p. 9.

⁶⁸ *Ibid.*, p. 62.

⁶⁹ *Ibid.*, p. 39.

⁷⁰ *Ibid.*, pp. 37, 67.

⁷¹ *Ibid.*, p. 36.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*, p. 59.

⁷⁵ *Ibid.*, p. 58.

⁷⁶ *Ibid.*, p. 60.

⁷⁷ *Ibid.*, p. 61.

⁷⁸ *Ibid.*, p. 62.

⁷⁹ *Ibid.*, p. 63.

⁸⁰ *Ibid.*

for systematic plunder of occupied territories,⁸¹ investigative judicial report of the US army on the concentration camp at Flossenburg.⁸²

2.2.5.3. Typology of Documentary Evidence

The experience of war crimes investigations in different jurisdictions suggests a typology of documentary evidence comprising the following categories:

- Laws and decrees
- Logbooks
- Orders
- Ration cards
- Identification cards
- Commercial records
- Internal communications
- Bank records
- Exhumation records
- Transportation records
- Population censuses
- Leaflets
- Permits, safe conducts
- Posters
- Personnel administration records
- Intercept records
- Death certificates and notes
- Prison records
- Working notes
- Minutes of meetings
- Diaries
- Private letters
- Court and disciplinary records

2.2.5.4. Authentication of Documents

The issue of documentary authentication was raised in the cases prosecuted by the Office of Special Investigations (OSI) of the US Department of Justice in the 1980s. The OSI used as evidence Nazi documents gathered from archives in Germany, Israel, the Soviet Union, Poland and the United States. For example, lists of camp guards and members of the police were used to identify suspects. When confronted with evidence originating from the Soviet Union, an accused alleged that documents and witnesses had been manipulated by the KGB security agency.⁸³ The prosecution had to call graphologists, chemists and other experts to examine the documents and to testify in court on their authenticity. Even when expert analysis established that the documents were produced with decades-old paper and ink, the defence alleged that the KGB was so sophisticated that

⁸¹ *Ibid.*, p. 69.

⁸² *Ibid.*, p. 64.

⁸³ Jeffrey N. Mausner, "Apprehending and Prosecuting Nazi War Criminals in the United States", in *Nova Law Review*, 1991, vol. 15, no. 2, p. 757.

it could use ink and paper stored since the 1940s for their forgeries. Ultimately, in the OSI experience, “evidence from the Soviet Union has proven to be very reliable” and the relevant documents were crucial for the success in the cases related to the Nazi era.⁸⁴

Authenticity of documents has been an issue in contest in the ICTY proceedings. For example, the documentary collections of the State Archive of Croatia have been utilised by the prosecutor in cases against Croat and Bosnian Croat accused. In a way similar to the OSI experience, in one case the defence objected to the authenticity of the documents, suggesting that they could be forged or manipulated by state agents interested in framing their clients. The prosecutor argued for the authenticity of the documents based on the fact that they were found by its own staff of analysts within the original collections, and their internal and contextual coherence.

Another element of authentication is the establishment of a system of chain of custody, which is common in criminal investigative agencies, and has also been implemented in the ICTY. The protocol of chain of custody consists on keeping a certified record of the location of the document at any given time between its reception by the Office of the Prosecutor and its presentation in trial. While being under the custody of the prosecutor, the access to the original documents subject to the protocol of chain of custody is restricted and any person given such access shall be registered in the relevant record.

2.2.5.4.1. Exploit Open Sources

The exploitation of sources of evidence that are available in the public domain, known as open sources, needs to be prioritised for reasons of cost-efficiency and consistency of the investigation. They comprise the printed and electronic media, books, laws and any other public means of information. A number of private and institutional services provide screening and summaries of media around the world, and may assist greatly in this otherwise very large endeavour. For example, the Federal Broadcast Information Service (‘FBIS’) produces summaries by interna-

⁸⁴ *Ibid.*, p. 758. The OSI used experts of the FBI, Immigration and Naturalization Service and the US Treasury Department. The latter developed a technique of “relative aging”, which allows for the assessing of the age of a document by measuring the degree of solubility of the ink, and so allowed for countering the allegation that the documents could have been fabricated recently with old materials.

tional organisations that focus on different regions, including commercial providers such as Lexis Nexis, Westlaw and so on. The US FBIS monitors more than 3,500 publications in 55 languages, and each day collects half a million words from its field offices around the world. Nowadays the internet has become a primary and indispensable tool for these purposes. The value of open sources for the investigation is multifaceted.

- *Open sources as a lead.* The information contained in open sources may constitute an initial *notitia criminis*, on the commission of the crime itself, or may convey relevant data on the suspect and his or her organisational environment. Such information needs to be systematically collected and analysed and, when appropriate, will lead to further investigative steps for corroboration and upgrading to the level of admissible judicial evidence.
- *Open source records of statements by the suspect.* There may be instances in which there are open source records of incriminating statements by the suspect, that constitute *per se* evidence of instigation, planning, complicity or relevant knowledge. A classic example is the statement by Hitler in the Reichstag on 30 January 1939, when he admonished that war would result in “the annihilation of the Jewish race in Europe”.⁸⁵ Interestingly, Radovan Karadžić delivered a speech before the Bosnian Parliament in 1992, shortly before the beginning of the war, when he referred to a similar fate for the Muslims of Bosnia in case a war would start (which was widely registered by the media). Other examples in the practice of ICTY’s Office of the Prosecutor refer to General Tihomir Blaškić and his public statements indicating loyalty to the overall Croatian objectives in Bosnia, and Milan Martić, who stated that retaliation should take place against Croatia in 1995 (which resulted in an indiscriminate attack on the civilian population of Zagreb).
- *Open sources as evidence of instigation or criminal propaganda.* Whether stated by the suspect or by other associated persons or organisations, statements of criminal instigation or propaganda may be recorded in open sources and constitute relevant evidence as such (note Streicher, Milošević, Brđanin and a number of International Criminal Tribunal for Rwanda [‘ICTR’] cases).

⁸⁵ Cited in Hans Mommsen, *From Weimar to Auschwitz*, trans. Philip O’Connor, Princeton University Press, Princeton, NJ, 1991, p. 237.

There is a risk of underexploiting open sources because of several reasons. The study of open sources is a rather “unromantic” activity compared to other tasks that involve operative action. It may be a more exciting prospect for the investigator or the analyst to go to the field in search of evidence than to stay in the office long hours reading hundreds of pages of media. There may also be a prejudice or underestimation of the local resources and the levels of education and communication of the victimised societies, often more qualified and sophisticated than what a foreign observer would assume. Finally, language is an objective problem, when the original language of the open source is not accessible for the investigating officer.

In the experience of ICTY, the Leader Research Team has developed an Open Source Unit, composed of researchers who are able to process materials in the original language, and are familiar with the sources and their context.

2.2.5.4.2. Limit the Number of Witnesses, Focus on Insiders and Internationals

Witnesses are the soul of the proceedings. Without them the process would result in an abstract exercise, and the human suffering that originated the whole judicial effort could be underestimated or sidelined. And yet, experience suggests that it may be advisable or just inevitable to limit the number of witnesses, for pragmatic reasons related to limited court time and resources, security, and the problems of secondary victimisation and witness fatigue, well-known to practitioners.

Victims must be central to any criminal process, and the ICC Statute has given them an important procedural role. Nevertheless, in practice the prosecutor will find him or herself in every major case having to make difficult decisions about selection of the number of victim witnesses that can be admitted within the given investigative resources and court time.

The need to limit the number of witnesses has to be understood and foreseen from the beginning of the investigation, in order to optimise the choice of witnesses and to focus on the profiles with the highest evidentiary value. Experience indicates that insiders and internationals are among the most valuable witnesses for war crimes leadership cases. Insiders, because their potential to establish the intimate *de facto* functioning of the criminal apparatus; internationals, because of the credibility that

international judges attribute to them, and often their ability to present a broader picture of the events (as when they are observers deployed in the field by international organisations).

2.2.5.4.3. Interrogating Insiders

Assessing the testimony of an insider or a suspect is a particularly difficult task, which requires the most sophisticated analysis of the source and knowledge of the matter. The insider is usually in possession of a great deal of potential evidence, but he or she might have been too close to the crime to feel at ease telling the whole truth. The interrogators need to prepare themselves with uttermost detail, gathering the necessary evidence to avoid, as much as possible, a situation in which the source is more knowledgeable than them. They also need to avoid the effect of fascination that dealing with such sources often causes, due to their proximity to the crime, their real or perceived power, and the possession of information that is so badly desired.

Some examples from Nazi cases are illustrative of the difficulties characteristic of analysing this kind of sources. Upon his arrest in 1946 Rudolf Höss, the former commander of Auschwitz, was interrogated by two Polish experts in psychology and law, Stanisław Batawia and Jan Sehn. After having lengthy conversations with and questioning of the suspect in prison, the two professors concluded that his testimony was essentially truthful. Batawia observed:

The inhibition, shown at first by Höss, gradually lessened and when he came to trust his interlocutor the investigation proceeded in an atmosphere conducive to frank answers. [...] both the investigators and all those who came into contact with Höss thought that his statements were generally true, as opposed to the statements of the majority of the interrogated war criminals.⁸⁶

Sehn, who as a judge and member of the chief commission for investigating Nazi crimes conducted the preparatory investigation for the trial of

⁸⁶ *Biuletyn Głównej Komisji Badania Zbrodni Hitlerowskich*, vol. 7, Wydawnictwo Ministerstwa Sprawiedliwości, Warsaw, 1951, pp. 14, 28, as quoted by Jerzy Rawicz in the foreword to Rudolf Höss, Jadwiga Bezwińska and Pery Broad, *KL Auschwitz Seen by the SS*, Auschwitz-Birkenau State Museum in Oswiecim, Krakow, 1978, p. 16. Höss had been interrogated before by British and US officers, who arrested him in Germany and took him to testify in Nuremberg for the Kaltenbrunner, Pohl and IG Farben trials.

Höss, supported this assessment and noted: “He readily gave detailed answers to all the questions of the interrogator”.⁸⁷ Other observers shared the same views on the sincerity of the suspect. Höss did admit his position as commander of the camp, and provided a detailed account of the extermination machinery.

Nevertheless, subsequent scrutiny by other researchers has shown that the testimony of Höss was not as truthful as his interrogators first thought. In 1978 Jerzy Rawicz, another Polish scholar and former Auschwitz prisoner, carried out his own analysis of the statement of Höss and questioned the assessment of Batawia and Sehn. In his view, the interrogators were “captivated to some degree by the prisoner’s voraciousness, they took all that Höss had written at face value [...]” and they “did not manage to avoid a certain overestimation of the allegedly absolute credibility of his reminiscences”.⁸⁸

What Rawicz observed is a common occurrence when dealing with sources of this kind; the suspect had been reasonably truthful when speaking about the crime and related events, which in any event were well known to the interrogators, and the suspect knew that, but he was not all that truthful when it came to speak about his personal involvement.⁸⁹ In a typical scenario in this kind of interview, the suspect conveyed:

the picture of a man of small stature entangled in the cogwheels of the vast, all-embracing machinery [...] as an unshaken and irreproachable National Socialist, acting disinterestedly and in the firm conviction that his activities were necessary for the good of his country and nation. He admitted, it is true, that what he had done was terribly wrong, and he felt the burden of his responsibility; but he wanted us to believe that his motives were exclusively ideological.⁹⁰

⁸⁷ *Wspomnienia R. Hossa, komendanta obozu oświęcimskiego*, Wydawnictwo Prawnicze, Warsaw, 1965, p. 19, as quoted by Rawicz in *ibid.*, p. 16. Sehn is also the author of the booklet Jan Sehn, *Auschwitz-Birkenau*, Wydawnictwo Prawnicze, Warsaw, 1957. His motivation for such “frankness” may have been the hope of avoiding a very foreseeable capital punishment. Ultimately, he was found guilty and executed in April 1947.

⁸⁸ *Ibid.*, p. 17.

⁸⁹ *Ibid.*, pp. 17–18. The same applies to the testimony of Pery Broad, former SS officer of the political section in Auschwitz: “Once again it should be stressed, that Broad’s report of the events which he had witnessed or about which he had heard was truthful, although he omitted to mention to mention his own role in the life of Auschwitz” (*ibid.*, p. 28).

⁹⁰ *Ibid.*, p. 18.

The falsehood of such an account is apparent in several points revealed by the analysis of Rawicz. On plunder, Höss alleged it to have been an “unavoidable difficulty” attributable to some officers acting on their own, when the reality was that his own private residence was abundantly furnished with belongings robbed from the prisoners.⁹¹ On the mistreatment of prisoners, Höss blamed some “strong-minded” subordinates that he could not control, as well as some common criminals. Victim testimonies indicate, among other inconsistencies, that in fact Höss himself had empowered common criminals as a means to terrorise and control the camp population.⁹² Finally, on sexual abuse, Höss accused some notorious lower-ranking officer while stating utter indignation. He omitted to mention the case of Eleonore Hodys, the prisoner he took as his mistress, and who, when her pregnancy became known, was put in a *Stehbunker* (standing-cell) where she died of starvation.⁹³

In 1985 the Italian author and Auschwitz survivor Primo Levi completed his own review of the account of Höss, reaching conclusions similar to Rawicz’s. While “on the whole” the account of Höss is “substantially truthful”, when it comes to his own responsibility, by pretending to be “the model bureaucrat, squeezed between the upper and lower jaws of authority”, he was “lying until his very last breath”.⁹⁴

Adolf Eichmann, the former head of the Jewish Evacuation Department of the Gestapo, was captured in Argentina on 11 May 1960. On 23 May it was announced that he would stand trial in Israel. On 25 May the police authorities established a special team to interrogate him, and four days later the interrogations started. One officer was tasked with the direct questioning, while others, cognisant of the different geographical areas and languages, assisted in preparing the questions and analysing the resulting testimony. The main interrogator was a native German speaker, knowledgeable of the material context, and he communicated with the accused in German.

⁹¹ *Ibid.*, pp. 18–21.

⁹² *Ibid.*, pp. 22–23.

⁹³ The murder of Eleonore Hodys was reported in 1965 by a former SS judge testifying during the Auschwitz trial in Frankfurt. See Hermann Langbein, *Der Auschwitz-Prozess: Eine Dokumentation*, vol. 1, Europa Verlag, Vienna, 1965, p. 145, as quoted in Rawicz, *ibid.*, pp. 22–23.

⁹⁴ Rudolf Höss, *Commandant of Auschwitz*, Phoenix Press, London, 1995, pp. 22, 25 (originally published in Polish in 1951, translated and first published in English in 1959).

A problem characteristic of this kind of interview was present at the beginning of the interrogations: Eichmann knew the matter in dispute better than the interrogators. As the leading interrogator would acknowledge, “no one on our team had detailed knowledge of the Holocaust”, while “Eichmann amazed us at first with his knowledge of the material”.⁹⁵ The problem has also been identified in the interrogation of other Nazi suspects, where “the ignorance or deference of a young questioner could allow the respondent to dominate the interchange”.⁹⁶ To bridge that critical knowledge gap, the interrogating team had to hurriedly review thousands of pages of the Nuremberg proceedings and the main historical studies published at the time. They also got the assistance of a specialised researcher and the Holocaust Memorial Centre in Jerusalem.⁹⁷ At the end of every session the transcript was delivered “to the research staff for the purpose of analysis and discussion”.⁹⁸

Documentary evidence was crucial for the interrogation and was used systematically to confront Eichmann, who “would lie until defeated by documentary proof, just as Kaltenbrunner, his former chief had done”.⁹⁹ The same was observed on a related suspect: “Only when he was confronted by telltale documents signed by him did he change his story”.¹⁰⁰ Among the documentary evidence put to Eichmann were the actual testimonies of Höss, Dieter Wisliceny and other former SS officers who had incriminated him before the International Military Tribunal (‘IMT’) and other jurisdictions.¹⁰¹

⁹⁵ Jochen von Lang and Claus Sibyll (eds.), *Eichmann Interrogated: Transcripts from the Archives of the Israeli Police*, Vintage, New York, 1984, p. xxxi. A.W. Less, officer of the Israeli police and leading interrogator of Eichmann, was presented as the first witness of the prosecution.

⁹⁶ Raul Hilberg, *Sources of Holocaust Research: An Analysis*, Ivan R. Dee, Chicago, 2001, p. 65.

⁹⁷ *Ibid.*

⁹⁸ Avner W. Less, “Interrogating Eichmann”, in *Commentary*, 1 May 1983, p. xxx.

⁹⁹ *Ibid.*, p. xxi.

¹⁰⁰ Hilberg, 2001, p. 179, see *supra* note 96. The quote refers to Elmars Sporgis, former Latvian police officer suspected of assisting in the assassination of nine Jews in 1941.

¹⁰¹ Von Lang and Sibyll, 1984, pp. 101, 115–21, see *supra* note 95. Dieter Wisliceny, former direct subordinate of Eichmann, had given a statement in Bratislava prison in 1946 before being tried, convicted and executed. The chamber had to decide on the admissibility of his statement, which it did favourably.

Eichmann did acknowledge that millions of Jews were killed, and reported readily on the involvement of other officers, while minimising his own role. In the words of the interrogating officer:

he would present himself as a little cog in the machine and put all the blame on others, subordinates as well as superiors. [...] Convinced that he could save his neck by demonstrating his own unimportance, he spoke at length and in detail about mass executions he had witnessed but in which his own role had been purely passive. In return for these volunteered accounts of crimes committed by others, he evidently expected me to give credence to whatever lies he produced to conceal his own crimes.¹⁰²

The abovementioned examples suggest several elements for the interrogation and analysis of the statements of insiders or suspects. First, it needs to be teamwork. Because of the extension of the matter, the typically ambivalent attitude of the source and the need to keep some distance as a safeguard of objectivity, such a complex task needs to be addressed by a group, with a proper division of the tasks of identifying the relevant evidence, questioning and analysing.

Second, personal contact and involvement, like the first interviewers had extensively, may lead to excessive closeness and the development of an empathy with the source, with the result of overestimating his truthfulness. Batawia and Sehn not only spent long hours with the suspect in prison, they also suggested that Höss write his whole autobiography and reviewed it, including moving episodes of his childhood. The insider or suspect may cause an effect of seduction or fascination on the interrogator (“amazement” Avner W. Less would say) because of the value of the information that he or she – possibly only he or she – has, and the key role that he or she played, so close to the power and to the crime. The absence of such direct contact may help in gaining the necessary analytical distance and higher objectivity. Rawicz did not meet the suspect, conducted his analysis 30 years later, and limited it to the account of the Auschwitz period, instead of dealing with the whole autobiography of Höss.

Third, the more evidence available to crosscheck statements, the better the position of the reviewer. Rawicz had at his disposal larger documentary resources than the interrogators, including the records of the

¹⁰² Less, 1983, p. xxi, see *supra* note 98.

Auschwitz trial in Frankfurt of 1965. When available, documentary evidence can be critical in helping the witness enhance his or her sincerity.

Fourth, it is necessary to keep a literal record of the statement, to assure the utmost accuracy, and eventually to confront the source with his or her own information.

2.2.5.4.4. Indicators of Reliability

It may be the case that the standard criteria of assessment of the sources cannot be applied, because of the difficulties explained above. Nevertheless, some verifiable parameters of reliability are necessary to guarantee some objectivity and prevent problems of overestimation and falsehood.

The following criteria cover the basic factors that determine the reliability of a source or an insider witness, and would need to be checked routinely against the delivered information.

1. *Acknowledgement of the crime.* Does the potential witness acknowledge clearly that his former associates committed crimes (eventually in an organised and systematic manner)? Does the potential witness acknowledge that he or she participated in crimes (in case the available evidence indicates this)?
2. *Factual accuracy.* Is the information given by the potential witness consistent with the available evidence when it comes to details of names, locations, dates and organisation? How accurate is the potential witness? Are the eventual inaccuracies intentional, or an unintended result of faulty recollection?
3. *Experience and consistency.* Is there any previous experience with the source? If so, how positive was it? If the witness has previously given statements, is he or she consistent in subsequent submissions?
4. *Motivation.* Why does the potential witness want to co-operate? Why, if so, did the potential witness change his or her mind from participating in the crime or related structures, to assisting in charges against his or her former associates? Private or political conflict? Resentment, revenge? Self-importance, vanity? Expectations of reward (penitentiary benefits)? Psychological unrest, personal evolution?

5. *Personal qualifications*. How qualified is the witness to assess the events and its context? Professional qualifications, studies, experience, direct knowledge?
6. *Self-control*. Is the witness adjusting his or her statement to the areas that he or she really knows, or is the witness “talking about everything”? Does the witness acknowledge what he or she does not know or is not sure? Is the witness more assertive than reflective? Would the witness be able to keep restraint in cross-examination?

The routine testing of these or similar indicators at the earliest possible stage would prevent the reception of misleading information, factual miscarriage, and further waste of resources.

2.3. The Role of Analysis in War Crimes Investigations

As the examples mentioned in the sections above indicate, analysis has played an important role in war crimes investigations, from Nuremberg to different national war crimes offices, to the UN *ad hoc* tribunals (the latter reviewed in detail in section 2.3.4.).

The budget for the first financial period has identified three areas of analysis and their corresponding positions within the Analysis Section: political, criminal and military analysis. This categorisation appears to be based on the analysis system of the Office of the Prosecutor of the ICTY, which is indeed the most relevant reference for these purposes. While a certain division of labour and specialisation is advisable, experience indicates that these three functions are closely related, complementary and sometimes even interchangeable. Aspects of the crime itself are relevant to infer political and military responsibility, and analysts from these two fields need to study the evidence on crime. Conversely, criminal analysts have often entered the field of political and military issues as a natural continuation of their analysis of the crime, providing with key links to the suspects. Be that as it may, the following sections suggest operational definitions and an overview of the key issues to be analysed based in the categories of political, criminal and military analysis.

2.3.1. Political Analysis

The analysis of political structures and leaders is essential due to their involvement in war crimes, typically in the modes of liability of planning, instigation and complicity. This is one of the most difficult areas of analy-

sis. Civilian leaders tend to be more difficult to investigate than military leaders because political structures may be under great strain in a war situation, political leaders operate with more sophisticated means of manipulation and their involvement is altogether less obvious. Note that the three accused acquitted in the Nuremberg IMT trials were civilians (the chancellor, the banker of the Reich and a leading propaganda officer).

Accordingly, this area of analysis may need the most sophisticated skills and methodology, often related to the domains of constitutional law, political science, and other social sciences. Franz Neumann (chief of analysis for the US prosecution at the IMT Nuremberg trials) is the paramount example of an expert on law and political science (with first-hand knowledge of the country and the language) who assisted with crucial analysis of the political structures of the crime.

Historians and other social science researchers have been instrumental in all major war crimes and genocide investigations in recent decades, both at the academic and judicial levels.¹⁰³ State war crimes commissions have employed historians as analysts in their investigations of Second World War crimes in Canada, Poland, Scotland and the United States. Subsequently, a number of historians from these commissions joined the *ad hoc* tribunals. The main contribution from the fields of history, sociology, political science and other social sciences is the ability to understand the broad and complex picture of social and institutional phenomena, while handling large sequences of evidence.

However, differences between social science research and criminal investigation should be noted. Criminal investigations need to be goal-orientated, functional and entirely focused on acceptable evidence, while social sciences are a broader exercise with wider room for creativity and abstraction. Raul Hilberg, a leading historian of the Holocaust who assisted as an expert in the war crimes investigations of the US Department of Justice, explains the difference in the following terms:

The aims of prosecutors, critics, and claimants are basically different from those of academic researchers. For the former, the gathering of evidence serves as a practical end that can be expressed in a specific result: convictions, expulsions or

¹⁰³ For a relevant compendium of social science research see Frank Chalk and Kurt Jonassohn (eds.), *The History and Sociology of Genocide: Analyses and Case Studies*, Yale University Press, New Haven, 1990. Note contributions from a number of leading members of the International Association of Genocide Studies.

payments. Once the goal is reached, the quest is over. For the academic person, discovery itself is the purpose, and there is no limit to the desire for understanding.¹⁰⁴

Hence, while social sciences may assist greatly in war crimes investigations, the delimitation of goals and roles is essential to avoid an over-theoretical deviation.

Political analysis in the experience of the ICTY has been assigned primarily to the Leader Research Team (LRT), since its establishment in 1997. The LRT has recruited mainly analysts with a command of the Bosnian-Croatian-Serbian language, and it covered, among others elements, background political analysis, national legislation and institutions, open sources, demography, individual profiles of political leadership targets, expert and policy witnesses, and a “who’s who” database.

Analysis of this kind is essential to establish the context of the alleged crimes and assess the individual background of leadership targets. The findings of political analysis may not always constitute incriminating evidence *per se*, but they are indispensable to placing the evidence in its authentic context of meaning, identifying potential areas of evidence and co-operation, and assisting in defining the overall strategy of investigation. Knowledge of the original language of the evidentiary sources is important, in order to facilitate work on original laws, media and other sources.

Political analysis may be particularly relevant to assessing issues of admissibility (Article 17), to the extent that the judicial ability and willingness presumably will need to be evaluated in the political context of the concerned state. These are the main areas for political analysis (illustrated with some examples):

- *Constitutional and public law.* The formal or *de jure* nature of the incumbent structures, as defined by national instruments of constitutional and public law, needs primary consideration. To define the responsibility of a minister, a head of state, a chancellor or a major, their formal competence and duties will need to be analysed in the original legal system. For example, in the IMTFE Tokyo trials the defence alleged that under the Meiji Constitution the Japanese mili-

¹⁰⁴ Hilberg, 2001, p. 199, *supra* note 96. For an extensive comparative discussion on historical and judicial research of war crimes, see Florent Brayard (ed.), *Le génocide des Juifs entre procès et histoire, 1943–2000*, Éditions Complexe, Brussels, 2000.

tary was not under the control of the government but only of the emperor, and therefore the ministers were not accountable for crimes committed by the army (defence of Hirota Kōki). Political analysts were heavily involved in the case against Milošević *et al.*, where issues of constitutional law were critical in order to determine the scope of responsibility of the relevant senior state authorities.

- *De facto political and institutional functioning.* In addition to and beyond the *de jure* status, the *de facto* functioning of political institutions needs to be thoroughly analysed, with a review of the organisational and relational changes over time, and other factors that affect political activity. It may be the case that a political appointment was not effectively implemented or supported with the necessary resources (as alleged for example by the defence of Brđanin).
- *Political parties.* The centre of gravity for the political planning and instigation of war crimes often resides in political parties rather than in State institutions. That was the case with the Ittihad party, accused of being the locus of the conspiracy to massacre the Armenians in the indictment of 1919, and the Nazi Party, found to be “the instrument of cohesion among the defendants” by the IMT Nuremberg judgment. Several ICTY cases have required thorough analysis of parties like the Srpska Demokratska Stranka (Karadžić, Krajšnik, Plavšić) and the Hrvatska demokratska zajednica (Croatian Democratic Union, see Kordić conviction), with the critical involvement of political analysts. The organisation, formal and informal power relationships, and public discourse of political parties need specialised analysis.
- *Finance.* This is one of the key links of evidence to political leaders in a context of war criminality. The analysis of budgetary competence and effective financial flows may be crucial for civilian leadership cases (as in the Milošević case to prove links to irregular formations operating outside the Federal Republic of Yugoslavia territory).
- *Police.* The role of the police is often under-investigated in war crimes, while emphasis is placed on the typically more blatant involvement of the military (this is the case in the historiography of Nazi crimes, and in some aspects of ICTY investigations). This

trend must be confronted in order to ensure thorough analysis of police structures, which is highly relevant for investigations of civilian leaders. While the police are less likely to be involved in breaches related to the conduct of hostilities, their role is typically crucial in offences related to persecution and crimes against humanity on civilian population (including unlawful arrest, torture and deportation).

- *Civilian–military relationships.* The relationship between civilian and military leaders needs to be fully assessed for an objective understanding of their responsibilities, and for anticipating “blame shifting” lines of defence. Military subordination to civilian authorities is only one of the possible schemes in place, while the opposite can also be true (praetorianism), or some sort of joint civilian–military command may exist (war cabinets, insurgent armed committees, or crisis staff as in the case against Brđanin and Talić, regional political and military leaders indicted jointly). This is a key issue for the arguments of joint criminal enterprise in leadership cases.
- *Propaganda.* To the extent that propaganda is used to instigate crime or some other purpose of complicity, it requires analysis falling in the area of politics, including the study of the main propagandistic themes, the means of communication utilised, audience, timing and so on (note the Streicher case at Nuremberg, Akayesu and other genocide cases before the International Criminal Tribunal for Rwanda, and Milošević, Brđanin and other cases before the ICTY).
- *Nationalism and other criminogenic ideologies.* Ideologies that are used to incite violence (including xenophobic nationalism, religious fundamentalism, political totalitarianism and militarism) require analysis as a matter of criminal planning and instigation, as well as for source assessment purposes (as an indicator on the credibility of a given source).

2.3.2. Criminal Analysis

Criminal analysis has developed as a professional field mainly in the last two decades, due to the need to face increasingly complex forms of crime (organised crime, terrorism, narco-trafficking) in domestic jurisdictions.

Nowadays the need for advanced analytical approaches to complex criminal investigations is widely acknowledged. The concept of intelligence-led investigation, in reference to the leading role attributed to intelligence and analysis in planning and implementing strategies of criminal investigation, has also gained currency.¹⁰⁵ Some examples of the development of criminal analysis in different systems include:

- *Canada*: The Royal Canadian Mounted Police has its own criminal analysis branch and criminal intelligence directorate to identify nation-wide criminal patterns and deal with particularly complex types of crime.
- *Colombia*: The Fiscalía General de la Nación, has its analysis unit within the Cuerpo Técnico de Investigación (Investigations Division), assisting the national prosecutor and chiefs of units, with a particular focus on organised crime, corruption and crimes under international humanitarian law.
- *Finland*: The National Bureau of Investigation has a crime analysis group within its intelligence division, which covers both operational analysis in support of particular investigations of complex crime, and broader strategic research projects with qualitative as well as quantitative statistical methodology.
- *Germany*: The Bundeskriminalamt has developed its strategic crime intelligence analysis division, with the aim of early identification of criminogenic factors and advising the higher decision-making levels on investigation strategies.
- *Norway*: The National Criminal Investigation Service has its units of analysts tasked with nationwide investigations of organised crime, which assist police with operational intelligence, and a team of strategic analysis which deals with the broader picture of criminal activity.

¹⁰⁵ See Paul Andrews and Marilyn B. Peterson, *Criminal Intelligence Analysis*, Palmer Enterprises, Loomis, CA, 1990; Marilyn B. Peterson, *Applications in Criminal Analysis: A Sourcebook*, Praeger, London, 1998; International Association of Law Enforcement Intelligence Analysts, *Successful Law Enforcement Using Analytic Methods*, IALEIA, Alexandria, VA, 2000; Angus Smith (ed.), *Intelligence Led Policing: International Perspectives on Policing in the 21st Century*, International Association of Law Enforcement Intelligence Analysts, Lawrenceville, NJ, 1997. For the latest developments in the field, see, among others *IALEIA Journal*. For a comprehensive bibliography of criminal analysis techniques see <http://www.ialeia.org/analytical.html>.

- *Spain*: The Policía Nacional and Guardia Civil have their own Unidad Central de Inteligencia, which are assisting investigating judges and prosecutors of the Audiencia Nacional in the analysis of crimes under their competence (terrorism, organised crime).
- *United Kingdom*: National Crime Agency provides centralised nationwide analysis of criminal patterns and phenomena of organised crime.
- *Kosovo*: The United Nations Interim Administration Mission in Kosovo ('UNMIK') has established an intelligence unit comprising criminal analysts focused on organised crime and breaches of international humanitarian law.
- Europol and Interpol have their own analysis unit and analytical criminal intelligence unit respectively, which deal with similar matters within a framework of international police co-operation rather than conducting investigations and prosecutions themselves.¹⁰⁶

Usually the aims of such analytical units are: to assist in investigation planning by providing the broad picture of the crime; to integrate into the investigations personnel with higher standards of training and education; to facilitate co-ordination between local or particular units of investigation; and to handle large quantities of evidence by electronic processing.

In war crimes investigations, while political analysis may tend to utilise *deductive* approaches (from the general to the particular, starting from general hypothesis at a higher degree of abstraction), criminal analysis tends to be more *inductive* (from the particular to the general, building on individual criminal events). Both approaches should complement each other so as to integrate the evidence of the actual crime into the general context and higher responsibility.

In the experience of the ICTY, criminal analysts have been assigned to particular investigation teams and co-ordinated by senior strategic analysts. They are often trained with the most appropriate techniques of dealing with criminal evidence, integrating forensic evidence, co-operating with law enforcement officers, assisting in evidence-gathering operations,

¹⁰⁶ See Peterson, 1998, *supra* note 95; contributions to the Fifth International Crime Intelligence Analysis Conference, 1999 (organised by the Bundeskriminalamt and Europol); and different publications by the IALEIA.

and keeping the requisite confidentiality standards. Electronic information management and analytical software are typically needed in this area. Due to the scale and nature of the crimes to be analysed, this category has brought into the ICTY a scope of professionals broader than conventional domestic criminal analysts, including professionals from the domains of law, history, and criminology, as well as national security agencies. Thus ICTY criminal analysts have often gone beyond the analysis of the crime as such and entered areas of political and military analysis intrinsically related to the commission of the criminal event (including much of what is specified in the sections on political and military analysis of this memorandum).

These are the main areas for criminal analysis (illustrated with some examples).

- *Crime pattern analysis.* The consideration of a series of criminal incidents as a consistent pattern may be either an element of the crime (a “widespread” crime against humanity) or an important basis to infer higher responsibility. The fact that particular incidents are not exceptional, but representative of a broader pattern, needs to be established, through systematic analysis of common elements of *modus operandi*, chronology, geographical spread and other circumstantial indicia, which requires standardised processing of very large quantities of evidence. Crime pattern analysis is typically essential for charges of crimes against humanity and genocide (see virtually every indictment of the *ad hoc* tribunals that include such charges), but it may be equally important for charges of unlawful attack on civilian population (for example, to infer superior orders or knowledge relevant to a campaign of shelling or sniping against civilians). The degree of victimisation of a given community, and the impact of violence in absolute and relative terms, are also relevant aspects of crime pattern analysis (typically to establish the level of destruction of a group protected under the law of genocide, as in the Krstić investigation).
- *Link association analysis.* Through graphics, specialised software and other techniques, the *de facto* links among accused need to be identified in order to unveil criminal networks and establish formal and informal power relationships. Usually any leadership case needs systematic link association analysis in order to go beyond the formal *de jure* scheme and establish the effectively operating *de*

facto network (note the allegations of joint criminal enterprise in the ICTY indictments in 2001 to 2003). Link analysis is typically applied, for example, to evidence from communications intercepts, in order to re-construct from multiple phone, cable or internet connections the structure of a criminal network. Link analysis is applied in a similar way to evidence of financial flows, which are most relevant for civilian leadership suspects. See Figure 2 for an example of a linkage chart produced with Link Notebook.

- *Statistical analysis.* This is also related to the analysis of broad series of criminal events. While crime pattern analysis usually refers to qualitative corroboration, statistical analysis is the quantitative aspect of equally important evidentiary value. The frequency, intensity and chronological development of the criminal actions need quantitative measurement and analysis, particularly but not exclusively for charges of crimes against humanity and genocide (as explained above for crime pattern analysis).
- *Source assessment.* This is a crucial function that refers to the need to assess the sources of evidence critically and by standard parameters on their reliability and the credibility of their information. Source assessment has been systematised in the domain of criminal analysis, with standard indicators and practice, for example, when insider sources need to be assessed (a very sensitive area which calls for the finest analytical methodology).
- *Computerised analysis.* The use of special software is characteristic of criminal analysts (Link and Case Notebook, Crime Zone and so on), in addition to the regular use of electronic databases and data retrieval tools. This technical ability is indispensable for the effective handling of the very large collections of evidence common to war crimes investigations.¹⁰⁷

¹⁰⁷ For a design of databases for recording gross human rights violations see Patrick Ball, *Who Did What to Whom? Planning and Implementing a Large Scale Human Rights Data Project*, American Association for the Advancement of Science, New York, 1996. For a follow-up and testing of this model in El Salvador, Guatemala, Haiti and South Africa from 1992 to 1999, see Patrick Ball, Herbert F. Spierer and Louise Spierer (eds.), *Making the Case: Investigating Large Scale Human Rights Violations Using Information Systems and Data Analysis*, American Association for the Advancement of Science, Washington, DC, 2000.

- *Visual aids.* Graphics, maps and other visual aids are useful to assist the presentation of complex factual issues, both for internal work purposes and before a chamber of trial (examples abound among the Office of the Prosecutor of the ICTY trial exhibits). Specialised software allows analysis and presentation of the crime with the utmost geographical accuracy (Arc View combined with GPS field data).

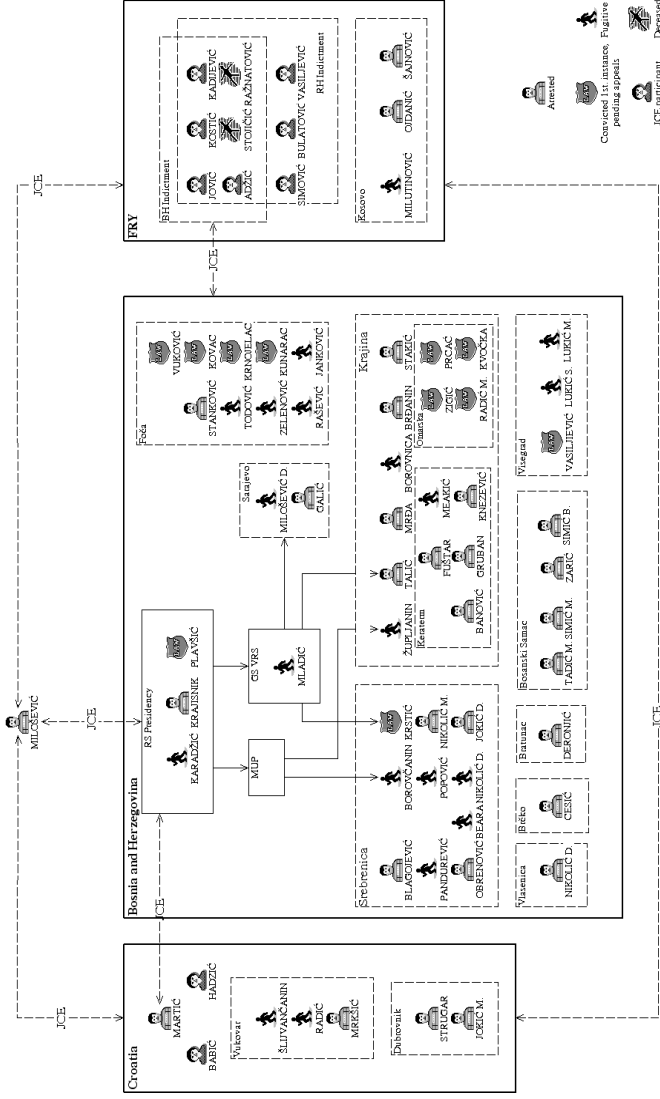


Figure 2: Link Association Analysis.

Note: Icons and entities may be hyperlinked to databases so as to make all relevant information accessible from the graphic chart or to produce the linkage automatically.

2.3.3. Military Analysis

The analysis of military structures and the responsibility of their commanders is critical because of their role at the execution stage of the crime. This discipline is typically associated with military intelligence analysis, since military intelligence officers are often in the best position to observe and understand the functioning of military formations.

Some of the key contributors to the Nuremberg investigations and prosecutions were military intelligence officers, such as Telford Taylor (intelligence officer of the US Army in Europe during the war, and then prosecutor before the IMT and chief counsel for the subsequent proceedings in Nuremberg), Peter Calvocoressi (intelligence officer of the British Army and prosecutor before the IMT) and Bill Donovan (head of the OSS).¹⁶¹ Taylor himself, who directed the case against the High Command of the Wehrmacht, produced classic works in the field of military analysis of war crimes, on crimes committed by the Wehrmacht, as well as by the US Army in Vietnam.¹⁶²

The fields of political science and military sociology have also contributed significantly to the analysis of military organisations in relation to war crimes.¹⁶³ A good example of this approach is the study by Jennifer Schirmer of Harvard University on the doctrine, structure and tactical deployment of the Guatemalan Army in relation to the mass killings committed in the 1980s.¹⁶⁴

¹⁶¹ To be more precise, the three were civilian lawyers by training who were mobilised into intelligence duties because of the war, and then contributed to the Nuremberg proceedings.

¹⁶² For an analysis of the German military in the Second World War and the criminal responsibility of their commanders, including a study of command structures, ranks and tactical deployment, see Telford Taylor, *Sword and Swastika: The Wehrmacht in the Third Reich*, Victor Gollancz, London, 1953. For a comparative view of Nazi crimes and US war crimes in Vietnam (with a focus on the My Lai massacre) see Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, Time Books, New York, 1970. Further information on military analysis is included in his final report and memoirs, see Taylor, 1949, *supra* note 4; and Taylor, 1992, *supra* note 31. For Peter Calvocoressi's view of military analysis in Nuremberg see his book *Nuremberg: The Facts, the Law and the Consequences*, Chatto and Windus, London, 1947.

¹⁶³ For the views of this author on military sociology related to war crimes in the former Yugoslavia, see Xabier Agirre, *Yugoslavia y los Ejércitos: La legitimidad militar en tiempos de genocidio*, La Catarata, Madrid, 1997.

¹⁶⁴ Jennifer Schirmer, *Las intimidaciones del proyecto político de los militares en Guatemala*. FLACSO, Guatemala, 1999. This study is based in interviews with more than 50 senior of-

In the experience of the ICTY, military analysis was assigned to the military analysis team since its establishment in 1997.

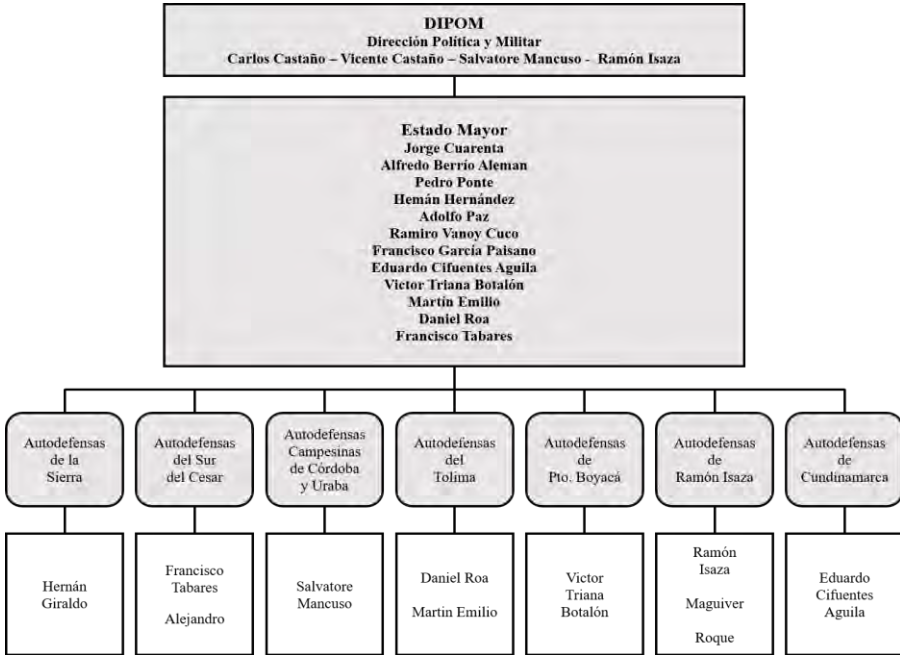


Figure 3: Organigrama for Autodefensas Unidad de Colombia.

These are the main areas for military analysis (illustrated with some examples):

- *Command structures.* Organisation of military entities, their tactical and strategic doctrine, chains of command, ranks and units. The analysis of command structures needs to take into account initially their formal or *de jure* constitutive instruments as well as internal, personnel and disciplinary regulations. The status of collective bodies of senior military command such as the main staff, which varies in different military systems, needs to be ascertained (an issue much discussed in the High Command case in Nuremberg, the trials of the Greek military, the Juntas trial in Argentina and several ICTY cases). See Figure 3 for an example of the formal representation of the

ficers of the Guatemalan Army (including several former heads of state and ministers of defence) and it includes a thorough analysis of the connections between the military doctrine and deployment and the widespread commission of mass killings.

command structure of Autodefensas Unidad de Colombia ('AUC'), a paramilitary organisation.¹⁶⁵

- *De facto functioning.* In addition to and beyond the formal command structure, the *de facto* functioning of the military entity needs to be thoroughly analysed, keeping a detailed chronological record of the operations, orders and appointments. Contextual factors that affect military action need to be taken into account (from interaction with enemy forces to weather, geography, supplies and so on). Note, for example, that the formal command structure of the AUC (see above) is questioned by the *de facto* operational autonomy of its components (*bloques* and *frentes*), that in some cases have disregarded and even opposed the orders of the *estado mayor* (the same applies to the structure of Fuerzas Armadas Revolucionarias de Colombia ['FARC'] guerrillas).
- *Communication systems.* As a central element of the command and control system, the means of communications available and the effective traffic of information require detailed analysis. Intercepts, logbooks of communications, cable transcripts and so on often provide critical evidence (as in the Krstić conviction). Encryption techniques need to be analysed (decoding). The availability and effective functioning of communication systems are essential to proving the element of knowledge relevant to command responsibility ("knew" or "should have known", Article 28(a)(i) of the ICC Statute).
- *Special units.* Special units are often assets of the top military level, used as shock troops and tasked with clandestine or sensitive operations (including possibly unlawful actions, selective killings or agent provocateur actions). Shifting the blame from the regular structure to special units allegedly under the command of civilian bodies is a common line of defence in military leadership cases (see High Command defence blaming the Waffen SS, the Blaškić and other ICTY cases).
- *Military police.* This entity may take the form of a *gendarmerie* (similar to the model in France and Belgium), the Italian *carabinieri*

¹⁶⁵ For other representations and discussion of the Colombian paramilitary command structure see, among others, *Tras los pasos Perdidos de la guerra sucia: Paramilitarismo y operaciones Encubiertas en Colombia*, NCOS, Brussels, 1995.

ri and Spanish *guardia civil*, that is, nationwide formations under the authority of the Ministry of Defence, or in the form of policing troops assigned to regular units under the military chain of command. Such bodies often are tasked with the custody of detention centres (like the SS and the Hrvatsko vijeće obrane [‘HVO’, Croatian Defence Council] Vojna Policija), with implications regarding torture, sexual assault and forced labour of prisoners. Their particular status and interface with regular units needs to be established (note the Blaškić defence of blaming the military police). In some cases, the civilian police is particularly strengthened in weaponry and firepower, becoming a militarised body (note the Milošević case particularly for Kosovo) or they operate under the Ministry of Defence (as in Colombia).

- *Paramilitaries*. The organisation of paramilitary units is one of the most common tactics to carry out unlawful armed actions avoiding the implication of regular state structures. Paramilitary formations may take the form of local inhabitants armed and mobilised for purposes of “self-defence” (Patrullas de Autodefensa Civil in Guatemala), armed branches of radical political groups (Hrvatske obrambene snage [‘HOS’, Croatian Defence Force], Serbian White Eagles), or common criminals hired for particular crimes (Colombian *sicarios*). They often integrate foreign mercenaries, attracted by adventure or profit, who in turn may become valuable sources of evidence if, as it often happens, they later distance themselves from the cause (like some public witnesses in the case against Naletilić and Martinović). The communications, financing and consistency with higher strategic objectives of paramilitary formations need detailed analysis. The problematic profile of their human component often makes paramilitary formation a fertile ground for insiders.
- *Military intelligence*. When involved in unlawful actions, military intelligence is typically connected to the functioning of special units and paramilitaries, as described above. Intelligence officers may play a role of instigation or complicity, by providing the information necessary to carry out the crime, indicating targets for murder or unlawful attack, or directing interrogations under torture. This is one of the most obscure areas for investigation, given the specialised training in clandestine operations and concealment techniques of the suspects; note among other ICTY examples,

Hrvatska Izvještajna Služba (Croatian Security and Information Service) and Vojna Sigurnosno-Obavještajna Agencija (Military Security and Intelligence Agency) involvement in HVO crimes, as well as involvement of military intelligence in crimes attributed to the paramilitary in Colombia.

- *Weaponry.* Analysis of the weaponry utilised by the direct perpetrators aids in identifying them, as well as ascertaining the degree of precision and firepower available to them (and hence the foreseeability of the criminal result). Relevant evidentiary indicators include ammunition, calibre of light arms and artillery, sniper capacity, training, maintenance and budget needs for particular types of weapons. This is particularly relevant for cases of unlawful attack on a civilian population (either deliberate targeting, or inference of disproportionate or indiscriminate attack, Article 8 of the ICC Statute), such as the attacks on Sarajevo (cases against Galić, Mladić and Milošević), Zenica (of which Blaškić was charged and acquitted) and Dubrovnik (case against Strugar *et al.*). Note phenomenon of *pipeta* bombs by the Colombian FARC, resulting on indiscriminate and disproportionate attacks on civilians (such as the attack on Bojaya in which more than 100 civilians were killed).
- *Ballistics.* This is the forensic aspect of the analysis of weaponry, which concerns the trajectory of direct or parabolic artillery fire, or tests of suspected weapons against cartridges found at the scene of the crime (note Sarajevo and Srebrenica cases before the ICTY). The use of some types of ammunition prohibited by treaty law may need to be ascertained.
- *Logistics.* This area is relevant to establishing the military capability of a given deployed force as well as financial and resource support, transport, supplies of equipment, food, fuel, ammunition and so on (note the case against Krstić, who was accused, among other actions, for the logistical operations of removing the bodies of the Srebrenica victims).

2.3.4. The Experience of the UN *Ad Hoc* Tribunals

From the viewpoint of the ICC, the investigations of the UN *ad hoc* tribunals should be seen as a prototype, an experimental model, rather than an archetype, an ideal model.

There is much merit in the groundbreaking activity of the *ad hoc* tribunals, including the training of a new generation of specialised professionals in the field (among whom is the author). As the senior management of the Offices of the Prosecutors of the ICTY and ICTR has rightly observed, the *ad hoc* tribunals have gone far beyond the limited expectations that surrounded their creation, overcoming the initial general scepticism, lack of resources, limited international support and open hostility of the main warring factions. The mandate of the international prosecutor was virtually unprecedented, and the legal and political bases of its work far from clear. The work of the *ad hoc* tribunals has taken international justice to a stage of development unthinkable before their existence.

Like any prototype, like any experiment necessary for the progress of science, the *ad hoc* tribunals have moved forward by means of trial and error, testing the new ground and adjusting its activity to new findings and needs.

Concerning analysis, the Office of the Prosecutor acknowledged its needs from the earliest stages, hiring a number of professional analysts from different national war crimes offices (primarily from the United States, Canada and Britain), police and military forces, human rights organisations and others. Some of them were assigned to particular cases and investigation teams, while others were grouped in a Strategy Team (until 1997), and later in the Leadership Research Team and the Military Analysis Team. Their importance has been acknowledged by a steady increase in their numbers, up to a total of some 60 professionals. In the area of criminal analysts (P-2), the new function of strategic analysts (P-3) was created in 1999 in order to secure a strategic overview and analytical co-ordination among the different investigations, and to respond to the need of a higher professional level.

Analysts of the four categories (strategic, research officer, criminal and military) have contributed significantly to the investigations from the earliest stages of preliminary examination and target selection, to indictment drafting, trial support, testifying in trials themselves and even appeals. Typically, the higher the level of the accused, the more important the role of the analyst has been. Analysts have developed most of their work in the office, collating and processing the evidence gathered by investigators. In addition, they have participated regularly in the interviews of more complex witnesses (insiders, policy and expert witnesses) and in the collection of documentary evidence in the field. For example, in 2000

when the Croatian government authorised the Office of the Prosecutor access to HVO records in the state archive of Croatia in Zagreb, the project for selecting and processing several thousands of original documents was directed and carried out primarily by analysts.¹⁶⁶

There is a difference in the organisation of research officers (mainly P-3 and some P-2) and military analysts (mainly P-2 and some P-3), who are grouped in their own teams, under the supervision of a senior analyst (P-4), while the criminal analysts are deployed in teams under the supervision of a team leader (who is a senior investigator, P-4).¹⁶⁷ The scheme of subordinating analysts to senior investigators has proven dysfunctional, because the supervising investigator is usually not familiar with the potential and methodology of the analyst, and tends to underutilise him or her, which results both in the waste of a valuable human resource and the chronic dissatisfaction of the analyst. Further, at a more general level, the subordination of the whole of the investigations section to senior investigators (at the P-4, P-5 and D-1 levels) was found to be inadequate by the prosecutor, who decided to change this structure in 2001 in order to promote legal guidance and supervision over the investigations.

Organisationally, a better use of the analysts would be secured by grouping them in an analytical unit, and having them under the guidance of legal officers rather than investigators, which seems to be the choice of the ICC structure, as indicated by the budget for the first budgetary period.

Notwithstanding the remarkable achievements of the *ad hoc* tribunals, the efforts to integrate analysis in the investigations and recent encouraging developments, it is important to identify existing areas for improvement, in the best interest of ICC investigations. In brief, the work of the *ad hoc* tribunals has included some analysis, but it has been insufficient given the complexity of the matters to be investigated, accessory to an operations-driven investigative model, and not duly considered at the crucial level of strategic planning.

¹⁶⁶ Information in the public domain, several analysts subsequently testified in different Bosnian Croat cases explaining the process of gathering and authenticating this documentary evidence (including this author).

¹⁶⁷ Recently, criminal analysts have been assigned also to the appeals section and the Tracking Intelligence Unit, under the supervision respectively of the head of the section and team leader.

Too often investigations have been driven by *ad hoc* short-term assessments, while analysis has not been properly considered at the planning and strategic level. The concepts of intelligence-led investigation or the centrality of analysis, which are characteristic of the most advanced investigative agencies dealing with complex crime, have not been applied. On the contrary, the model used could be described as operations-led and the centrality of operations, since a recurrent field-orientated ‘mission urge’ appears to have often been the driving force. Proper analytical guidelines and standard procedures for analysis were never developed.

The underutilisation of evidence available in-house has become a mantra, recurrently stated and acknowledged, but still never solved, because of insufficient analytical resources and discipline. Several attempts to correct this trend have not given the intended results because of the operational inertia and prevalence of an operational mindset, as opposed to a more analytical and strategic doctrine. The resource implications of such a practice are very grave, but difficult to quantify without the budgetary information at hand. The practical consequences are noticeable in several domains.

As the prosecutor herself has observed, there are investigation teams that after several years of employment, with a major expenditure of UN resources, have delivered less than expected. Indictments have had to be amended repeatedly to adjust the allegations of fact and responsibility, and cases have often reached the trial stage without a well-defined theory of liability of the accused. Typically, the Office of the Prosecutor is able to gather compelling evidence on crime and able to produce some formal statement of liability, but then problems arise in defining the precise links between the existing crime and the accused, which is actually the crux for every criminal case.

In a series of decisions issued in 2001, ICTY judges criticised the performance of the ICTY prosecutor in quite explicit terms, bringing this issue to public attention. On 20 February 2001, Trial Chamber II requested the prosecution to allege in precise terms the particular nature of the individual responsibility alleged for each count, as opposed to the general allegations contained in the indictment, comprising all possible modes of liability for all counts.¹⁶⁸ On 26 June 2001, the same Trial Chamber, deal-

¹⁶⁸ International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *Prosecutor v. Radoslav Brđanin*, Trial Chamber, Decision on Objections by Momit Talic to the Form of the

ing with the same case, complained of the failure of the prosecution to address the earlier concerns. Even harsher criticism was expressed, referring to “the ambiguities engendered by the style of pleading adopted by the prosecution in this and other cases”, “[...] the very general nature of the case which the prosecution has pleaded”; “the only alternative explanation for the recalcitrant attitude which the prosecution is exhibiting is that it still does not know what its case is”.¹⁶⁹ On 21 September 2001, the same Trial Chamber in the same case once again pointed out the insufficient precision of the prosecution’s case, characterising as “ambiguous in many ways” the allegation of the liability of one of the accused, and referring to “two unsuccessful attempts to plead its common purpose case” and again to “recalcitrance” on the part of the prosecution.¹⁷⁰ This decision referred to the fourth version of the indictment, which had to be amended three times on factual as well as legal matters.

On 23 October 2001, the Appeals Chamber delivered a judgment on a different, unrelated case, where the abovementioned decisions were quoted approvingly, and further serious criticism for the prosecution was made for including “broad and imprecise” allegations.¹⁷¹ It was observed that “what the Prosecution must do [...] is to particularise the material facts of the alleged criminal conduct of the accused that, in its view, goes to the accused’s role in the alleged crime”.¹⁷² Two of the accused convicted in the first instance were acquitted (after having spent four years in the detention unit in The Hague).

The flaws observed by the judges in these cases refer to the core of the judicial process, and they are not limited to the abovementioned cases.

Based on information that is in the public domain, another relevant indicator is the withdrawal of charges against 20 indictees, some of them because of insufficient evidence, and others because of their low level in

Amended Indictment, IT-99-36-PT, 20 February 2001 (<http://www.legal-tools.org/doc/1e64dc/>).

¹⁶⁹ ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Chamber, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, IT-99-36-PT, 2 July 2001, paras. 5, 10, 11 (<http://www.legal-tools.org/doc/801f15/>).

¹⁷⁰ ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Chamber, Decision on Form of Third Amended Indictment, IT-99-36-PT, 21 September 2001, paras. 12, 15, 20 (<http://www.legal-tools.org/doc/aa73a7/>).

¹⁷¹ ICTY, *Prosecutor v. Kupreškić et al.*, Appeals Chamber, Judgment, IT-95-16-A, 23 October 2001, para. 93 (<http://www.legal-tools.org/doc/c6a5d1/>).

¹⁷² *Ibid.*, para. 98.

spite of the existing evidence against them. Both categories indicate serious miscalculation, either for indicting without sufficient evidence or focusing on a level too low for international jurisdiction.

In leadership cases, it took seven years for the Office of the Prosecutor to indict Milošević for crimes committed in Bosnia-Herzegovina (it started working effectively in the autumn of 1994 and the indictment was issued in November 2001). On crimes committed by Bosnian Croat forces, none of the main leaders had been indicted eight years after the Office of the Prosecutor started investigating this segment of crimes. Such delays in both areas are due partly to the fact that the limited resources were utilised for other cases, against accused at lower levels of authority (which again is related to insufficient analysis and strategic vision).

The experience with analysis in the ICTR is not any more encouraging. An internal review carried out in 2000 concluded that the analysts in the ICTR were not fulfilling their job description because of improper tasking by their superiors, inadequate training and inadequate information technology infrastructure. According to analysts who have worked in both *ad hoc* tribunals, the abovementioned problems identified in The Hague are only aggravated in Kigali, in relation to the structural problems of the ICTR.

The responsibility for these shortcomings is shared by all professional domains involved – investigators, lawyers and analysts. They are partly due to objective difficulties, such as insufficient state co-operation, the lack of resources and problems of access to the scene of the crimes and relevant records. Other causes are related to management and professional qualifications, which are beyond the scope of this memorandum. What is important to underline here for the benefit of the ICC is that a more analytical model of investigations would most likely be more effective, by focusing on personnel of higher qualifications, securing strategic coherence and optimising the use of limited investigative resources.

2.4. The Analysis Section of the Office of the Prosecutor of the ICC

2.4.1. Mandate of the Analysis Section

Analysis seems to be particularly important for the investigations of the ICC for legal, material and managerial reasons.

Legal reasons. The ICC Statute states its competence to be “complementary”, while the conditions of admissibility imply in fact that the Court operates in a way subsidiary to the national prosecutions and investigations.¹⁷³ Article 54(2) of the Statute determines that the prosecutor “may conduct investigations on the territory of a State” only in accordance to the regulations on state co-operation (Part 9 of the Statute), or further to authorisation by the Pre-Trial Chamber under Article 57(3)(d). Both options, in the context of complementary (subsidiary) competence of the ICC defined by the Statute, suggest significant restraints and limitations on the part of the prosecutor to carry out evidence-gathering operations, calling alternatively for greater reliance on analysis of evidence submitted by other investigative actors. Note the very restrictive requirements of Article 57(3)(d), according to which to “take specific investigative steps within the territory of a State Party without having secured the co-operation of that State under Part 9” the prosecutor needs the authorisation of the Pre-Trial Chamber, which shall grant it only if “the State is clearly unable to execute a request for co-operation due to the unavailability of any authority or any component of its judicial system competent to execute the request for co-operation under Part 9”.

The ICC’s normative requirements appear to define a prosecutor who shall operate primarily on evidence gathered by institutions other than herself, such as judicial institutions of the concerned states, international organisations or non-governmental organisations (‘NGO’). Hence the key function of the ICC investigations may be to analyse the evidence submitted by other actors, rather than gathering evidence directly in field operations.

This is even more so at the preliminary examination stage of Article 15(2), where the Statute instructs the prosecutor primarily to “analyse the seriousness of the information received”, then “he or she may seek additional information” from other states or organisations, and lastly he or she “may receive written or oral testimony at the seat of the Court”.¹⁷⁴ The

¹⁷³ Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>). On complementarity see preamble para. 10 and Art. 1; on conditions of admissibility see Art. 17.

¹⁷⁴ For a commentary on the purpose of Article 15(2), see Morten Bergsmo and Jelena Pejic, “Article 15: The Prosecutor”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, pp. 365–67. See also Silvia Fernandez de Gurmendi, “The Role of the International Prosecutor” in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Stat-*

primacy of analysis at this preliminary stage is apparent from the letter of the Statute and the very nature of this examination activity.¹⁷⁵

Material reasons. As previously explained, the matter to be investigated is of a complexity that requires significant analytical discipline, particularly to establish individual responsibility in leadership cases. The budget for the first financial period indicates among the functions of the Analysis Section “[c]ollecting and analysing potential evidence on systemic facts required by contextual elements of crimes”, such as “for example, the existence of an armed conflict or a widespread or systematic attack directed against a civilian population”.¹⁷⁶ In fact, “systematicity” and “widespreadness” or pervasiveness are elements of the crime (Article 7), so is the existence of armed conflict and possibly its international character, the qualification of the victims as protected persons, insufficient military necessity, proportionality and discrimination in an attack (Article 8), or *dolus specialis* (Article 6), all of them complex issues to be established as a matter of fact requiring qualified analysis. Even more complex and in need of analysis may be the issues relevant to superior responsibility (Article 28), which has been rightly foreseen among the functions of the Analysis Section in the first budget by reference to “Analysing military, police and civilian power structures in territorial States” and “Developing evidence relevant to superior responsibility”.¹⁷⁷

Managerial reasons. Analysis is essential to optimise the use and management of investigative resources. The process of gathering and handling evidence in international investigations is very costly. It is a

ute: Issues, Negotiations, Results, Kluwer Law International, The Hague, 1999, pp. 175–87; and Philippe Kirsch and Darryl Robinson, “Initiation of Proceedings by the Prosecutor”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 657–63.

¹⁷⁵ The type of analysis needed for preliminary examination could be similar to the report produced by the Office of the Prosecutor of the ICTY on the NATO campaign in Yugoslavia in 1999: it was a preliminary report, in order to decide on the eventual initiation of an investigation, and it was based on information submitted by actors other than the Office of the Prosecutor (international NGOs, authorities of the Federal Republic of Yugoslavia, NATO and open source).

¹⁷⁶ See International Criminal Court, Assembly of State Parties, Budget for the First Financial Period of the Court, ICC-ASP/1/3, 3–10 September 2002, p. 270, para. 67 (‘Budget for the First Financial Period’).

¹⁷⁷ *Ibid.*

heavy burden to finance field operations, travel, translations, forensic procedures, storage of evidence, maintenance of the information systems and so on. Given the limited resources available to the ICC and the magnitude of the task, it is essential to introduce strict parameters of cost-efficiency and procedural economy in the investigations, whereby the added value of every investigative step and item of evidence needs to be carefully assessed.

It may be the case that a certain operation seems very important and appealing because of the impressive nature of the information, and yet the added value would not justify the projected expenditure of resources because that evidence is already available to the prosecutor from other sources. It will be the case that before any investigative operation is launched one or more working hypothesis will have to be formulated on the responsibility of the suspects, in order to guide the gathering effort. It is also foreseeable that given sources will need to be evaluated on their reliability and credibility prior to their utilisation. Systematic analysis is necessary for all these assessments of strategic value.

The concept of “analysis” is explicitly referred to among the duties of the prosecutor in the Statute and the Rules of Procedure and Evidence of the ICC. Article 15(2) of the ICC Statute states:

The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

Rule 104(1) of the ICC Rules of Procedure and Evidence 104(1) states:

Evaluation of information by the Prosecutor. 1. In acting pursuant to Article 53, paragraph 1, the Prosecutor shall, in evaluating the information made available to him or her, analyse the seriousness of the information received.

It is important to mention that the activity of the Analysis Section should be consistent with the criteria of objectivity dictated by Article 54(1)(a) of the Statute, “to establish the truth”, to cover all relevant facts and hence to analyse “incriminating and exonerating circumstances equally”.

The budget for the first financial period of the ICC approved by the Assembly of State Parties has provided for an Analysis Section within the

Investigation Division, composed of a chief of section and three analysts (political, military and criminal), and tasked with the following duties:

collecting and analysing potential evidence on systemic facts required by contextual elements of crimes [such as, for example, the existence of an armed conflict or a widespread or systematic attack directed against a civilian population]; analysing military, police and civilian power structures in territorial States; developing evidence relevant to superior responsibility; advising senior management on investigation strategy by assessing overall victimization in territorial States; identifying and assisting experts; analysing document collections; developing tools of criminal intelligence-analysis such as time lines and visual aids relevant to factual patterns [or spreadsheets showing chains or patterns of events, and multi-layered maps showing both background and crime-specific facts], providing a mapping and reference service and sensitive sources coordination; and assisting the Legal Advisory and Policy Section with the training of staff members on background information relevant to territorial States.¹⁷⁸

This enumeration constitutes a comprehensive and appropriate description of analytical duties, consistent with the experience of international investigations and the mandate and apparent needs of ICC. On the basis of this description, and the considerations summarised in other sections of this memorandum, the mandate of the Analysis Section should comprise mainly three functions: advisory-strategic, support-tactical and source exploitation (as shown in Figure 4).

¹⁷⁸ *Ibid.*

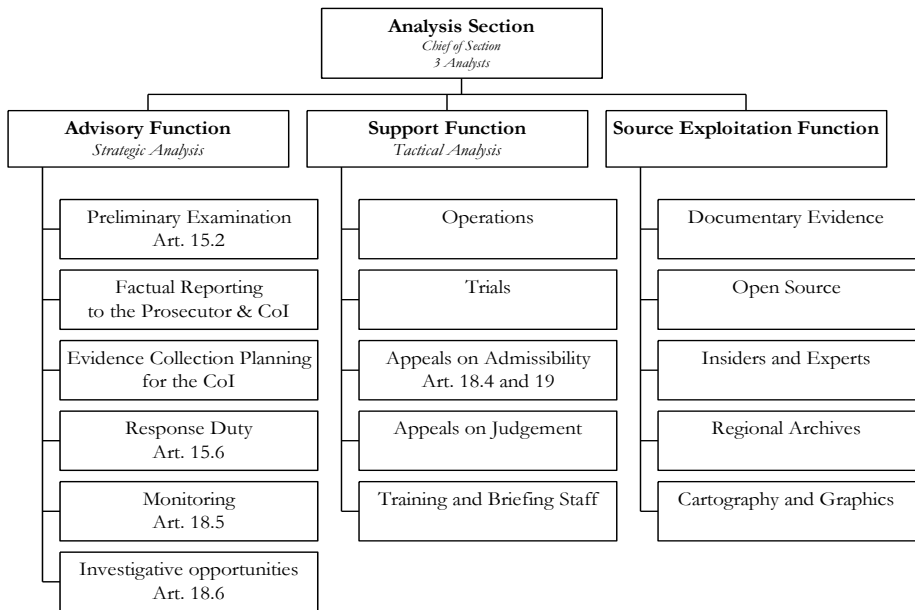


Figure 4: Functions of the Analysis Section.

2.4.1.1. Advisory Function

The budget for the first financial period indicates among the duties of the Analysis Section “[a]dvising senior management on investigation strategy by assessing overall victimisation in territorial States”.¹⁷⁹ Accordingly, the Analysis Section should fulfil an advisory role on factual issues (as opposed to legal issues), at the strategic level of planning and decision-making, for the benefit of the prosecutor, deputy prosecutor and the chief of investigations. With limited resources, and critical decisions to be made, the higher levels of the Office of the Prosecutor will need thorough and accurate advice on the relevant facts, which shall be the result of systematic analysis provided by the Section.

The main areas of strategic analysis and advice should comprise preliminary examination (under Article 15(2) of the ICC Statute), factual reporting for strategic decision-making on an *ad hoc* basis, evidence collection planning, response to external submissions (under Article 15(6)), monitoring of concerned states (further to Article 18(5)), and identifica-

¹⁷⁹ *Ibid.*

tion of “unique investigative opportunities” (Article 18(6)). The advisory function implies the highest responsibility, and so it should correspond primarily to the chief of the section, with the support of the section members and in close co-operation with the incumbent legal officers.

1. *Preliminary examination.* Further to the provision for *proprio motu* initiation of investigations, the prosecutor will need to “analyse the seriousness of the information received” from a variety of sources (Article 15(2) (see Annex 1). This is primarily a task of analysis, focused on studying and processing information or evidence submitted by external sources, rather than gathering new evidence *ex officio* (although Article 15(2) permits the reception of testimony “at the seat of the Court”). The standard of evidence to request authorisation to open an investigation is “reasonable basis”.¹⁸⁰

Parameters. The parameters for Article 15(2) factual analysis shall be: a) *Jurisdiction*, preconditions for its exercise;¹⁸¹ b) *Crime*, definition of the alleged crimes, their elements under ICC norms and level of gravity;¹⁸² c) *Individual responsibility* under the ICC Statute¹⁸³ with special focus on superior responsibility;¹⁸⁴ d) *Admissibility* issues;¹⁸⁵ e) *Interests of Justice*;¹⁸⁶ f) *Viability*, practical conditions of access to the evidence and feasibility of the investigation.

Process. Analysis for Article 15(2) purposes will require the following process: a) *Acquisition of background and contextual knowledge*; b) *Source assessment*, as to the reliability of the source and the credibility of the information; d) *Collation and cross-*

¹⁸⁰ ICC Statute, Arts. 15(2) and (3) and 53, see *supra* note 120; ICC, Rules of Procedure and Evidence, adopted 3–10 September 2002, ICC-ASP/1/3, Rule 48 (<http://www.legaltools.org/doc/8bcf6f/>).

¹⁸¹ ICC Statute, Art. 12, see *supra* note 120.

¹⁸² Namely, ICC Statute, Arts. 6, 7 and 8, see *supra* note 120; International Criminal Court, Assembly of State Parties, Elements of the Crimes, IIC/ASP/1/3, 11 June 2010, pp. 108–55 (<http://www.legal-tools.org/doc/3c0e2d/>). On the threshold of gravity note repeated mentions of the “most serious crimes of concern to the international community” in preamble paragraphs 4 and 9 and Article 5 of the ICC Statute. The mention in Article 8(1) of “war crimes in particular when committed as part of a plan or policy or as part of the large-scale commission of such crimes” further seems to stress a high threshold of gravity.

¹⁸³ ICC Statute, Arts. 25–28, see *supra* note 120.

¹⁸⁴ *Ibid.*, Art. 28.

¹⁸⁵ *Ibid.*, Art. 17, namely inability or unwillingness to investigate by a competent state.

¹⁸⁶ *Ibid.*, Art. 53(1)(c).

checking of the available multiple-source information; e) *Formulation of different hypotheses and strategies of investigation*; f) *Presentation* of the analysis and investigative options in a manageable format for decision by the Prosecutor.

Standard format. A standard format for a “preliminary analytical report” needs to be defined, covering the abovementioned parameters (jurisdiction, crime, individual responsibility, admissibility, interests of justice and viability), so that a standardised system will permit comparative assessment of different situations and overall policy consistency.

Legal direction. While the focus of the Analysis Section is on the facts, legal guidance and co-ordination will be essential for preliminary examination, under the direction of the legal officers duly assigned.

2. *Factual reporting to the prosecutor.* The Analysis Section should be available to the prosecutor and senior levels of the Office of the Prosecutor for reporting on any factual issue that might be relevant for higher planning and decision-making. It is important that the Section preserves organisational autonomy within the Office, so that this channel of reporting is not conditioned by projects and priorities of other units and the prosecutor can receive objective analysis and advise on the relevant facts.
3. *Evidence collection planning.* Any investigative effort, either at a preliminary level or at a phase of full investigation, needs a proper collection plan to identify the main sources of evidence and ways of accessing them, so as to ensure systematic consideration of every relevant source and avoid duplication of work. The design of collection plans should fall primarily to the Analysis Section based on its command of contextual information and the main relevant sources. The chief of the section should submit a collection plan for every investigative project to the chief of investigations for consideration and approval.
4. *Response duty.* According to Article 15(6) of the ICC Statute, if after preliminary examination “the Prosecutor concludes that the information provided does not constitute a reasonable basis for investigation, he or she shall inform those who provided the information”. If this provision is understood as an obligation on the part

of the prosecutor to reply to all external submissions of information (which may need to be decided as a matter of law and policy), this may require some factual analysis in accordance with the above-mentioned parameters for Article 15(2) (preliminary examination). While presumably some submissions may be clearly immaterial and alien to ICC jurisdiction, and hence a response may be easily elaborated, for others it will take quite some analysis to substantiate a response consistent with the relevant facts and legal parameters.

5. *Monitoring.* Article 18(5) of the ICC Statute determines that “when the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions”. In such a scenario the reports submitted periodically by the state concerned will need to be assessed and verified with other sources of information, which will require factual analysis of the state’s actions and proceedings. The Analysis Section appears to be the most suitable instance for this process of factual verification.
6. *Unique investigative opportunities.* Article 18(6) refers to the possibility that the prosecutor may request from the Pre-Trial Chamber authorisation “to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available”. The Analysis Section should play a pro-active role in identifying such unique investigative opportunities and recommending the necessary steps to the chief of investigations and prosecutor.

2.4.1.2. Support Function

The Analysis Section should fulfil a support role to evidence-gathering operations, trials and appeals, on an *ad hoc* basis, at a level of tactical analysis focused on the specific operation or procedure. This function could be assigned for each project to different analysts within the unit by its Chief, for the benefit of the attorneys and investigators directing the relevant projects.

1. *Operations.* Evidence-gathering operations need analytical support at the levels of planning, implementation and evaluation. The par-

ticipants in the operation may receive from the Analysis Section briefings on the factual background, practical advice for the execution of the operation, as well as being debriefed by analysts upon completion of the operation. Analysts should assist in the preparation of witness interviews, particularly for insiders and policy witnesses, by providing the relevant contextual information, helping in the preparation of questionnaires and possibly joining the interview if necessary.

2. *Trials.* At the trial stage the Analysis Section should be available to support the attorneys in charge by providing all relevant information and evidence, particularly on issues such as the factual background, civilian and military structures of authority, documentary evidence, as well as graphic support by preparing the required visual aids for internal or litigation use.
3. *Appeals on admissibility and jurisdiction.* Article 18(4) of the ICC Statute provides the right of appeal for both the prosecutor and the state concerned against a ruling of the Pre-Trial Chamber on admissibility. Article 19 provides the right of appeal for the accused or any concerned state on issues of both admissibility and jurisdiction. To the extent that, in case of appeal, these issues will have to be tried as a matter of fact, it seems that analytical support will be necessary to assess the evidence on the degree of ability and willingness of the state authorities to carry out the investigation or prosecution (by the criteria of Article 17, as well as on the different elements of jurisdiction determined by Articles 5–8, 11 and 12).
4. *Appeals further to trial judgment.* At the appeals stage, further to a judgment by a Trial Chamber, experience indicates that analytical support is necessary, among others, to review and cross-check (within the limited parameters of the appeal) large amounts of evidence submitted by both parties, and to secure prosecutorial consistency among different cases. The Analysis Section should provide the appeals counsel with the necessary assistance for this purpose.
5. *Training.* As indicated in the budget for the first financial period, the Analysis Section shall engage in “[a]ssisting the Legal Advisory and Policy Section with the training of staff members on back-

ground information relevant to territorial States”.¹⁸⁷ This function is consistent with the experience of the *ad hoc* tribunals and is a logical utilisation of the knowledge gathered by the Analysis Section.

2.4.1.3. Source Exploitation Function

The Analysis Section should be assigned certain types of evidence that require analytical skill for their identification and collection. This function is crucial to secure means of evidence indispensable to understanding the factual context of the alleged crimes, as well as to proving cases of command responsibility. Under the supervision of the chief of section, different analysts should focus on particular types of sources and regions, for the overall benefit of the Office of the Prosecutor as well as particular projects.

1. *Documentary evidence.* This kind of evidence requires analytical experience and training to be handled properly. Large archival collections may need to be screened to select the relevant items, index, classify, authenticate and analyse them. “Analysing document collections” is among the duties assigned to the Analysis Section by the first budget.¹⁸⁸ The members of the Analysis Section, by their profile and qualifications, would be the most suitable personnel to deal with documentary evidence with the necessary discipline and understanding.
2. *Open source.* A variety of media will need to be systematically screened, including those of the territorial states in the native languages, as well as the vast traffic of open information on the internet. Note specialised providers and searching services (FBIS, LexisNexis, West Law, Copernicus and so on). This type of screening and selection belongs typically in the field of analysis, and the personnel in the Analysis Section would be most appropriate for this purpose.
3. *Insiders and experts.* The identification, interrogation and exploitation of insider witnesses are crucial for cases of command responsibility. This is a particularly sensitive duty, with serious security implications, and it requires thorough knowledge of the organisational context, culture and personal circumstances of the insider, which

¹⁸⁷ Budget for the First Financial Period, see *supra* note 123.

¹⁸⁸ *Ibid.*

cannot be achieved without proper analytical discipline. It is also necessary to keep a centralised record of this kind of witness, to avoid duplication and jeopardising of sources due to inadequate handling. Experts will be necessary both as consultants on particular forensic or regional issues, and as witnesses in court; their identification and exploitation are typically an analytical function. “Identifying and assisting experts” and providing “sensitive sources co-ordination” are among the duties assigned to the Analysis Section by the budget for the first financial period.¹⁸⁹

4. *Regional archives.* Background and reference files on different regions and concerned states will be necessary, so as to provide the necessary contextual knowledge and further identify other sources and investigative opportunities. These background archives will include, among others, specialised literature and biographical summaries (“who’s who”) for the key personalities, to be produced by the Analysis Section.
5. *Cartography and graphics.* The budget for the first financial period tasks the Analysis Section with “[d]eveloping tools of criminal intelligence-analysis such as time lines and visual aids relevant to factual patterns” or “spreadsheets showing chains or patterns of events, and multi-layered maps showing both background and crime-specific facts”, and “[p]roviding a mapping and reference service”.¹⁹⁰ Proper cartographic materials are necessary both for analysis and field operations, and need appropriate procurement and archiving. Graphics shall be one of the special duties of the Analysis Section, with the aim of presenting the evidence and working proposals, both internally and before the chambers, with the latest electronic tools.

2.4.2. Analytical Guidelines

It is advisable to define analytical guidelines for the Analysis Section in order to systematise its practice, guarantee consistency with the ICC Statute and Rules of Procedure and Evidence, and operate with a standard terminology. A standardised practice will allow quality checking and supervision of the work product, comparative assessment among different

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

cases and situations, and thereby contribute to the overall consistency of the prosecutorial policy. The guidelines would also be important to facilitate the integration of new staff and guarantee continuity in the work of the Section.¹⁹¹ These guidelines should be approved by the senior management and distributed to other sections, so that the services of the Analysis Section may be best utilised. Hence, they would facilitate co-operation and joint work with other sections, particularly with the Investigations Section and the legal officers in charge of the relevant projects

These are the main areas to be regulated by the guidelines for the Analysis Section.

1. *Internal organisation.* Duties of the chief and members of Section, by areas of expertise (criminal, political, military), sources (documentary, open source, insiders, experts) or regions, with a clear division of tasks and responsibilities. A division of labour needs to be combined with systems of co-operation and joint work among the Section members, having in mind possible overlap among areas of expertise and sources. Issues of training and mentoring of new staff need to be duly considered. Procedures of professional supervision and evaluation, and mechanisms for professional accountability (on the quality, quantity and timeliness of the work product) need to be defined.
2. *Investigation and analysis cycle.* A standard protocol or cycle of analysis should be defined, to guarantee systematic development, phase by phase, from collection to final recommendations, through collation and source assessment. Such a discipline is essential for proper planning and to avoid superficial or merely impressionistic assessments.
3. *Source assessment.* Sources of information and evidence will need to be assessed based on criteria of credibility, reliability as well as added value (procedural economy), for which standard indicators and practice needs to be defined.

¹⁹¹ This section is based on the ICTY experience, as well as Peterson *et al.*, 2001, see *supra* note 15; other IALEIA publications; Europol, 1999, see *supra* note 14; and the Law Enforcement Intelligence Unit Guidelines (United States). For an example of guidelines produced by the Uniform Crime Reporting Program of the FBI, see *Hate Crime Data Collection Guidelines and Training Manual*, US Department of Justice, 27 February 2015.

4. *Standard terminology.* Given the innovative character of the institution and the diverse origin of its staff, it is highly advisable to define a standard lexicon to develop a common language and guarantee accurate understanding of key terms and concepts. Among others, legal as well as descriptive terms like “crime”, “evidence” (as opposed to mere “information”), “credibility”, “document”, “witness” and “analysis” would need accurate operational definition.
5. *Standard reporting formats.* The reports produced by the Analysis Section should follow standard formats on quotations, references to sources, differentiation between statements of facts and analytical assessment, and other meaningful elements. Standard formats should be defined for particular duties, such as a preliminary examination analytical report or report on unique investigative opportunity”, defining the parameters and areas to be covered.
6. *Security and confidentiality.* Criteria for protection of sources and information, classification, restriction of internal dissemination (need-to-know basis) and compartmentalisation of information need to be defined.

2.4.3. Recruitment

The ICC Statute establishes that “[i]n the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity” (Article 44(2)).¹⁹² High standards of recruitment are essential for the successful performance of the Analysis Section.¹⁹³ The complexity and responsibility of the analysis function in ICC investigations cannot be overemphasised, and professionals with the highest qualifications and commitment are indispensable. These are the main areas of qualification that should be considered.

1. *Advanced university education.* An advanced university degree, which is a standard requirement for professionals in the UN system, should neither be dispensable nor tradable with experience in any position of the Investigations Division (contrary to the practice of

¹⁹² For the relevant Interim Guidelines, see International Criminal Court, Assembly of State Parties (‘ICC-ASP’), Selection of the Staff of the International Criminal Court, 9 September 2002, ICC-ASP/1/Res.10.

¹⁹³ This section is based primarily on the experience of the author in the recruitment of analysts for the ICTY and discussions with senior analysts from different agencies.

the UN *ad hoc* tribunals), least of all in the Analysis Section. University education is indispensable to developing the level of intellectual sophistication, the ability to handle large amounts of information, to understanding complex issues, and to assessing conflicting sources, which are essential for the factual analysis that the ICC needs. Standard analytical training provided by police agencies or private firms (generally lasting some two weeks) is valuable,¹⁹⁴ but it is far from the high level of epistemology guaranteed by a proper university education (four to seven years of curriculum). The areas of law and social sciences (political science, history, sociology, criminology and possibly others) should have priority consideration. Analysts may be called to testify in court, to explain to the chamber particularly complex material or evidentiary issues. This should be kept in mind at the recruitment stage as a standard for assessing the reasoning, synthesising and communication skills of the candidates.

2. *Extensive relevant experience.* It takes a great deal of professional and life experience to develop the know-how and maturity necessary to perform analytical work of the quality that the ICC needs. Analytical experience in the UN *ad hoc* tribunals should be considered as very relevant, but not the only reference. Other relevant fields of experience will refer to war crimes investigations at the national level, specialised criminal analysis units in different states, social science empirical research in relevant areas, and human rights reporting by specialised non-governmental or international organisations.
3. *Knowledge of law.* The Investigations Division is different from other police or investigative agencies in its jurisdictional role; it is part of the judicial process, legally regulated and orientated towards

¹⁹⁴ This category contains the analytical training provided by the Anacapa Sciences, Focus Investigative Analysis (UK), the Canadian Police College, the International Association of Chiefs of Police, Intelligence Study Centre (for Strategic Intelligence), the Alpha Group Center for Crime and Intelligence, the Crime Mapping Research Center (USA) and other internal training courses of different national agencies. For standard training handbooks, see *Introduction to Intelligence Analysis*, Canadian Police College, 1995; and McDowell, 1998, *supra* note 14. For an updated listing and contact details of these training providers see www.ialeia.org. At the university level, Mercyhurst University (Pennsylvania) offers a four-year programme designed to generate entry-level analysts for the government and private sector.

objectives of criminal law. Some of the questions to be analysed will have a strong legal component, such as the issues of admissibility in Article 17, which will need to be established as a matter of fact, requiring substantial analysis. The investigation and analysis process is to be directed by legal officers, to whom the analysts will relate as their clients and superiors. Given these legal elements it is very advisable that the analysts have some legal training, particularly in criminal law, international humanitarian law and, evidently, the regulations of the ICC.

4. *Languages.* While English may be indispensable as the main working language of the Office of the Prosecutor, it is advisable that analysts are also fluent in at least the second working language or another of the official languages. The Analysis Section needs to be able to handle evidence in its original languages (which are likely to comprise the different major languages of the world and official languages of the Court). A cosmopolitan, multicultural and multilingual vision and composition of the Section would be consistent with the nature of the Court, avoiding prevalence of any particular region or culture.
5. *Personal suitability.* In addition to formal training and qualifications, a personal profile suitable for analytical work is necessary. This implies, very importantly, a good attitude towards teamwork (listening and communication skills, peer support, flexibility, mutual respect, sharing ideas, self-criticism and introspective ability) because analytical tasks are such that they cannot be handled in isolation; they always require a team effort with fellow analysts, legal officers and investigators. Analysis calls for reflective, persistent, dispassionate and self-disciplined persons, who will have to spend very long hours sitting in the office processing the evidence, and thinking very carefully before giving an opinion. The analyst needs to be circumspect and discrete, able to keep a low profile and meet the strictest standards of confidentiality. Gender and cross-cultural respect is essential. Commitment to the core values and objectives of the Court is necessary, and will reflect on the motivation, quantity and quality of the work product.
6. *Regional expertise.* The relevant information and evidence needs to be analysed in its original social and political context. Thorough knowledge of the original context of meaning of the evidence is es-

sential from the earliest stages of investigation. This will require advanced knowledge of the society, language, history and current developments of the concerned state. Since nobody can be an expert on every region, at some point of the process it will be necessary to recruit analysts with expertise on particular concerned states or regions. Personal experience in different regions of the world is should be considered an important asset.

7. *Computer literacy.* The large amounts of information and evidence originating from multiple sources can only be processed with electronic tools. Experience with databases (Access, Oracle, Visorfox and so on), search and data retrieval tools (Zyfind, Keyfile) and specialised analytical software (Link and Case Notebook, Crime Zone, Crime Workbench, Atlas, Visio 200, ArcView, Mindmap, SPSS and so on) is an important asset, although it could be compensated with other methodological merits, and further covered by technical training provided by the Office of the Prosecutor.

As for the method of recruitment, experience with analysts suggests the following points.

1. *Leading participation of senior analysts.* Senior analysts need to have a leading part in the recruitment of staff, for the obvious reasons of consistency and knowledge of the field. Additionally, the participation of senior legal staff is also advisable, so that they may assess the ability of the candidate to understand the legal environment of the Office of the Prosecutor.
2. *Written sample.* The interim guidelines for selection of staff indicate that the evaluation of the candidate “should, wherever possible and appropriate, include examples of the candidate’s capacity of analysis and drafting ability in one or both of the working languages of the Court”.¹⁹⁵ It is most advisable and appropriate to request written samples from the candidates for the Analysis Section. An assessment based only on an oral interview may be insufficient and lead to disappointment with candidates who have experience in oral expression (particularly if they speak in their mother tongue) and master the technical jargon, but lack the requisite methodological strength. Candidates who come from certain police or intelligence agencies may not (or should not) be able to present written

¹⁹⁵ ICC-ASP, 2002, point 3, see *supra* note 139.

- samples of their work due to their confidentiality obligations (as opposed to researchers from the academic or other domains). In such cases they should be asked to produce a short written document on a relevant issue for the purpose of the application.
3. *Standard questionnaire.* Candidates need to be questioned using a standard questionnaire, so that all of them are asked about the same themes (or even exactly the same questions), the attention of the interviewers is better focused, and a consistent comparative evaluation is best assured. The questionnaire should include specific questions on the abovementioned areas of qualification. Positive and negative examples from the professional experience of the candidates should be examined. Critical and challenging questions should be included for the interview to gain the necessary depth.
 4. *Interview in person.* Candidates should be interviewed in person as far as possible, in order to best assess their behaviour and responses to the questions. Telephone interviews may be too superficial and distant for a proper evaluation.
 5. *Practical exercise.* It is recommended to include a practical exercise in the recruitment process, so as to test the ability of the candidate on tasks of synthesising large amounts of information, assessing sources critically, drawing clear conclusions and investigative recommendations, and other analytical duties.
 6. *Targeted recruitment.* A recruitment strategy should proactively target the areas where the most suitable professionals are likely to be found, in the domains of national and international criminal investigations, professional associations, universities and others.
 7. *Security check.* It is advisable to run background security checks and questioning of the candidates so as to assess, for example, their connections to groups related to the matter of investigations or undue links to national agencies. Security evaluations are to be conducted by the Office of the Prosecutor, on an individual basis, as opposed to exclusions based on general categorisations (the same would apply to staff of other sections).
 8. *Internship.* Including the Analysis Section in the internship programme of the Office of the Prosecutor would help to identify and train valuable junior professionals for further recruitment (to the extent permitted by the applicable norms).

2.4.4. Notes on Management

A few points relevant for the management of the Analysis Section can be anticipated summarily at this preliminary stage.

1. *External resources.* The Section should develop contacts and mechanisms to optimise the exploitation of external resources, aiming and utilising the most advanced resources and knowledge available outside the Court, avoiding unnecessary duplication of work and saving funds. Options such as the following should be explored: hiring regional or forensic experts as external consultants; optimising the input and support from international and non-governmental organisations, universities and specialised institutes (and their library and research resources); forensic capacity of the state parties; acquiring the services of private or institutional providers of open source. The momentum created by the launching and initial actions of the Court should be seized in order to negotiate possible agreements in the most favourable conditions.
2. *Personnel stability.* It is advisable to define a system that would offer some professional stability. A proper career path may need to be established in order to prevent excessive changes of personnel and to engage good professionals for a long-term commitment. Conversely, at the recruitment stage the duration of the candidate's commitment should be considered as an important factor for selection.
3. *Expansion of the unit.* It appears that the initial staffing provided by the budget for the first financial period will not be sufficient to handle even one single situation, if duly authorised (besides the response duties of Article 15(6)). A number of undetermined variables make it difficult to draw a precise staffing plan at this stage. Nevertheless, it appears that in the case that a full investigation is authorised, the Section may need to develop one specific unit for each situation, due to the need for specialised regional expertise and the sheer volume of information that will be analysed. The organisational and managerial implications need to be foreseen (from working space, to supervision and co-ordination issues). In the longer run, the Analysis Section may possibly develop into subsections by regions (just as, at their level, intelligence agencies, ministries of foreign affairs or companies do regularly).

4. *Computer equipment.* The Section will need adequate computer equipment, in order to run efficiently the necessary analytical software and handle large volumes of information.
5. *Induction and training.* A detailed plan for induction and training of the new staff should be defined, as to integrate all Section members in a standardised system of work. This is essential to guarantee the cohesiveness of the Section.
6. *Clerical support.* The Section is likely to need clerical support for purposes of database inputting and so on. As far as possible, it is necessary to avoid distracting the analysts from their specific duties by burdening them with clerical work (which is a very common problem in analytical work).

2.5. Conclusions and Recommendations

In view of the difficulty and crucial responsibility of its mandate, the Office of the Prosecutor of the ICC needs to integrate high-quality analysis as a central element of the investigative effort. Given the limited resources and critical decisions to be made, the ICC needs ‘smart’ investigative techniques displaying strategic vision, and optimising the use of information submitted by third parties, open source, documentary evidence and other sources of evidence that will be available to the prosecutor in large quantities. The following are recommended in the best interests of the Analysis Section and the investigations of the Office of the Prosecutor as a whole.

1. *Define a clear mandate for the Analysis Section.* The Analysis Section needs to have its mandate clearly defined so as to best perform its duties and co-operate with the rest of the Investigations Division and the legal staff. Analysis needs to be central to ICC investigations in order to avoid dysfunctionality and waste in operations-led practice. The Analysis Section should cover three main functions: advisory-strategic, support-tactical and source exploitation.
2. *Determine high standards of recruitment.* The Analysis Section needs standards of recruitment consistent with the high complexity of its duties. An advanced university education, extensive relevant experience, knowledge of applicable law, command of several languages and an adequate level of intellectual sophistication should be required.

3. *Assign factual preliminary examinations to the Analysis Section.* The factual aspects of preliminary examination under Article 15(2) should be assigned to the Analysis Section, under the direction of the appropriate legal staff, due to the complexity and strategic consequences of such assessments.
4. *Ensure organisational autonomy for the Analysis Section.* In order to preserve its integrity, operate as a safeguard for objectivity and best perform its advisory-strategic function, the Analysis Section needs to maintain its organisational autonomy under the chief of investigations, but without being subordinated to any particular line of investigation or proceeding.
5. *Establish analytical guidelines.* The Analysis Section needs mandatory guidelines to guarantee the systematic collection and analysis of evidence, proper assessment of sources, standard terminology, and thus standardised work that will allow comparative assessments and contribute to the overall consistency of the prosecutorial policy.
6. *Elaborate working hypotheses for Article 15 proprio motu action.* The Analysis Section, in close co-operation with the competent legal officers, and within the realm of Article 15(2), should start elaborating without delay working hypotheses on the territorial states with the gravest situation of crime, to present to the prosecutor in the future with different options for possible initiation of proceedings *proprio motu* under Article 15.

Annex

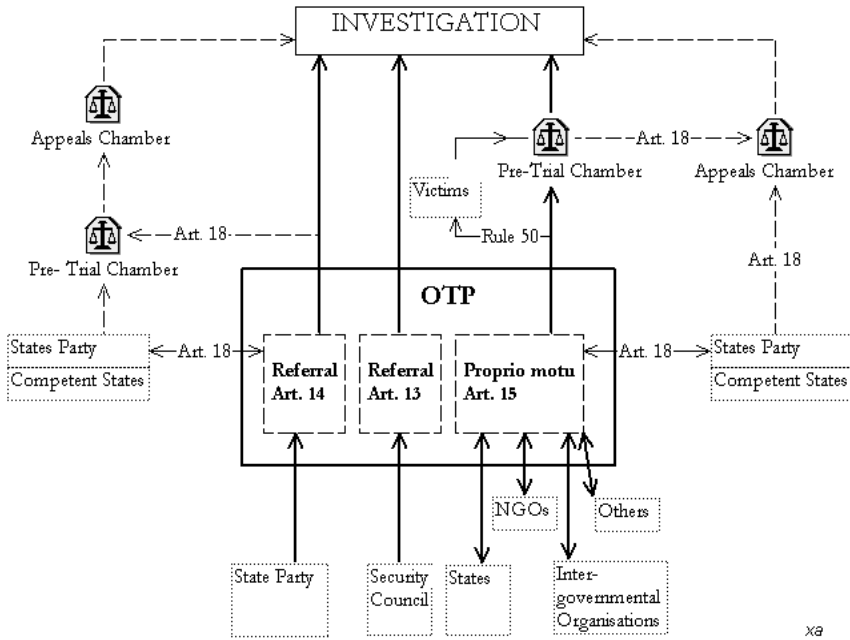


Figure 5: Initiation of ICC Investigations.

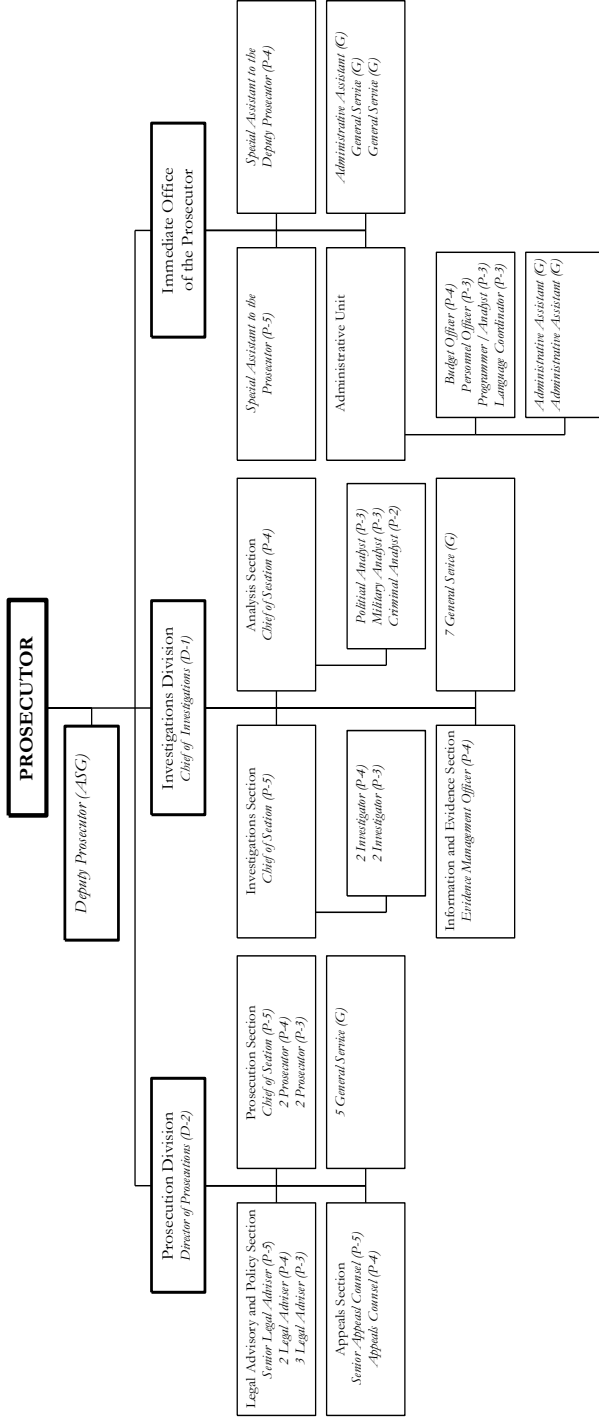


Figure 6: Structure of the ICC Office of the Prosecutor.

Source: Budget for the First Financial Period, 2002, pp. 265–70, see *supra* note 123.

The Function of Analysis and Analysts

Peter Nicholson*

3.1. Introduction

This chapter is intended to provide thoughts, comment, guidance, ideas and advice to an International Criminal Court prosecutor's office on the function of analysis, military analysis and the role of the analyst within it. It also touches on associated matters that are relevant to the main subject, including management issues, broader analytical issues, information management issues, intelligence, information and evidence collection, technological requirements and security matters.

3.2. Function of Military Analysis

Military analysis provides investigation and subsequently prosecution cases with the military dimension of integrated events, personalities, organisations and crimes under scrutiny. The analyst will examine *de jure* and *de facto* issues relating to crimes, prosecution targets and events, and will provide analysis from the most preliminary stages of an investigation or assessment, right through to the presentation in court of such analyses by the analyst for the prosecution. He or she provides the ability to monitor, research for and advise the prosecutor in the defence phase of a trial.

* **Peter Nicholson** has broad experience from international criminal analysis and investigations. He has been Director of Investigations at the Commission of International Justice and Accountability, and an investigations and intelligence team leader for nine years at the International Criminal Tribunal for the former Yugoslavia, including as the manager of the Human Intelligence Unit. He was also an investigator and intelligence liaison officer at the International Criminal Court in the Office of the Prosecutor for four years, and served for 16 months as the Chief of Investigations at the United Nations Investigation Commission in Lebanon. The text of this chapter was originally submitted as part of an informal consultation process at the time of the establishment of the ICC Office of the Prosecutor. It reflects information available to the author at the time. The text – like the other chapters in Part 1 of the book – has deliberately not been updated since. Only minor textual editing has been undertaken. Personal views expressed in the chapter do not represent the views of his employers.

To enable a better understanding of military analysis, the component parts have been deconstructed from each other below and described individually. It should be noted that all the categories outlined are in fact critically integrated and interwoven with each other. All facets have to be examined and considered together in reality, and one cannot separate one topic from another if one requires complete analyses for cases.

3.2.1. Events

The military analyst will provide the picture of who was doing what to whom, when, where, how and why in the military sense, and, when appropriate, in the criminal sense too. He or she will place into context single, low-level events and actions (the tactical level in military terms), will provide a broader context of collected/linked actions and events over larger geographical areas (the operational level), and will provide the broadest picture of actions and events across an entire country or geographical region (the strategic level). He or she will also provide the interface between the political and military hierarchies at the centre of government (the grand strategic level). Finally, the analyst will provide the above for both or all sides of any conflict, actions or events as required.

3.2.1.1. Legitimate Military Targets

The analyst will provide analysis and advice regarding the definitions and interpretation of what constitutes a legitimate military target or otherwise. He or she will apply the law on the topic to date, together with factual analysis of events and targets of relevant time periods to establish the legitimacy or otherwise of a target(s) at any one given time.

3.2.1.2. Proportionality

The analyst will provide analysis and advice regarding the definitions and interpretation of what constitutes the legitimate use of force or otherwise, and lawful and unlawful attacks and acts, when examining events. The concepts of proportionality will be examined from a *de jure* perspective and applied to events which have taken place in the *de facto* sense.

3.2.1.3. Military Objectives

The military analyst can place into context actions and events, and can examine the relevance and military necessity of such events from the tac-

tical, operational and strategic objectives perspective of an overall military campaign where appropriate.

3.2.2. Personalities

The military analyst will place individuals into the context of events which have taken place, either in the context of “at a certain time on a certain day”, or in the broader context of “during the time period when crimes occurred”. This is done for low-level individuals, perhaps at the scene of a crime itself, all through the chain of command as required up to and including a commander of an army, his or her staff and into the political/military interface, including the political mechanisms and ministerial responsibilities where appropriate.

3.2.2.1. Command Responsibility: *De Jure*

The analyst will establish where, why and how an individual will, or will not, hold command responsibility for events, individuals and units, and crimes which have occurred. The analyst will establish the *de jure* position of an individual, not only through the application of international humanitarian law but also within the subject’s military law, constitutional law and military doctrine, including the concepts of chain of command and the orders process. He or she will outline the obligations of a commander, *before, during and after* criminal events have occurred, and will demonstrate the mechanisms and options available to military commanders when executing their command responsibilities.

3.2.2.2. Command Responsibility: *De Facto*

The analyst will also establish the *de facto* command responsibility aspects relevant to a case, from establishing an individual’s position within a hierarchy through to the demonstration of the individual’s practice of military command and control of military formations and units *before, during and after* events in relevant time periods. The analyst will establish the chain(s) of command above and below targeted individuals in order to establish further, higher level culpability for crimes which have taken place if relevant, and to establish the practicing working chain of command from the target down to the crimes which occurred. In this way, the analyst establishes an individual’s knowledge and/or intent *before, during and after* relevant events. Finally, the analyst will examine the working

process and mechanisms which are *de jure* available to a commander to establish their utilisation in the factual sense *before, during and after* the course of relevant events.

3.2.2.3. Command Responsibility: Use of Military Experts

The analyst will offer advice in the use or not of an external military expert(s) during the investigative and prosecutorial phase of a case. Such an expert(s) can provide added value to the case by providing advice, and eventually writing a report and giving evidence, in relation to the targeted accused, his or her knowledge and his or her likely command responsibility for events and crimes which have taken place. The expert should be of similar or higher rank than the target/accused, and have had operational experience or similar in order to authenticate and validate the ‘expert’ label. The expert need not necessarily be from the same military environment of the target/accused, nor have served in the relevant theatre of operations; however, when selecting an expert, a matrix of required factors should be drawn up, with benefits and drawbacks weighed accordingly.

Ordinarily, such an expert is invited to accept that the facts of the case are correct, and draws conclusions on that basis, having read into the case thoroughly in both the *de jure* and *de facto* senses. The expert will then write a report to cover the command responsibility, command and control, knowledge and intent aspects of the case, and present for the benefit of the court his or her opinion.

3.2.3. Organisations

The analyst will examine the linkage between targeted individuals and others within their command chain, and tangentially to it as appropriate. He or she will establish the extent and mechanisms of ‘knowledge’ throughout an organisational structure vertically and horizontally. The analyst will establish the nature, type and structure of organisations involved in events and more specifically, when appropriate, crimes that have occurred.

He or she will establish the organisation(s) involved, including the examination of formal military organisations, both regular and reserve, *ad hoc* military units, paramilitary formations, special police units, armed criminal gangs, sponsored armed groups or individuals. The analyst will also provide the relationships between the diverse groupings, including

the concepts of joint operations, superior–subordinate hierarchy, mixed military groups and concepts of operational control or otherwise.

3.2.3.1. Integrated Functions within the Military Environment

Within the analysis of military organisations and events, the analyst will provide the extent to which individuals and organisations conducted and utilised military functions, for example: combat operations, combat support, logistics, intelligence, training, finance, fuel supply, communications (including secure), transport, air defence, engineering support, ammunition re-supply, medical support and administration (including accommodation, promotions, welfare).

3.2.3.2. Use of Military Expert in Organisational Function Analysis

The analyst will offer advice in the use or not of an external military expert during the investigative and prosecutorial phase of a case. Such experts can provide technical/operating advice, eventually writing a report and giving evidence in relation to the nature of a specific function being examined. For example, in the analyses of artillery and its use, an expert may give advice/evidence regarding the technical capabilities of a weapons system and may give operating advice as to how such systems work, are used and engaged, and by whom. The expert should be of appropriate rank and/or experience, be of sufficient knowledge, and have had operational experience or similar where appropriate in order to authenticate and validate the ‘expert’ label. The expert need not necessarily be from the same military environment of the target/accused, nor have served in the relevant theatre of operations, however, when selecting an expert, a matrix of required factors should be drawn up, with benefits and drawbacks weighed accordingly.

3.2.4. Crimes

The military analyst will provide analysis and advice relating to the crimes committed and the involvement of individuals from the military perspective. He or she can establish whether criminal acts took place within a broader legitimate action, or whether the action itself had no legitimate military value. He or she can examine such crimes from the tactical, operational and strategic perspective when establishing culpability and knowledge levels.

3.3. Evidence Requirements for Military Analysis

Military analysis as defined above demands specific forms of evidence to establish the fullest and most comprehensive picture as possible. It is critical to note that *breadth of sources* is vital for quality analysis, and that the majority of evidence will not come from victim and ‘low-level witness to crimes’ testimony, but from information collected by other means. These include:

- Indigenous documents: seized, handed over, requested, captured, openly acquired. Such documents provide a contemporaneous record of knowledge and events for all levels of military command, and vary greatly in type (for example, daily combat reports, intelligence situation reports, orders, administrative instructions, military magazines, war diaries, formation/unit records and so on).
- *De Jure* documents: constitutional decrees, military law, military manuals (for example, doctrine, command levels, operations, technical), standard operating procedures and so on).
- Witness interviews: of targeted indigenous individuals in a position to provide evidence to events at all levels of command as appropriate. Interviews to be requested overtly or achieved through ‘insider’ acquisition. Interviews to be carefully prepared beforehand.
- Open source information: newspapers, journalists, media footage, interviews, books, television coverage, commercial imagery, websites (in particular official military intelligence).
- Internationals: for example, non-governmental organisation representatives, diplomats, United Nations (‘UN’) representatives, mercenaries, special representatives of regional bodies (such as the European Union), monitoring missions, military forces deployed in area (such as the UN, NATO and so on).
- Intelligence: imagery, human intelligence, signal intercepts. Can be provided by contributing governments, special caveats invariably apply legally, procedurally and evidentially (see below on “Utilisation of Intelligence”).

3.4. Collection of Evidence

The military analyst should be used as a collector of the above forms of evidence *where appropriate*. This immediately creates a dilemma, given

that when an analyst is collecting, he or she is not analysing. However, the balance has to be struck given that the specialised knowledge possessed by a military analyst, both by past experience and through case knowledge, can be critically useful in the collection phase. This should be factored into case planning and time management of resources. The military analyst should possess training and experience in the interview of individuals, especially those with a military background.

3.5. Time Management of the Analysis Function

It is critically important to recognise that the military analyst needs time to produce a quality product, as well as a breadth of sources of information and evidence. The analyst should be integrated into the case *at the start*, and should be given the continuity of task to remain on the case all the way through its life wherever possible. There is a direct correlation between time given, breadth of sources and quality of product: if either of the first two are lacking, the product will suffer.

3.6. Presentation of Military Analysis

Military analysis can be presented in different forms to suit the prosecutor's requirements. It can be verbally briefed, despatched in micro-elements electronically, produced as a text report, and presented visually by the use of electronic analytical tools such as timelines, link charts and geographical information systems.

The means by which the analysis is disseminated will depend on factors such as individual customer preference, evidentially driven minimum standards, volume of data, nature of data and for which phase of a case, that is, indictment review, presentation in court and so on.

It is highly recommended that electronic analytical tools are utilised throughout the phases of a case, from the earliest gathering and examination stage, through the mature investigation phase and on into the trial phase. This achieves continuity of information, a systematic approach to analysis and saves much time as the case develops. Presentational items for the courtroom can thus be merely extensions of a dynamic and developing investigative/prosecutorial product, rather than a start from scratch creation using raw data.

3.7. Utilisation of Intelligence

While the acquisition of intelligence to support the investigations, and latterly, the prosecutions, of the prosecutor is not *fundamentally vital* to the success of cases, it can be extremely useful indeed given the reasons for its collection, and the sophistication of the means and methods by which it was collected.

It is implicit that in a geographical environment where serious and sometimes widespread crimes have been committed, other organisations and governments may have had an interest, if not a stake, in events that have occurred. Thus, it is highly likely that not only host nation governments but others external to the area have been collecting intelligence for their own reasons, for example to achieve a political advantage and/or to facilitate military planning. It can follow therefore that much of what may have been collected by such entities is of some value too to an international court.

3.7.1. Critical Factors in Acquiring Intelligence

3.7.1.1. Establishing Relationships with Providers

Such relationships must be developed at the most senior political levels, and must be followed up with a very knowledgeable working-level team from the prosecutor to exploit appropriately any success achieved at the highest levels of negotiation. Demonstrating knowledge of means, methods, capabilities and, especially importantly, *sensitivities* is critical to establishing a working relationship with a provider.

3.7.1.2. Procedures for Intelligence

It is most important to establish appropriate working procedures to satisfy the provider who may pass intelligence to the prosecutor. It is extremely important to know what to ask for and how to ask for it. Also, receiving, viewing, handling and storing procedures must be appropriate to ensure the intelligence is not mismanaged at any stage, ever. One mistake can turn off a flow of intelligence immediately. Ordinarily, the providers have to satisfy themselves that the procedures are in accordance with their own procedures and requirements.

3.7.1.3. Intelligence in the Courtroom

Mechanisms must be developed to enable vital intelligence of critical importance to a case to be used in the courtroom. It must be acknowledged that this will not always be possible, and some intelligence provided may forever remain outside of the courtroom. However, a flexible, creative and procedurally solid approach must be adopted, using the rules as positively as possible, often on a case-by-case basis only, in the negotiation with providers to make the product available where needed. Different measures can be examined, such as downgrading product by classification; downgrading by quality of information; specific focus on the actual requirement for the data, including what its end use is actually going to be; applications to the court, representations from the provider, further information provision by a provider and so on.

3.7.2. Types of Intelligence and Its Use to the Prosecutor

3.7.2.1. Imagery

Imagery can provide contemporaneous evidence in relation to events, crimes and actions on the ground. It can be especially useful to show, for example, destruction, killing fields, mass graves, military logistics and military positions. Imagery can be pinpointed in time, even to the minute and hour in a day. It can therefore be used to corroborate the veracity of human information, for example provided by a witness to events and/or crimes. Imagery is a form of intelligence that can surmount the usual security and sensitivity caveats of a provider and be used in the courtroom.

3.7.2.2. Signal Intelligence

Signal intelligence can provide contemporaneous evidence in relation to events, actions, crimes and individuals. It can be especially useful to show command chains in operation, to show interplay between the political/military interfaces, and to show, critically, intent and knowledge of an individual. Signals intelligence is a difficult form of evidence to bring into the courtroom, given its sensitivities from the providers' perspective regarding their means and methods of collection. Some lower-level tactical signals intelligence can be easier to negotiate for with providers, but requires extensive validation and authentication procedures to render it evidential in standard.

3.7.2.3. Human Intelligence

Human intelligence can provide very detailed and well-placed evidence in relation to events, actions, crimes and individuals, especially at the highest levels. It can be especially useful to show command chains in operation, to show interplay between the political/military interfaces, and to show, critically, intent and knowledge of an individual. Human intelligence is a difficult form of evidence to bring into the courtroom, given its sensitivities from the providers' perspective regarding their sources and the security issues surrounding them. Because acquisition of high-quality human sources is painstaking and very carefully done, normally clandestinely, it requires a lot of motivation and negotiation with a provider to enable a source to be used in the courtroom.

It should be noted that the collection of human intelligence is a function that a prosecutor's office can perform for itself, *providing the appropriate working parameters are applied*. It should be done by professionals in this sphere of intelligence work, and should not be traded off to others who do not possess the necessary skills and experience, for example, untrained law enforcement officers or analysts.

3.8. Strategic Use of the Broader Analysis Function

- *The analyst and the analysis function (therefore, by definition, the military analysis function where appropriate) should form a third of the triumvirate of main disciplines supporting the prosecutor. They should be aligned in equal measure to the other two disciplines in terms of numbers of resource, and should provide an equal voice in the input to the Office of the Prosecutor's strategy and direction.*

The reasoning here is that the analyst can provide breadth of knowledge, a strategic view and objectivity of relevant case(s), and can provide advice as to the nature of sources, timescales required for work, linkage requirements, tasking and collection needs and future targeting opportunities. The analyst should have the strategic view whereas other staff disciplines may only have a lower-level focus.

'Equal numbers' is critical in so far as much very senior and senior level perpetrator work is focused on its linkage to a crime base and the enshrining of an accused in status and position within the country's managing organs. This demands systematic and thorough analysis of types of evidence and information which are not ordinarily dwelt upon, or even

sometimes collected by investigators. This function is time consuming, resource intensive yet critical for success.

- *The analyst should have a separate management chain in terms of the execution of his or her professional obligations to the Office of the Prosecutor, namely objectivity, ethical analytical process, qualitative contribution and proper utilisation of the resource.*

At the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the role of the analyst had been minimised and incorrectly used in its earlier days. Too many analysts were used as administrative support staff, and their intellectual capacities were not properly utilised or misunderstood in many cases. Historically the effective use of analysis had been from outside the investigation team environment, where the analyst nevertheless supported the team, but the tasks were identified, allocated and supervised by the analytical management structure.

Sometimes analysts were stifled into not being able to provide an opinion because it may have run contrary to the prevailing view of an investigative team. This issue created a subjective, one-dimensional environment, where counter-thinking and alternative strategies were not encouraged, and direction, case status and future indictments were therefore sometimes based on personal bias and views, and not from the objective analysis of facts. The analyst should be a component part of the checks and balances in the investigation and case development processes. This avoids skew, bias and subjectivity as the work unfolds. The analyst should have a platform for voicing opinion long before he or she feels the need to express professional ethical concerns.

3.9. Structure

- *The analyst should support the investigative function and investigation teams from outside of the immediate investigative management structure. This ensures integrity of tasking, quality of product, focus of requirements and proper use of the resource. Similarly, the analyst should support the prosecutions team from without, but working in close liaison with attorneys to provide advice, knowledge and guidance of the case. The analyst should work from the Analysis Section's project-driven tasking, ensuring the necessary modules for case completion are identified, collected against and resourced accordingly.*

At the ICTY, much analytical work could be identified as modular and identifiable by template application, based on the experience of the analyst teams in support of cases. It was unnecessary to reinvent the entire wheel for each investigation, and although each case was unique in terms of facts, it was not in terms of certain analytical requirements for a complete case.

Although analysts work very closely with investigators for crime base work, there is little requirement for them to conduct linkage analysis or political analysis from within the investigator environment. Case direction should come from the attorneys, and the analysis and investigations requirements should be modular, project-driven and not based on a rigid hierarchal structure, which leads to inflexibility, dearth of knowledge and lack of attention paid to linkage aspects of cases.

3.10. Work Cycle: Analyst's Involvement

- *The analyst should be fully integrated into every aspect and phase of the case life cycle. There is no such concept as “collect first, then analyse”:* the two functions should work hand in glove at all times, with one driving the other and vice versa. As cases develop and mature, and most likely therefore become ever more complicated, the analytical component of them becomes more significant and pivotal in terms of managing the data, developing theories and ensuring collection is continued appropriately in the areas which are required.

Often at the ICTY the two functions were seen as consecutive in their application, rather than concurrent. This had the effect of creating stop/go/stop/go forms of case management, and is tied to the hierarchal managerial structures, within which the analyst was largely unable to advise in case direction, collection requirements and status effectively.

- *A strategic investigations plan, closely backed up by a strategic collection plan, should be written to provide the framework within which a case can be managed throughout the extent of its life. The analyst should participate in the writing of the former, and write (for authorisation) and manage the latter. In this way, a case can remain focussed, efficiently directed and can avoid over and under collection. It also serves to provide a transparent status report and update at all times: this has the effect of spreading knowledge*

throughout the case team, and enables management staff to monitor case progress and status effectively.

This aspect was lacking in some ICTY cases, leading to situations where some cases took too long to come to court, or were seriously over-collected against, significantly under-collected for, and sometimes charged over-ambitiously through lack of facts being established.

- *The analyst(s) should be critical component members of case status committees, indictment writing groups and indictment review boards. They should be allowed to air opinions and views independently of their legal and investigative colleagues, and offer alternative theories of fact interpretation and target culpability where necessary.*

This was not always the situation in international criminal jurisdictions.

- *The composition of the required professional skill-sets within project teams beginning an investigative review of a case should not necessarily be the same as the one which completes the indictment or deals with the prosecution of the case. This means that the case requires individuals with relevant skills at relevant times to its phases of development. It is highly likely that more analysts are required the further a case matures, as well as support staff. Thus a flexible management and resource allocation process, incorporating the ability to manage change in relation to project team structure appropriately, is required.*

This was not always the situation in international criminal jurisdictions.

- *A function of the senior management is to ensure the education of the prosecutor's staff in relation to what an analyst can and should do to support a case. It should be acknowledged and understood by all staff to ensure such staff are utilised in their correct professional capacity. Similarly, analysts should be able to maintain and update their specific skills, especially in the electronic tools developing environment.*

This was not always the situation in international criminal jurisdictions.

3.11. General Management Issues

3.11.1. Organisational Development and Change

The management of the analytical function requires more than individuals with only analysis experience. It requires real management experience, particularly in the area of organisational development and the management of change and the change process. It is critical to maximise the effectiveness of the individuals in the analytical function, at the same time ensuring the resource is efficiently deployed.

In a dynamic office that frequently changes its shape, such as a prosecutor's office, the tasks it accepts and the shifts in workload-emphasis require a flexible and experience management approach, where a culture of organisational development and change is integral to the philosophy of the management team. It is extremely important that hierarchal structures are relatively fluid and flexible to absorb necessary changes to reflect strategies, yet without being too quick to reorganise at every unnecessary opportunity.

3.11.2. Analytical Staff and Others

It is important to recognise the difference between an analyst who has the fundamental training, skills and experience to analyse information and data in a systematic and objective manner, and a country expert who is knowledgeable about a specific geographical area. It is necessary to have a blend of both individuals when dealing with a specific task in hand, but the trained analyst should always be the driving or supervising authority. A well-trained and experienced analyst will apply an approach to *any* analytical tasks, and will achieve results that should be fulsome, objective and focused on the requirement. A country expert runs the risk of subjectivity according to his or her knowledge base and personal views held; while their knowledge is crucial in the preliminary stages of investigative and analytical work, it wanes as time goes on and analytical knowledge increases in importance and requirement.

It is important to recognise the skills which the analyst contributes to the working process, and that they are not mistaken for providing by default another function that others do not want to take on. They should not be used to perform administrative tasks that others will not do (over and above that which all staff are expected to perform during various

phases of a case and at various ‘crisis’ times), and should not be viewed within the professional culture as the junior member of staff or a team. They should be considered for the intellectual contribution they make to a case, and allowed the time and facilities to perform their function correctly.

3.11.3. Cases Are Modular and Are Foreseeable in Structure

The management of the analysis function should understand that many, if not all, cases are modular and foreseeable in working methodology, strategy, structure and requirements. By understanding the modular components, resourcing and time allocation can be planned for in advance, and appropriate tasks can be allocated in an appropriate order. Concurrent work can be implemented with other forms of case work, and timescales can be reduced accordingly, together with ensuring that critical aspects of cases, in particular its linkage components, are fully developed in time.

3.12. Final Comment

The comments offered above are designed to cover many aspects of the role of the analyst and function of analysis, without dwelling too deeply on any one particular facet. Thus, should amplification or greater depth of answer be sought by ICC staff to any of the above topics, they should feel confident in contacting the author at any time to arrange further provision of information.

Research and Analysis in the Investigation, Prosecution and Adjudication of Crimes

Patrick J. Treanor*

I would like to set forth below some views as to the place of research and analysis, broadly speaking, in the investigation, prosecution and adjudication of international crimes. In doing so, I base myself not only on my eight and a half years of experience in this area at the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ('ICTY') but also on over thirteen and a half years with the Office of Special Investigations of the US Department of Justice. The latter office handles cases that are substantively similar to those before ICTY, although relating to the era of the Second World War and pursued under US domestic law and civil procedure.

Within the Office of the Prosecutor, research and analysis (henceforth simply analysis) fall into several, sometimes overlapping, categories, including criminal, political, military, media and demographic. Inasmuch as I have been involved in what can generally be considered political analysis, I frame my remarks with primarily this area in mind, though the International Criminal Court may require all of these types.

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The place of analysis in war crimes cases raises any number of issues, whether substantive, organisational or administrative. I focus on just three of them. Since they all affect the development of cases in the most important sphere, the substantive, I will begin with some considerations in this area.

It is extremely important that investigations, especially of leadership figures on a higher level, begin and continue to proceed on the basis of a substantive hypothesis (for example, the party leader was in control) developed through the analysis of all information and evidence available on the given leadership structure. That is, all relevant knowledge must be integrated through analysis into a consistent hypothesis or, if inconsistent with it, put aside but not forgotten for later re-evaluation and possible use. The hypothesis may, indeed most likely will, change over time, but the changes must reflect a deepening of knowledge and constant analysis. Analysis will in fact serve to point up gaps and other weaknesses in the hypothesis and the available knowledge and serve as a guide to the investigative process, that is, the turning of mere information into evidence and the gathering of fresh information and evidence. Hard-won knowledge, based on steadily accumulating information and evidence, must not be forgotten. Ongoing analysis must constantly integrate it into the hypothesis and constantly evaluate and re-evaluate the hypothesis and all available knowledge against each other. The reciprocal relationship between the hypothesis and the knowledge gathered is extremely important, as the analysis required to establish this relationship is what should drive the investigation forward. Ideally, of course, at the end of the process, all the information and evidence will be consistent with the hypothesis or have been shown to be false or irrelevant. The initial hypothesis may not even point to criminal liability. Indeed, the final hypothesis may not point to criminal liability, but at least it will be clear why. The crucial thing is that at any given point the investigation must know what it knows and what it must still find out.

The implications of an analysis-driven leadership investigation are twofold: 1) it must focus on collecting information and evidence relating to the substantive hypothesis and a legal theory of *leadership* liability based upon it and not to the actual crimes; and, therefore, 2) much, if not most, of this information and evidence will concern matters that are not themselves of a criminal nature. That the investigation should be analysis-driven may seem obvious but experience has shown that these implica-

tions, at least, are easily neglected. This can lead to a scattershot approach to collecting evidence manifested in two syndromes, both wasteful of time and resources: ‘looking under the lamplight’ and ‘reinventing the wheel’. Mountains of ‘evidence’ may be collected but of the wrong things because it is easily available using traditional investigative techniques (for example, victim interviews and exhumations). Such misplaced effort is also often impelled by the perceived need to do something or at least be seen to be doing something publicly. On the other hand, it is truly amazing with what regularity the same piece of information (even misinformation!) or evidence can be ‘discovered’ only to be promptly forgotten again in the rush to ‘do’ something or collect ‘new’ evidence of the same old things. All this can easily add up to an exercise in futility or frustration at best. The trial, should there be one, can turn out to be one great game of ‘catch-up’. Only an analysis-driven investigation can lead *efficiently* to a successful conclusion, whether it be an indictment or a closing memo.

In order to secure these results, it is necessary to adopt the appropriate organisational framework. The analytical function must be recognised as an independent one on an equal footing with that of the other two main professions in an international prosecutor’s office: attorneys and investigators. Such offices are in any case fairly unique by bringing the latter two professions under one roof. It will be difficult enough for these two groups to accommodate to each other. But they both must also understand that a third skill set is required and their acceptance of this fact will be heavily dependent on its representation in the organisational structure. The lead analyst assigned to a given case must, on the one hand, have direct access to the senior attorney who has overall responsibility for the investigation and the development of its legal theory and, on the other, be shielded from the pressures generated by the need to justify the efforts and expenses associated with the collection of vast amounts of evidence in the field. The power of groupthink is enormous and the effort to combat it must be institutionalised and not personalised.

On the operational level, this means that the chief consumer of the analyst’s product will be the senior attorney on a given case and his or her legal associates. Their relationship must be characterised by constant interaction and exchange of *ideas*. The analysts must in no case be viewed as ‘assistant’ investigators simply providing skill sets which the investigators may lack to do their own jobs. Although much of their time may in

fact be spent doing just that, frittering away a valuable resource in this manner must be guarded against. On the organisational level, therefore, all analysts must be grouped in their own organisational unit with a chief from their own profession. Their chief will be the one to guide and evaluate their work as well as mediate the pressures that may come from various sides (attorneys, investigators and even different investigations). Analysts, like the attorneys and investigators, will thus have dual subordination: *functional* under the chief analyst within their own profession, and *operational* under a senior attorney for each particular case.

In order for the analysts, including the chief analyst, to be able to fulfil their assigned roles within this scheme, they must have the appropriate levels of expertise. These in turn must be reflected administratively in appropriate grade levels. In approaching this issue, which will immediately become important in the recruiting process, it must be clearly understood that what is required (and this relates above all to political analysts) are people who are *already* substantive experts. Each case will be bound to a particular geographical, historical, political, socio-economic and linguistic setting. Investigations relating to specific events and leadership structures must be able to place and understand them within this broader framework. Otherwise valuable and even essential connections (a fundament of analysis) quickly apparent to the expert will be either missed entirely by novices or realised only after months and possibly years of on-the-job training.

The political analysts must therefore be highly trained and experienced area specialists with prior personal experience in the given region. To put it another way, they must be able to look at a case from the outside in and not from the inside out. If they cannot, who will? The attorneys and investigators will be highly skilled in their own professions but need not, and probably will not, know anything of the area now of concern to them. What they learn of the larger picture, they will learn via the investigation, and the picture they will develop in their mind will be skewed by what information or evidence they happen to collect or review (remember?). The analysts, on the other hand, must have both a high level of substantive knowledge of the region and the requisite (research, analytical and communication) professional skills.

The chief analyst should report directly to the chief of the Investigations Division and have the same grade as his or her other direct subordinates. This is necessary in order to be fully able to present analytical re-

sults and defend the interests of the analytical function at the highest possible level on an equal footing with other professional groups. A regional approach should be taken to the organisation of the analytical effort below this level. The lead analyst for each region will be the functional equivalent of a team or unit leader with responsibilities for recruiting and then supervising the work of specialists on projects relating to one or more cases encompassed by individual or even multiple conflicts. The analysts themselves must be fully competent to execute such projects independently, though perhaps with the aid of assistants at a lower level. A concrete example of what may be required here is the Leadership Research Team. It consists, at any given time, of around 14 P-3 and eight P-2 research officers as well as one P-3 and two P-2 demographers plus a few G-level staff. All of these people work on cases involving all parties to an inter-related series of conflicts within *one* country.

I believe that the organisational scheme and grade structure set forth above will properly institutionalise the understanding of analysis-driven investigation that I initially elaborated. The investigation, prosecution and adjudication of international crimes represent an enormous task requiring the efforts and co-operation of a mixture of professional disciplines greatly different from that found in traditional domestic arrangements. The pitfalls are many, but valuable experience has been gained that can assist the ICC in avoiding them and getting a running start.

Information, Analysis and Intelligence: The Role of Investigators

John Ralston*

The identification of roles and relationships between the professional disciplines involved at the outset of the Office of the Prosecutor is necessary. This is a problem area in most institutions where multidisciplinary teams are involved.

An investigation goes through several stages before pre-trial. First, it will have a wide or threshold investigation stage where information is gathered to determine the nature of conduct under review and those who appear to bear responsibility. This will be followed by a more in-depth investigation on selected individuals and in relation to a specific event or set of events, leading to the issue of an indictment. The formal pre-trial stage would normally begin upon the arrest of an accused. In each of these stages decisions on direction should ultimately be made in consultation between the lead investigator, the assigned prosecutor and the analyst.

The lead investigator should be responsible for all operational aspects of the investigation, including the management of staff involved. Investigators are collectors of evidence and this is their field of expertise.

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They will also have had specific training in supervising resources and controlling operations. The prosecutor is an expert in assessing evidence and what is required to prove particular elements of any alleged crime. The analyst is an expert at organising and interpreting large amounts of data, and if utilised properly will be the person best placed to identify investigative opportunities and advise the investigator and prosecutor of the nature of information or evidence available. Too often these distinctions are ignored, leading to dysfunctional relationships.

Establishing coherent and viable investigation and prosecution strategies will be crucial to the success or otherwise of operations conducted by the International Criminal Court ('ICC'). If the experience of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') are anything to go by, the ICC will uncover information regarding a far greater number of offences and offenders than it will ever be able to deal with. Case selection decisions will be crucial and must be made on the basis of a well thought-out strategy to ensure that overall aims, objectives and obligations are met. When establishing such a strategy, the capability of the trial chambers to deal with envisaged cases must be considered. At the ICTY, information was gathered, which identified over 7,000 individuals with responsibility for at least one murder. Allowing a four-week trial for each one of these (if they had been prosecuted), it would have taken about 250 years for the trials to have been completed. The only way to deal with this type of situation is to establish criteria for opening an investigation and proceeding to a prosecution and establish a strategy to ensure that resources are focused on cases which will meet these criteria.

On the need for regulations of the Office of the Prosecutor on these questions, they can be extremely useful. However, I believe the better course is to establish guidelines that set out guiding principles rather than having regulations which can be rather proscriptive. In my experience the latter give rise to more arguments than they settle.

5.1. Information, Analysis and Intelligence

5.1.1. Overview

This section is dedicated to information, analysis and intelligence and their use within the field of investigation of serious violations of interna-

tional humanitarian law. It explores processes for utilisation of information with specific reference to:

- Analysis and the role of analysts;
- intelligence and the intelligence cycle;
- databases;
- forms of dissemination; and
- specific rules related to the collection and utilisation of information at the international criminal court and international tribunals.

The section discusses the use of various types of research specialists, including political and historical researchers, military analysts, criminal analysts and the use of demography. The final part of this section identifies some of the key aids to producing analysis or synthesising large volumes of data into a product, which can assist key decision-makers in major investigations.

5.1.2. Analysis

Analysis is the heart of the intelligence process and consists of a set of activities designed to produce inferences such as hypothesis, conclusions, estimates and predictions, which will aid law enforcement at the tactical, operational and strategic levels. Historically, it is the military that have used analysts to come to grips with vast quantities of information from a wide range of sources. Their role has been to synthesise this data, enhance it and provide their commanders with the material necessary to make decisions.

In criminal investigations, the role of an analyst was largely unheard of until about 20 years ago. Up until then, any form of analysis was done by investigators themselves and by prosecutors when preparing their cases. Failures in this process and the inability to properly deal with vast data sources in major investigations led to the introduction of the trained analyst into criminal investigations. Police services and law enforcement bodies in the United Kingdom, the Netherlands, Scandinavia, Australia, the United States and Canada now utilise various types of analysts as an integral part of their operations.

At the strategic level, analysts can advise on emerging trends and widespread patterns of interest, which will assist in determining the overall focus of an organisation. At the tactical or operational levels, analysts are an integral part of investigations, preparing analytical products, which

will assist in determining the direction of an investigation, and preparing assessments of material already gathered. Importantly, it is the analyst who is often in the best position to identify gaps in an investigation.

An analyst does not become so simply by claiming to be one. A skilled analyst is a product of years of training, study and experience combined with a logical and organised approach. In major cases the analyst should be included in the investigation team at the outset. For an analyst to be an asset to the investigation, immediate access to the information flow is imperative. To put an analyst in a catch-up situation detracts from potential benefit to an investigation.¹

War crimes investigations occur in an environment where there is a large volume of information, some valuable, some not. To fully exploit this data requires a well-managed and well-structured system. A trained analyst is best placed to do this. In a criminal case, analysts are not only involved in the investigation stage. They also provide other support, such as research into trends and patterns to help with operational deployment, crime prevention, crime market research, future threat assessments and other predictive tasks.

If we look to the experience at the ICTY, we observe that the analyst is not so involved in such predictive tasks. They invariably find themselves looking backwards to try and interpret the significance of events and their relevance to prosecutions. There are several phases in the process which analysts are involved.

- *Preliminary research phase:* One of the most significant issues the prosecutor has to address is where to focus resources. In the preliminary research phase, the analyst is involved in characterising the nature of violations of international humanitarian law, identifying those involved, recommendation of targets and assessment of likelihood of success of a particular investigation.
- *Investigation phase:* The analyst is involved, together with the team leader and prosecutor, in ensuring that investigations remain focused, determining any adjustments in the direction of an investigation, collating new data and identifying new avenues of investigation as they arise.

¹ Canadian Police College, *Major Case Management Manual*, 4th ed., Canadian Police College, Ottawa, 2000.

- *Indictment preparation:* While indictment drafting is not traditionally a role for analysts, there are various aspects of drafting an indictment where experience has shown us that analysts can make a significant contribution. These include writing and compiling background material, specific perpetrator detail and liability theories, crime base data, incident schedules and annexes and compilation of supporting materials.
- *Pre-trial phase:* In the pre-trial phase, analysts are heavily involved in identifying material for disclosure. The ICC Rules of Evidence and Procedure place a heavy burden on the prosecution to disclose information to be relied upon in trial and also the existence of evidence, which may be exculpatory.
- *Prosecution phase:* In the prosecution phase, analysts are involved with maintenance of witness lists, identification and preparation of expert witnesses, matching of witness information to counts in the indictment or to specific points in the indictment, document management and charting and presentational aids. Analysts are also involved in assisting attorneys in preparation for witness cross-examination and rebuttal of defence arguments.

Having identified these tasks, what skills are required? Analysts engaged in international humanitarian law investigations may fall into the following core skill groups.

- *Criminal analysts:* Typically from a police or law enforcement environment, they are situated in the investigation teams and are involved in identifying alleged serious violations of international humanitarian law, identifying individuals and groups of individuals involved, determining those who bear the most responsibility, picking the key individuals, identifying sources of evidence and assisting investigators and prosecutors to determine investigation strategies.
- *Military analysts:* Typically drawn from the military with unique training with regard to military formations, military doctrines and analysis processes in a military context, their role is to assist in determining whether an armed conflict existed in a particular area under investigation, determining the nature of that conflict, identifying the forces involved, and detailing orders of battle and chains of command.

- *Research officers/historians*: This group require skills not normally found in a criminal investigation environment. Serious violations of international humanitarian law often occur either as a result of, or at the same time as, a breakdown of constitutional law and order. In order to determine just who is in control of groups such as emerging regimes, paramilitary formations, the police and the military when they are alleged to have committed crimes, requires detailed study of the structures of these new regimes. These studies not only focus on the *de jure* aspects of power but also how power was exercised *de facto*.
- *Demographers*: Important elements of offences in the ICC Statute include being able to determine the nature of a group, be it defined by race, ethnicity, religion or nationality. Experience at the ICTY has shown that to do this, the skills of a professional demographer are vital.

When the product of these groups is brought together, the investigation will have identified:

- The existence or otherwise of criminal conduct warranting investigation by the ICC;
- individuals and groups involved;
- those allegedly responsible for planning, organising or implementing the conduct;
- those individuals against whom the investigative resources should be focused.

5.1.2.1. Analyst's Role

In an investigation team, the analyst can perform various significant roles. Firstly, it should be the analyst's role to advise those with primary responsibility for the investigation on the current position concerning information – what is known and what is not known, what has been collected and what needs to be collected. The lead investigator and case prosecutor need this information for decision-making. Without co-operation and trust in this leadership group, the analyst's job would be very difficult and largely ineffective. This is sometimes referred to as the command triangle.

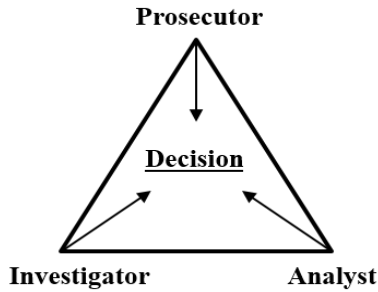


Figure 1: The Command Triangle.²

What does the analyst bring to the command process? A simplistic flow chart would look something like this:

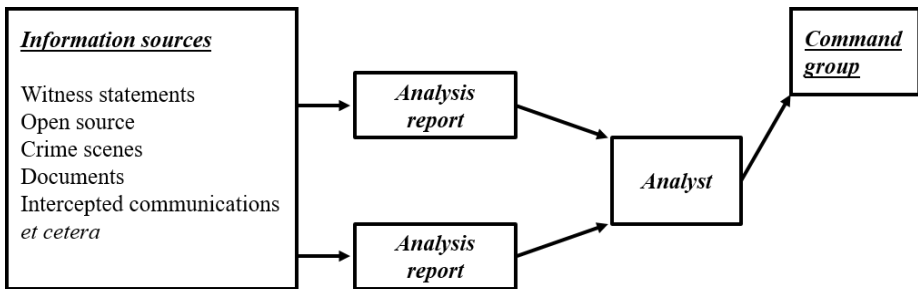


Figure 2: The Command Process.

Within an investigation team, the number of analysts involved will largely depend on the size of the investigation. A smaller investigation may get by with one analyst performing all analytical tasks. A larger investigation may have several analysts, some working on specific projects focused on a particular element of the investigation, with a lead analyst pulling together the various products of their work.

5.1.2.2. What to Expect from Your Analyst?

There are numerous product types you can expect from an analyst. These include:

² Chart developed from material in Canadian Police College Manual, see *supra* note 1.

- Overview or projects reports – including graphic illustrations;
- information collection plans;
- analysis of links and relationships and events within an investigation – it may be in the form of a link chart, but there may be other forms of dissemination;
- assistance with devising investigation plans – directions for further investigation;
- detailed project analysis;
- interview assistance, for example possible questions or topics to cover;
- potential sources for exploitation;
- selection of witnesses;
- historical/political/military appraisal of intelligence/evidence value.

5.1.2.3. Popular Misconceptions

I have heard a prosecutor's comment that it was his role to read and analyse all the data collected in an investigation to build a prosecution. This may be possible in a small-scale investigation. In a large investigation, involving widespread violations of international humanitarian law, this is simply not possible. Having a skilled professional identify the material investigation leaders and prosecutors should focus on is crucial to efficiently building a case.

In most situations, it becomes apparent quite early that the analyst, by virtue of their in-depth knowledge of material collected and ability to organise data, is the person who finds things and files things. While this may be correct, if this is all you use your analyst for, you are wasting a resource. Similarly, if the analyst is overburdened with these two tasks, he or she will not be in a position to provide you with the analytical products, which will enhance your investigation.

- *Analysts draw charts.* While a graphic illustration of an event or situation is one example of an analytical product, and linkage charts such as those provided for by the technology of companies such as i2 are techniques and tools utilised by the analyst, they do not represent the function of an analyst.

- *Analysts usually do the data inputting.* This is most definitely not the role of analysts. Though through the nature of their work the analyst will be a frequent user and be very familiar with any data storage/retrieval systems used, and may even be involved in devising specifications for a database, any usage of an analyst for data inputting detracts from their analytical function.
- *Investigators analyse as well, why do we need analysts?* Everyone performs analysis to some extent in his or her work. Specialist analysts are highly trained and experienced professionals engaged for analysis of information, to progress the investigation further by enabling thorough and comprehensive analysis of all intelligence from an overview perspective, to enable a more focused investigation by highlighting gaps and gluts in intelligence/evidence. Such a specialist role enables the investigators to concentrate more on the collection of evidence, and provides a further source for the investigator to utilise.

Having said that, it is important not to exclude the investigator from this intelligence process right from the outset. I also think that from experience it is more beneficial to include investigators in the intelligence cycle than to proclaim it to be the sole territory of the analyst. While the analyst maintains the overview of the investigation, the investigator may be required to become an expert in an area or present an overview of information and so on. The exact nature of the roles will only become apparent when the investigation team(s) is established, and the ratio of analysts to investigators and size of investigation is known.

5.1.3. Intelligence and Information

What do we mean by intelligence? In the section on Information Sources, the writer refers to intelligence, but states that the word ‘information’ should be used instead, as ‘intelligence’ is a contentious term. Indeed, it is. Put simply, intelligence is usually a value-added product obtained by analysis of information. Information sources may willingly provide you with information. However, they will jealously guard their intelligence product.

Effective investigation of international humanitarian law violations should be intelligence-led. Intelligence-led policing is portrayed by many governments as being a new key phase in the efforts of police agencies to

tackle criminal investigations that cover ever-increasing boundaries – nationally, internationally and across crime type. Yet intelligence itself is not a new concept. The remit of the military for decades, it is in fact a centuries-old process:

Only those who are sagacious and wise can successfully use intelligence. Only those who are benevolent and just can direct and manage informers. Only those who are detailed and subtle can obtain and decipher the truth in intelligence.³

So, what exactly is meant by intelligence? It conjures up images of spies, of covert operations and furtively gained documents. Yet in truth there is no all-encompassing definition. For the military, the dictionary is adequate: “the collection of information, esp. of military or political value”.⁴ But how does this apply to policing, and indeed to international criminal investigations, including those of human rights abuses? The principle remains the same. Intelligence in our context means taking lots of separate information, some of which may on its own not appear to be particularly significant, amalgamating it, assessing it, comparing it, contrasting it, and reassessing it to see if any further conclusions can be drawn to assist the investigation. One piece of seemingly irrelevant information may hold a vital key when placed in the mix with other forms of information.

Intelligence is information to which some value has been added by the process of analysis. This type of process is something that occurs in our everyday life – weighing up all of the information available to us to make an informed decision about our next actions. But with criminal investigations, especially those covered by the remit of the ICC, the amount of information involved is enormous, far too much for accurate assessments of information to be made by individuals on an *ad hoc* basis.

5.1.4. The Process for Utilising Information

Intelligence organisations, including those in the United Kingdom, the United States and Australia, utilise an *intelligence cycle* to assist in the handling of their information, and it is equally applicable to the cases that fall within the remit of the ICC. It is a process broken down into several stages:

³ Sun Tzu, *The Art of War*, trans. John Mitford, Penguin, London, 2008.

⁴ *Concise Oxford English Dictionary*, Oxford University Press, Oxford, 2011.

- Planning;
- collection;
- collection report;
- collation and evaluation;
- analysis;
- conclusions and recommendations; and
- dissemination.

However, all these stages are interrelated and continuous, and thus the cycle might be seen as a process. Whatever the name handed to the process, each step is as vital as the next.

5.1.4.1. Planning

It is essential to know before going to collect any information:

- What do we already know?
- What is it that we are trying to establish?
- How are we going to try and obtain more information?

The planning stage is vital and is one that often neglected in favour of the more exciting and active nature of being out in field on mission. However, the scale of investigations conducted regarding war crimes, and the eclectic nature of the sources available to the investigation, make it vital that the planning stage is conducted routinely and thoroughly. This applies both to the investigation management level and on an individual mission or project level. Given the resource-intensive nature of our investigations, it is vital that the investigation is focused and this can only be achieved through planning, both at the outset of an investigation and during regular reassessments of the progress.

On an individual basis, each investigator has the responsibility for their planning, whether for projects in the office or on mission in the field. Investigators need in both circumstances to be aware of the background information to the case, the nature of the information they are hoping to collect and the reasons for this. It is their responsibility to make sure they utilise all the resources available to them, including databases, other team members, sensitive sources, and to prepare fully before embarking on a project/mission.

5.1.4.2. Collection

This stage refers to the actual physical collection of the information, and is the area that the investigator is traditionally most involved with. Many sources exist for the investigator to follow up. In addition to more traditional sources such as eyewitnesses, victims, sources, forensic evidence from crime sites and documentation, for investigations with the Institute for International Criminal Investigations ('IICI'), the investigator must consider additional sources such as non-governmental organisations, international peacekeeping forces, political experts and, of course, open sources such as the media or the internet.

Collection of information may be in the form of a physical piece of documentation or a video, or it may be by word of mouth with an individual who does not want to provide a formal witness statement. In all cases, the collection of information, similarly to that of evidence, needs to be recorded fully and accurately, as this information needs to be assessed and if possible turned into useful intelligence and ultimately evidence. Physical pieces of evidence and witness statements can be more readily recorded into a system, but random and seemingly disparate pieces of intelligence can easily slip through the collection net. It is therefore imperative that systems of recording are adhered to.

One method of recording information gathered is through a written report, which may relate to one particular piece of information or to the results of a particular mission with several pieces of information. Whichever method is ultimately utilised, there are several rules that must be followed if the information is to be of use to the investigation.

5.1.4.3. Collection Reports

Written reports of intelligence gathered in the field or from other appropriate sources may be the only way of preserving the information. It is therefore important to consider several factors in report preparation.

- Recording of basic details such as identification details, locations, dates, names of sources, addresses for further contact;
- an assessment of the reliability of the information obtained and the source from which it came;
- accurate recording of as many details provided by the source as possible;

- lateral thinking when asking questions. Do not stick to the most obvious line of questioning or merely to those areas that relate to your direct area of interest. Remember to always think beyond the immediate perpetrator, to levels of political, military or police leadership for example;
- a list of recommendations for further action relating to this information.

Ensure that there is compatibility with other team members when identifying a crime site or sensitive source, and provide a key for any individual codes used. This seems obvious, but when identifying a crime site in the field, GPS or street names and house numbers are not always available. It is therefore imperative that if you describe a site or decide to refer to it as “K1”, for example, everyone is clear exactly the location you refer to and everyone refers to the site using the same code.

Once a collection report is written and entered into the system it is preserved not only for your own reference but also for the rest of the team, allowing for its analysis along with other sources of information or evidence.

5.1.4.4. Collation and Evaluation

The collation of the information refers to the stage where the information collected is handed to a central point for integration with all the other information. Investigators are required to submit appropriate reports of their findings to the designated collection point for processing. The scale of the investigations again means that gone are the days when investigators findings can be keep in a little notebook or, even worse, in their heads!

Both the previous stage and these two factors provide the melting pot for all of the information gathered. With large-scale investigations it is impossible for investigators to spread all their papers out on the coffee table, sift through and match up random pieces of evidence. The pool of information is enormous. And it is here, and for the rest of the process, that the use of a database is absolutely vital.⁵

The evaluation of a source is an essential part of the collection and collation process. Your decisions regarding the reliability of both a source and the information it is providing must be recorded for future reference.

⁵ Databases are covered separately.

This is used not only in the analytical process but also by other investigators. The grading of sources can be achieved in many ways including a written assessment in the report. However, it provides for more continuity if the source/information is graded using a standardised procedure so that everyone understands the meaning of a grading. The grading used in some national police forces is the 4x4 or more recently the 5x5 system, as can be seen in Appendix A. Whichever method is preferred, it should be used with continuity through the investigation team.

5.1.4.5. Analysis

Despite all the assistance of a database, the human brain does the actual analysis. If the database is populated with all the necessary information, reports can be generated to illustrate all the relevant pieces of information for a particular subject matter. But it is still a human function to make sense of that information, to weigh the information, to make a story. This part of the process develops the investigation by turning previously unimportant pieces of information into vital evidence, by providing leads for further investigation, by highlighting gaps in evidence or intelligence which need to be followed up, and equally important by establishing when a piece of the puzzle is solved.

Most large criminal investigations have at least one criminal analyst to assist with this process. For the analyst to be able to play their part properly, it is vital that the investigators who are actually collecting the information ensure that all the data is submitted to the central point. If this simple rule is followed, then the analyst can and should play a central role in any investigation.

5.1.4.6. Dissemination

In the strictest sense of the intelligence cycle, this phase applies to the dissemination of the analytical product by the analyst, either orally or in writing. The aims of this process are to advance the investigation and to pass the newly acquired knowledge, leads or information to other relevant members of the team.

It is essential that an investigator consider all the available information to them before embarking on a new course of action. In addition to discussing action with the team leader, other investigators and lawyers, they should take in account analytical product and the views of the analyst

by talking to them before going on mission. The analyst is often in a unique position of having an overview of the entire investigation, and can provide the investigators with additional angles to explore while collecting information.

However, dissemination is also within the remit of the investigator. Sometimes, within an investigation an investigator may become a specialist in a given area or for a particular theme – for example, the role of the police in the crimes committed. As part of the dissemination process it is also therefore imperative that the investigator is proficient and comfortable in writing reports and giving oral briefings to a variety of audiences.

5.1.4.7. Forms of Dissemination

5.1.4.7.1. Analytical Product

Working with analysts means that they are able to exploit a far greater array of information than would normally be available to the investigator. It is therefore probable that the analyst will provide an additional source of information for the investigator and the investigation. The product of the analyst available to an investigator may vary, but would include forms such as graphic charts or illustrations of intelligence, written reports and perhaps most importantly oral briefings. As a rule, before going on a mission to the field the investigator should approach the team analyst(s) and seek any input from them into areas which need further investigation, particular questions or areas of interest for a witness and so on.

5.1.4.7.2. Situation Reports or Assessment

These would usually be more comprehensive than a collection report, and provide for an overall assessment of a situation in the field, a particular subject area or an amalgamation of other sources of information. However, it is clear here that a collection report and situation assessment may become amalgamated, providing for both collection and dissemination of information at the same time. This overlap is not a problem as long as all of the information is ultimately included in a melting pot.

As with the collection reports, it is imperative that these reports are sourced fully and accurately, that you are identified as the creator and that the information is as full as possible. While there is no definitive structure for such reports, standardisation to a certain level provides for ease of

reading and helps to maintain a certain level of quality within a team. Sections usually included in such a report are:

1. Title, author, date;
2. aims and objectives – what the report is about;
3. detail – remember sources, locations; include your own comments and observations but make it clear that they are that;
4. conclusions;
5. recommendations.

An alternative format, which is also common, is:

1. Issue;
2. background;
3. current position;
4. discussion;
5. conclusions and recommendations.

5.1.4.7.3. Oral Briefings

In addition to providing written reports for inclusion in the planning and processes of an investigation, the investigator may also be required to provide an oral briefing to a variety of audiences, including other team members, management and outside audiences. The format of an oral briefing will vary depending on the audience, the circumstances and whether it is informal or formal, but the basic parameters are the same.

- Introduce yourself and explain your role;
- explain what the briefing is about and give an overview of the investigation to date;
- present your information;
- explain your conclusions;
- present your recommendations.

This section will be covered in greater detail during the practical sessions for report writing and oral briefing.

5.1.4.7.4. Databases

The retention of information and evidence is provided for in the ICC Rules of Procedure and Evidence under Rule 10:

Retention of information and evidence

The Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of the investigations by his or her Office.⁶

Within this category falls the database, perhaps the most useful and malleable tool for the collation and manipulation of information, assisting in the generation of useful intelligence in assisting the investigation. However, the scope and scale of war crime investigations means that it is an essential rather than useful tool. It can be utilised to:

- Store and allow access to the particular information and evidence you are looking for.
- Generate reports to assist with the investigation, both in terms of managing the data and in management issues.
- Queried to provide target or theme specific information. The database should therefore be designed to reflect the particular targets, categories and themes required for the investigation.
- Provide witness management: an essential component of the investigation and trial is to track witnesses and their relevant information.
- Assist with the preliminary stages of pre-indictment investigation, post-indictment investigation and trial phase work.

It is essential that the investigator becomes familiar with and routinely utilises the search and report capabilities of the database when preparing for mission and assessing particular areas of the investigation.

⁶ ICC, Rules of Procedure and Evidence, adopted 3–10 September 2002, ICC-ASP/1/3, Rule 10 ('ICC Rules of Procedure and Evidence') (<http://www.legaltools.org/doc/8bcf6f/>).

5.1.5. Specific Rules Related to the Collection and Utilisation of Information at the International Criminal Court and International Tribunals

5.1.5.1. Information Supplied for Lead Purposes Only

During investigations for the ICTY it became apparent that while some sources had important information of relevance to the proceedings, some states and non-governmental organisations were reluctant to pass that information on unless confidentiality could be guaranteed. To meet this challenge Rule 70(B) of the Rules of Evidence and Procedure was added in October 1994 by a unanimous vote of the judges. This amendment was therefore added to protect the source of the information.

Rule 70 was amended by the addition of Parts C, D, E and F in October 1995 following a proposal by the prosecutor to allow the use of evidence from such confidential sources, while at the same time protecting the source by restricting the power of the Trial Chamber to order the source to provide additional evidence or order a representative of the source to appear before the Chamber. For the ICTR, similar amendments were added in June 1997, to bring the ICTR Rules in line with those of the ICTY.

Rule 70. Matters not Subject to Disclosure

- (A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.
- (B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.
- (C) If, after obtaining the consent of the person or entity providing information under this Rule, the prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce

additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.

- (D) If the Prosecutor calls a witness to introduce in evidence any information provided under his Rule, the trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.
- (E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-rules C and D.
- (F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused.
- (G) Nothing in Sub-rule C or D above shall effect a Trial Chamber's power under Rule 89D to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.⁷

For the ICC, similar provisions are found in Article 54 of the Statute and Rule 82 of the Rules of Procedure and Evidence.

Article 54. Duties and powers of the Prosecutor with respect to investigation.

3. The Prosecutor may ...

- (e) Agree not to disclose, at any stage of the proceedings, documents or information that the prosecutor obtains on the condition of confidentiality and solely for the pur-

⁷ ICTY, Rules of Procedure and Evidence, 11 February 1994, as amended 22 May 2013, IT/32/Rev.49, Rule 70 (<http://www.legal-tools.org/doc/950cb6/>).

pose of generating new evidence, unless the provider of the information consents.⁸

Rule 82. Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e).

1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.
2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.
3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.
4. The right of the accused to challenge evidence, which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules 2 and 3.
5. A Chamber dealing with the matter may order, upon application by the defence, that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused under the same conditions as set forth in article 54, paragraph 3 (e), and which is to be introduced into evidence, shall be subject *mutatis mutandis* to sub-rules 1, 2 and 3.⁹

⁸ Rome Statute of the International Criminal Court, Art. 54, 17 July 1998, in force 1 July 2001 ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

⁹ ICC Rules of Procedure and Evidence, Rule 82, see *supra* note 5.

Thus, when gathering information or evidence under these provisions it is imperative that all such documents are marked clearly and stored in a manner which prevents unwitting disclosure or use. In the ICTY this is achieved by marking the information clearly with the Rule 82 restriction, and storing the information in a distinct section of the database. Additionally, for the more sensitive information and sources, access is restricted to particular personnel who have been individually assessed for security clearance by relevant states/sources.

5.1.6. Conclusion

In this section, then, we have taken the information collection process from the beginning to end, firstly identifying useful sources of information, then dealing with the type of expertise required to exploit this information and finally outlining the processes used. In conclusion, we have outlined some of the specific requirements applicable to existing international criminal tribunals, which must be taken into account when investigating serious violations of international humanitarian law.

5.2. Investigating War Crimes: The Role of Investigators in Crisis Intervention¹⁰

In the best-known international crises in the last two decades – Yugoslavia, Rwanda, Democratic Republic of Congo, Sierra Leone and East Timor – the need for detailed investigations of alleged serious violations of international humanitarian law has been raised and responded to on an *ad hoc* basis. Investigations have been carried out by a variety of people and organisations including:

- Reporters;
- humanitarian and other non-government organisations;
- local officials;
- internationals and international organisations who may be present;
- international investigation bodies established specifically for that purpose.

¹⁰ This part of the chapter is based on a presentation given by John H. Ralston at the 15th International Conference of the International Society for the Reform of Criminal Law on Politics, Crime and Criminal Justice, Canberra, 30 August 2001.

While the subject matter and evidence collected for or by all five may be the same, the purposes or uses can be quite different. The uses may be broadly placed into two categories:

- To raise the alarm – demanding intervention;
- to gather evidence for prosecution of individuals for alleged violations of humanitarian law.

The standards of evidence gathering for these two are not mutually exclusive, but can be quite different. It is unlikely that evidence gathered to raise the alarm will have to withstand the scrutiny of a court of law to achieve its purpose, but it will have to be sufficiently graphic to catch the attention of decision-makers. Evidence gathered for prosecutions must, however, be capable of withstanding the highest levels of scrutiny.

My focus in this section is on the investigative role in this second area, the collection of evidence on which war crimes prosecutions, prosecutions for genocide or for crimes against humanity can be based. Such an investigation is likely to be lengthy and time-consuming if prosecutions are to follow. However, the initial phase is crucial. At the time of intervention, there are several categories of evidence which must be considered if one is to build a successful investigation. They may seem basic, but are worth reiterating.

- *Witness testimony*: encompassing not only victims but addressing all elements of proof.
- *Crime scene evidence*: this evidence is vital; it validates witness testimony, provides incontrovertible proof of the nature of the crime and can provide irrefutable links to the offender.
- *Documentary evidence*: in my experience often overlooked in the initial stages of an investigation, but probably the most vital evidence of all when it comes to offender identification.
- *Intelligence collected by various agencies*: often evidence or information are collected by international organisations, interested government agencies or bodies such as the North Atlantic Treaty Organisation ('NATO'). This can include imagery, signals intercepts, human intelligence, electronic intelligence and so on.
- *Open sources*: in particular the media and the internet. These are an extremely important source of information, again often overlooked by investigators and lawyers alike.

Often, at the time of initial intervention, the focus has been on gathering witness testimony or witness anecdotes. There may also be some attention to crime scenes because of their visual impact or because of the need to deal with them immediately (for example, the removal of human remains or repair of damaged buildings before reoccupation of the area). The point I wish to make is that at the time of intervention, investigations must be able to focus on all five areas, with one overriding goal, the securing of evidence which will otherwise be lost irretrievably.

Further, to respond effectively to crises where alleged violations of international humanitarian law are occurring, several things need to be in place:

- A legal mandate to investigate;
- investigative and legal resources;
- logistic support;
- co-operation of all potential information sources including non-government, international and news organisations as well as individuals and local bodies;
- official information sources such as intelligence agencies;
- official bodies, for example, NATO, the UN, the Organisation for Security and Co-operation in Europe ('OSCE') and so on, who may be in the region;
- secure environment in which to conduct investigations;
- money and flexible (but accountable) procedures to facilitate a rapid response;
- background knowledge to facilitate proper targeting of resources.

I will use the evolution and role of investigations at the ICTY, and in particular draw some comparisons between different scenarios which have been encountered during the Tribunal's history to demonstrate this point. None of the conditions listed above existed when conflict broke out in the former Yugoslavia. In 1990, the first multiparty elections were held in the republics of the former Yugoslavia. Political parties were formed along mainly ethnic lines and ultimately this led to conflict between the ethnic groups as several of the republics broke away from the Yugoslav federal structure.

In 1991, the republics of Slovenia and Croatia declared their independence from Yugoslavia. In Slovenia, a brief armed conflict between the Yugoslav Peoples Army and the fledgling state followed with some allegations of war crimes. In Croatia, violent armed conflict between ethnic Croats, Serbian forces and paramilitaries resulted in the almost total destruction of Vukovar, considerable damage to the heritage-listed city of Dubrovnik and allegations of up to 10,000 people killed, many of whom were civilians.

A cessation of hostilities agreement was reached in January 1992 with a peacekeeping force, the United Nations Protection Force ('UNPROFOR') deployed to the area. The headquarters of UNPROFOR was to be Sarajevo, Bosnia and Herzegovina. As the headquarters was deployed, Bosnia and Herzegovina itself erupted into armed conflict between ethnic Serbs, Muslims and Croats. The city of Sarajevo was besieged for three and a half years by Serb forces which surrounded it. Thousands of civilians are alleged to have died as a result of shelling of the city and the actions of snipers.

The term 'ethnic cleansing' was used to label conduct across more than 100 municipalities, which involved creating conditions of life so difficult that persons of one ethnic group or another would leave and not return. The words 'ethnic cleansing' came to typify conduct where people were forcibly removed from their homes, men murdered or incarcerated in brutal detention camps, women raped, houses and businesses destroyed and large groups of people forcibly transferred out of municipalities where they and their families had lived for centuries. Ethnic cleansing in many areas saw hundreds of thousands incarcerated, removed from the homelands, and reportedly up to 300,000 casualties. Over 18,000 persons are still registered by the International Committee of the Red Cross ('ICRC') as missing.

In response to the exposure of cruel detention camps, mass murder of civilians, the forced removal of ethnic groups from their lands, and demands that the perpetrators be brought to justice (the 'raise the alarm phase' mentioned earlier), the United Nations Security Council established the ICTY in 1993 (the 'prosecution phase').

Returning to the criteria I mentioned initially, the five sources of evidence and the factors that need to be in place to facilitate investigations, let us examine three distinct investigations I was involved in.

5.2.1. The First Investigations: *Republika Srpska*

Although the Tribunal was established in May 1993, the Office of the Prosecutor was not staffed until May 1994. On a skeleton staff, it commenced operations shortly after. At the outset, the prosecutor was confronted with an enormous task, both the magnitude of alleged crimes and the complexity of the origins of the conflict, which formed the backdrop for subsequent atrocities. There was a perception that nobody outside Yugoslavia would ever be able to understand it. The Prosecutor's Office had to overcome this. Against this there was an expectation of immediate results by way of indictments and prosecutions. The question was, and still is, where should the Tribunal's scarce resources be focused. The answer came from planning, thorough analysis of available information and the establishment of a tightly focused evidence collection plan.

In *Republika Srpska*, we were looking at probably the largest crimes base with ethnic cleansing occurring in more than 50 per cent of the geographic area of Bosnia and Herzegovina. There were widespread allegations of murder, sexual violence, forced transfer or deportation of civilians and brutal detention camps in various locations. Over a million people were displaced throughout Europe and there were estimates ranging from 30,000 to 300,000 persons killed.

- We had no access to the locations where the alleged crimes occurred;
- we had no access to official records of the Bosnian Serb forces or their administration;
- we had no access to Western intelligence sources;
- contemporaneous intelligence, which had been gathered, allegedly no longer existed. If this contention was to be believed then most of the information that politicians, lobby groups and others used to base their calls for investigations on was gone;
- we had no resources – we had to assemble staff with the necessary skills, and obtain a budget through the UN system which took many, many months;
- we had little background knowledge *or* war crimes expertise – as a result investigators and prosecutors tended to expand investigations laterally rather than vertically, thus creating a potential for the Tribunal to become bogged down at the lowest level of perpetrators;

- there was immense pressure for results in the hope that it would break the cycle of violence in the former Yugoslavia; there was no time to build an investigation.

Under the circumstances, and confronted with a wide range of extremely violent crimes, we chose six geographic locations (Prijedor, Foča, Vlasenica, Brčko, Bosanski Šamac and Sarajevo) on the basis of their strategic location and reported egregiousness of crimes alleged there. Each consumed significant and precious resources.

As sources of evidence we had to rely on victim testimony and the accounts of international observers. This forced the investigations in a lateral direction. Without access to documentation, command structures and *de jure* responsibility were difficult to determine. As the investigations progressed, thousands of lower-level perpetrators were identified. To prosecute all of them at the Tribunal was physically impossible, at the same time the evidence was difficult to put to one side.

Witness contamination proved to be a problem. Many of the most important witnesses had been interviewed several times by people from a variety of organisations including news reporters, humanitarian organisations, intelligence agencies, officials in the region and many others – often without due regard for accuracy and whether the witness was speaking from his or her own observations. Differing versions of the same events were often recorded by different agencies using different methodology or for different purposes. The result was the creation of indelible but inaccurate records, which would prove to be inconsistent with accounts given by witnesses to trained investigators at a much later date.

It was June 1995 before any of the leadership, with alleged responsibility for the crimes outlined above, were indicted – at least three years after the events, two years after the UN created the Tribunal and a year after the fledgling court became operational. The effect was almost immediate, though: both Radovan Karadžić and General Ratko Mladić, who had proved intransigent in previous negotiations, were removed as principal interlocutors and the Dayton Peace Accords were reached.

Of the five areas of evidence collection mentioned above, we had to rely predominately on two, witness evidence and open sources.

5.2.2. The Srebrenica Massacres

Srebrenica remains the single most horrific event in the conflicts in the former Yugoslavia. In a matter of days almost the entire male population, some 8,000 men, of the Srebrenica enclave were captured, murdered and buried in mass graves by Bosnian Serb military, paramilitary and police forces.

As the ICTY had by this time been operational for approximately 18 months and was conceivably in a much better position to investigate these events, we were able to react and we did not have to build up the history. However, resource limitations meant that we could only deploy four people to this investigation, one investigator, one analyst, an operations officer with legal and military experience, and an interpreter. This enabled us at an early stage to:

- Define the nature of the events;
- interview key witnesses before contamination had occurred;
- take a proactive approach to gain access to the area and to exploit intelligence sources, particularly human intelligence and imagery; and
- collect valuable leads from open sources.

Limited resources, however, hampered our effectiveness. Signals intercepts were not located until 1998 and offender identification was not significant until we were able to execute search warrants on Bosnian Serb military establishments in early 1998. There was no real access to crime scenes until mid-1996. Notwithstanding this, five months later, the first Srebrenica-related indictments were confirmed.

5.2.3. Kosovo Crisis

There had been tension in Kosovo since Slobodan Milošević's famous speech before a crowd of Serbs in April 1987, where he endorsed a Serbian nationalist agenda and exploited a growing wave of Serbian nationalism in order to strengthen centralised rule in Yugoslavia.

These tensions did not escalate into war at the same time as the conflicts in Croatia and Bosnia and Herzegovina erupted. In 1998, however, with continued repressive tactics used against the Kosovar Albanians, tension between them and Serbian forces crossed the threshold into armed conflict. The existence of the Tribunal's geographic and temporal juris-

diction meant that any possible violations of international humanitarian law fell within the ICTY's mandate. At this early stage, the ICTY commenced investigations. In March 1999, after the failure of the Rambouillet peace talks, NATO forces commenced bombing defined targets in Serbia and Kosovo. At the same time, Serbian forces began widespread attacks on the civilian population in Kosovo. Thousands were murdered and an estimated one million civilians were forcibly expelled from Kosovo to neighbouring Macedonia and Albania.

Of the pre-conditions necessary to conduct an effective investigative response, several were already in existence: we had a legal mandate to investigate, although limited, and we had investigative and legal resources we could deploy. Utilising the experience gained in Croatia and Bosnia and Herzegovina, we were able to effectively plan our response. Through relationships we had established with other UN bodies, we were able to provide logistic support. We knew where to go to facilitate the cooperation of potential information sources. These included non-governmental organisations, international organisations, news organisations, individuals and local bodies. We were able to tap into official information sources such as intelligence agencies and bodies such as NATO and the OCSE. Just as importantly, we had background knowledge to facilitate proper targeting of resources.

Donations to the Tribunal's trust fund meant that we were able to purchase equipment and hire additional staff to fill the gaps on other investigations when more experienced staff were redeployed to the Kosovo investigation.

Throughout the entire period of this conflict, we were able to keep teams on the ground interviewing refugees and gathering testimony, which gave a clear picture of the atrocities occurring in Kosovo. We were able to utilise members of international organisations and non-governmental organisations in a systematic manner to screen witnesses and ensure that our investigators were directed to those witnesses with the most crucial testimony. Through a co-operative process with these organisations we were able to minimise, if not eliminate, witness contamination.

At the same time, senior staff of the Office of the Prosecutor worked swiftly to ensure access to information gathered by other bodies. We also commenced planning for the examination of crime scenes and the collection of documents once access to Kosovo became possible.

While this was going on, we were well aware that once hostilities ceased we would be confronted with probably the world's biggest crime scene, we would have to act quickly if we were going to gather any evidence available to support or validate the witness accounts we had gathered. This task would be far greater than could be accomplished by the Tribunal's resources. To enable us to respond to this challenge, we wrote to all member states of the UN requesting they donate to us a crime team to deploy to Kosovo. Fourteen separate countries responded with teams. Simultaneously, we negotiated with NATO for it to provide a secure environment for our teams to operate in, including the provision of explosive ordinance disposal teams. As a result of these actions, we had crime teams on the ground in Kosovo two days after NATO forces entered. We also had document-exploitation teams on the ground shortly thereafter.

In short, we were able to react in real time, and like the policeman who intervenes to stop a crime he is called to, we were able to react fast. The Tribunal was able to indict the Yugoslav president, Slobodan Milošević; Milan Milutinović, president of Serbia; Milošević's key aid and deputy prime minister of Yugoslavia, Nikola Šainović; Colonel General Dragoljub Ojdanić, chief of the General Staff of the Yugoslav Army; and Vljako Stojiljković, minister of internal affairs, for crimes against humanity and violations of the laws or customs of war. They are alleged to have planned, instigated, ordered, committed or otherwise aided and abetted in a campaign of terror and violence directed at Kosovo Albanian civilians living in Kosovo. The allegations include deportation, murder, and persecutions on political, racial and religious grounds. Shortly after these indictments a cessation of hostilities agreement was concluded.

Between 13 July 1999 and 31 October 1999, we examined each of the crime scenes outlined in the Milošević indictment, we exhumed over 2,000 bodies from gravesites and responded to thousands of further reports of serious violations of international humanitarian law. We also implemented a video project which documented the destruction across the whole of Kosovo.

This meant that the Kosovo investigation was the most complete and effective investigation the ICTY's Office of the Prosecutor had conducted – simply because we were in existence, with a mandate and had the ability to respond. Quite clearly this is a model for the future.

5.2.4. Conclusion

Criminal investigations by professional teams can be an effective method of intervention in international crisis situations where serious violations of international humanitarian law are alleged. Such interventions are extremely difficult and potentially dangerous. With proper planning and support, with a clear focus, they can be achieved. The factors necessary for this to happen are set out in the opening paragraphs to this chapter.

On the Need for a Scientific Advisory Unit

José Pablo Baraybar*

The application of forensic sciences in the prosecution of serious human rights violations (genocide or war crimes) is relatively recent.¹ For some time, however, forensic sciences, especially forensic archaeology and anthropology, have been successfully applied to the investigation of human rights violations in various contexts such as truth commissions and commissions of enquiry by governments or independent non-governmental agencies.² One may be inclined to say that the use of forensic sciences in those contexts was *ad hoc* rather than systematic due to the role played by those who sponsored the investigations (such as government commissions with limited mandates, and family associations exercising the role to provide experts to the court).

This picture changed, however, with the decisions both by the International Criminal Tribunal for Rwanda ('ICTR') and the International Criminal Tribunal for the former Yugoslavia ('ICTY') to use forensic sci-

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¹ See, for example, ICTY, *Prosecutor v. Radislav Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33 (<http://www.legal-tools.org/doc/440d3a/>).

² See José Pablo Baraybar, *Manual para la investigación eficaz ante el hallazgo de fosas con restos humanos en el Perú*, Defensoría del Pueblo y Equipo Peruano de Antropología Forense-Epaf, Lima, 2002.

ence on a much larger scale, and incorporate it into what we may call human rights enforcement rather than human rights reporting. In the latter, most reports on the evidence of crimes more often than not did not make it to trial and were used to illustrate the offences rather than to assist in punishing them. By the end of 1995, the first large-scale forensic operation in Rwanda was set in motion, and during the years that followed, further work was undertaken in Bosnia, Croatia and Kosovo under the auspices of the ICTY.

Based on my professional obligations, I have prepared a brief testimonial account of my tenure as the in-house forensic expert at the ICTR and ICTY, drawing whenever possible on other experiences in the field relevant to this discussion. The second part is a proposal of how in my opinion the International Criminal Court ('ICC') should apply forensic sciences to international justice, and finally the structure that would facilitate such an endeavour.

6.1. Forensic Work from Africa to the Balkans: ICTR and ICTY

At the end of 1995, the Office of the Prosecutor of the ICTR got in contact with Physicians for Human Rights, a US non-governmental organisation primarily involved with human rights reporting and human rights advocacy programmes. Physicians for Human Rights was involved through its former executive secretary, Eric Stover, in setting up a forensic programme to deal with the collection of evidence for the prosecution of the Rwandan genocide of 1994. An office called the Scientific Support Unit, attached to the chief of investigations in the Office of the Prosecutor was created for that task. The office consisted of one co-ordinator and two forensic experts. In addition, an expert in logistics and an engineer were seconded by the European Union. A grant was given by the US government to Physicians for Human Rights to hire international staff to perform different aspects of the work, namely exhumation of mass graves and the post-mortem examination of the remains.

Only two significant sites in Rwanda were dealt with: the exhumation at a church in Kibuye (western Rwanda) and at the Amgar garage in Kigali. The evidence recovered was used in the trials of Clément Kay-

ishema and Georges Anderson Rutaganda.³ Maybe because of the dimensions and extent of the crime, the Office of the Prosecutor of the ICTR did not know how to establish whether further forensic evidence should or could be collected. As a consequence, the slowness in determining evidentiary priorities regarding forensic evidence was confronted with the initiative of the families that decided to take into their own hands the job of exhuming the mortal remains of their loved ones and bury them in memorial graveyards.

The primary problem of the ICTR in this context was twofold: on the one hand, it was unable to stop the process and, on the other hand, it could not even profit from it. By this, I mean that no evidence was collected from this spontaneous exhumation campaign since the exhumation process destroyed all crime scenes. In addition, bodies were dismembered and their limbs were separated and stacked in improvised warehouses. While it was a sheer impossibility for the Rwanda Tribunal to collect all forensic evidence to prove that genocide took place, the ICTR could still have collected much more information regarding the *modus operandi* of more discrete groups by using forensic evidence.⁴ While other kinds of forensic evidence were collected on a smaller scale (primarily crime scene evidence) the bulk of evidence was lost by mid-1996.

By the spring of 1996, the ICTY decided that a limited collection of forensic evidence from the killings during and after the fall of Srebrenica (eastern Bosnia) and the city of Vukovar in eastern Slavonia (Croatia) would strengthen the respective cases against Karadžić, Mladić, Mrkšić and others.⁵ The ICTY thought about planning the intervention on an *ad hoc* basis and the Scientific Support Unit from the ICTR was borrowed for a period of three months to work in the Balkans, more specifically in Bosnia and Croatia. The intervention in the Balkans followed the same pattern as in Rwanda and was conducted through Physicians for Human Rights.

³ International Criminal Tribunal for Rwanda ('ICTR'), *Prosecutor v. Clément Kayishema et al.*, Trial Chamber, Judgment, 21 May 1999, ICTR-95-1 (<http://www.legal-tools.org/doc/0811c9/>) and Sentence (<http://www.legal-tools.org/doc/1822e5/>).

⁴ See, for example, the evidence presented in ICTR, *Prosecutor v. Georges Anderson Rutaganda*, ICTR-96-3 ('Rutaganda case').

⁵ See ICTY, *Prosecutor v. Ratko Mladić*, IT-09-92; ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18; ICTY, *Prosecutor v. Mile Mrkšić, Mirsolav Radić, Veselin Šljivančanin and Slavko Dokmanović*, IT-95-13/1.

During the latter half of 1996, four major sites were exhumed in Bosnia and one in Croatia. The end of the season was, however, marked by a number of events that jeopardised the process, namely allegations regarding the mismanagement of the operation and also tampering of autopsy reports.⁶ After the 1996 season, the ICTY decided to carry out further forensic work but without engaging third parties to run the project. From 1997 to 2002, a number of forensic projects were carried out in order to provide evidence to support a number of indictments.⁷

The Scientific Support Unit from the ICTR, this time reduced to one co-ordinator, one forensic expert, one logistics specialist and one engineer remained on loan to the ICTY until mid-1997 at which time all posts were transferred to the ICTY. The model of work that was used from 1997 onwards was that of full control of the operation by the ICTY.

6.2. Kosovo in 1999: Evidence Collection versus Humanitarian Concerns

The best example of lack of vision and centralisation of operations was Kosovo in 1999. Once it became imminent that NATO troops would enter Kosovo, the ICTY decided to set up systematic collection of forensic evidence. Despite the multiple recommendations to define the goals of the operation first (what evidence was to be collected for what? what evidence was not to be collected and why?) and memoranda to the chief of investigations John Ralston on the way an intervention in Kosovo would need to be planned – to set standard operating procedures for the collection and/or recording of forensic evidence, among others – it was decided to do exactly the opposite: not to establish standard operating procedures, to engage all possible forensic teams without regard to their experience or suitability for the work, and to not issue instructions as to what to collect and not to collect.

It is now apparent that the main objective of the ICTY was to collect as much data from crimes committed by the Milošević regime rather

⁶ See ICTY, *Prosecutor v. Radislav Krstić*, Court Transcripts, 29 May 2000, IT-98-33, pp. 3760–62 ('Krstić case').

⁷ See for example: Vladimir Kovačević, Simo Drljača and Milos Stankić (IT-97-24), Željko Ražnatović (IT-97-27), Miroslav Kvočka et al. (IT-98-30/1), Ante Gotovina (IT-01-45), Rahim Ademi (IT-01-46), Vidoje Blagojević et al. (IT-02-60), Slobodan Milošević (IT-02-54), Miroslav Deronjić (IT-02-61), Janko Bobetko (IT-02-62), Radoslav Brđanin, Momir Talić and Stojan Župljanin (IT-99-36).

than to investigate all crimes committed in Kosovo during the conflict. This was also based on the assumption that crimes committed against Kosovo Albanians were far larger than those committed against non-Kosovo Albanians.⁸

The approach was to go for the big fish and to forget about the small fish. The consequences are now clear: by amassing information on command responsibility (that is, Milošević), they jeopardised the effective investigation against lower-level perpetrators by obscuring forensic evidence recovered during 1999 and 2000. The United Nations Mission in Kosovo ('UNMIK') has struggled to collate evidence collected by the ICTY in 1999 and 2000, and to assess whether it can be used in local trials.

During 2000 the ICTY finally took seriously the advice given one year earlier and, as a result, a large-scale operation was undertaken. Unlike the previous year, the operation was to be centralised, standard operating procedures were to be followed and specific targets to be investigated. Because of political reasons, the ICTY accepted for the second year in a row support from *gratis* forensic teams from different countries, which worked, this time, under the command structure of the ICTY. The operation was centralised through a mortuary and logistics base in Orahovac, western Kosovo, where all mortal remains recovered anywhere in the territory were examined, identified and then returned to their families. An exception to this rule was the British forensic team who decided to work independently from the established system and out of Pristina (the multinational sector centre under British armed forces control). The British team, while working for the ICTY, was accredited to the UNMIK rather than to the ICTY itself. This again caused a number of problems, primarily because of the non-compliance of the British forensic team to the above-mentioned protocols and standard operating procedures.

⁸ While this assumption is correct, the ratio of missing Kosovo Albanians to non-Kosovo Albanians currently stands at three to one. See United Nations Mission in Kosovo, Office on Missing Persons and Forensics external briefing, April 2003. A large number of disappearances of non-Kosovo Albanians occurred during 1998 and then after the arrival of the international troops and even during the presence of the ICTY in Kosovo in 1999, until June 2000. In 2000, the priority was to collect evidence to support the Milošević indictment (IT-02-54) and less attention was paid to crimes committed against non-Kosovo Albanians.

In 1999 and 2000, the ICTY exhumed over 4,000 bodies of which nearly half were examined in 2000.

6.3. Kosovo in 2003: Prosecution Needs to Be Fulfilled *vis-à-vis* Humanitarian Disaster

Primarily during 1999 and 2000, the ICTY-emphasis was on numbers (that is, the crime was systematic, widespread and on a large scale). Thus, the priority was on performing post-mortem examinations of as many bodies as possible, relying on circumstantial evidence or single testimonies to support authorship of the crime. As a consequence, a large amount of information, alas not structured, was collected. In addition, a humanitarian challenge was caused by not undertaking the identification of those same victims that were examined.⁹ Future attempts to collect forensic evidence of the crime of genocide should take into account that because of its characteristics (systematic, widespread and large numbers) it must be treated both as a crime and as a humanitarian problem.

The investigations of the ICTY in 1999 and 2000 left behind a total of 4,019 bodies exhumed, of which only 50 per cent were identified. In addition, the non-identified bodies exhumed in 1999 by *gratis* teams were generally reburied in locations to date unknown to the Tribunal.

In June 2002, the UNMIK created the Office on Missing Persons and Forensics in the Department of Justice in order to determine the whereabouts of missing persons during the conflict. The challenge faced by this Office is enormous considering the two dimensions included in this problem: one is the humanitarian one, that is retrieving and identifying the bodies of alleged missing persons and returning them to their families; the second is determining which cases may be used in prosecutions by local courts or may still be of interest to the ICTY.

6.4. Discussion

The forensic activities of the Tribunal went through almost every phase of evolution, the contractors approach, the *ad hoc* organisational approach, chaos and centralisation. Throughout all these periods there was one element not present, and if present, not taken into account: the prosecutor is

⁹ The right to have an identity is a fundamental human right that cannot be alienated in the name of justice. See Alejandro Bonasso, “The Right to an Identity”, paper presented at the Permanent Seminar on Human Rights Education, University of Uruguay, 20 June 2001.

not a specialist and in order for him or her to determine what is the best type of evidence to use in a case, he or she needs an expert's advice. The advice given can then be weighed up on a cost-benefit ratio – a process at the end of which the prosecutor should take a final decision as to whether or not that evidence is worth collecting.

In Rwanda, the ICTR formally took the right approach by creating a Scientific Support Unit. But the unit was not empowered to defend and support its views regarding what and how forensic evidence should be collected because of the lack of understanding from the Office of the Prosecutor as to what forensic evidence was about. Because of this, the Tribunals lost control of the operations they were carrying out and potentially damaging allegations ensued in the trials that used the evidence collected by the ICTR and ICTY.¹⁰

The real problem after 1996 was, however, the factual dissolution of the Scientific Support Unit and the loose incorporation of its members into the investigations division of the Office of the Prosecutor under the supervision of an investigation commander. The latter was typically a medium-rank, non-specialised police officer without any specific knowledge in forensic matters. In that fashion, some investigations which could have benefited from forensic evidence, did not use it. The ICTY adopted a reactive rather than a proactive approach to the use of forensic work. The appointment of senior scientific staff was done on the basis of contacts rather than merit. More expert opinions were sought outside rather inside the Tribunal and a loose set of practices and procedures became apparent.

Once the Scientific Support Unit was in effect dissolved, non-specialists managed the structure. In this scheme, the experts became enforcers of, more often than not, mistaken policies.

6.4.1. The International Criminal Court and the Need for a Scientific Advisory Unit

The previous discussion leads us to conclude that forensic evidence, when used in the investigation of violations of international humanitarian law, should be considered as an integral part of building a case, in other words, its potential and usefulness should be evaluated at the onset while as-

¹⁰ See Rutaganda case, *supra* note 4; and Krstić case, *supra* note 6.

sessing the circumstances of the offence, the characteristics of the crime and so on. Only at that stage should it be determined whether forensic evidence may be useful or not (obviously, the need to collect forensic evidence may arise later in an investigation).

The only way to assess the need for forensic evidence and in order to devise strategies to make it available in a given case is through the creation of a Scientific Advisory Unit. Such a unit should be attached to the chief of investigations and should provide an analysis of whether forensic evidence could or could not be used in a given case. The results of the assessment should then be presented to the prosecutor with a view to enabling him or her to analyse what impact that evidence would have in the case. If the outcome is positive, the unit would then be responsible for the implementation and final outcome of the operation.

Considering that the ICC will have a much larger jurisdiction than the *ad hoc* tribunals (ICTY and ICTR), it is important to determine the basic requirements for such a unit in order to guarantee its viability.

6.4.2. The Composition of the Unit

At the outset, the unit can be staffed by only one scientist and one logistics specialist, and it is envisaged that once fully established, it would be no larger than four people: a senior forensic scientist in charge of the unit, two junior scientists and one logistics specialist.¹¹ In addition, between one and four clerical support staff would be necessary depending on the task to be undertaken.

As previously noted, the unit should be employed at a consulting and decision-making level. Therefore, the issue is not so much the number of people that the unit will comprise, but rather the weight its recommendations have. The unit should have the capacity to enforce standards and policies through contractors or *gratis* personnel seconded to a given mission. In that way, the ICC should concentrate on two areas:

1. Surveying the presence of local technical capacity in the areas or neighbouring areas where it intends to intervene; and,

¹¹ I use the term forensic scientist in a liberal way referring to somebody with first-hand experience in all aspects of recovery, recording and analysis of forensic evidence, particularly human remains and also general knowledge about other branches of forensics.

2. to assemble a directory of competent professionals to be possibly engaged in an *ad hoc* manner depending on the needs of the operation.

It is important, however, that in order to enforce its standard operating procedures, the ICC employs on a short-term basis technical personnel that could oversee or direct local staff to carry out the work pursuant to the demands of the Court. Since the ICC will be confronted with cases spread over a wide geographical area and with different subjects it must be mobile and adaptable to local conditions.

6.4.3. Basic Assets and Logistics: The Need for a Realistic Approach

As the ICTR and ICTY amassed a large amount of expensive technical equipment over the years that, at the end of the day, was sold for a fraction of its value to regional non-governmental organisations working in the Balkans, it is important for the ICC to be able to set up logistic capacities through local contractors and to use technical and unskilled local labour to the greatest extent possible. It would be advisable to invest in a well-trained logistics specialist familiar with the nature of the work to be conducted, possessing the appropriate people skills and technical knowledge to set up an operation with limited resources and in a short time span. (In my working experience, I have encountered a number of such people who were instrumental in setting up operations in difficult conditions such as in Peru, Congo and Kosovo.)

6.4.4. Using Local Resources and Imposing External Standards

Using local resources and imposing external standards has been the approach used for years by independent teams investigating human rights violations, primarily in Latin America and then elsewhere in the world.¹² In addition, the participation of local personnel in these kinds of operations has the double advantage of promoting local capacity-building which is necessary in most instances to deal with the humanitarian consequences of all human rights violations. The advantages of doing so are combining the humanitarian aspect of human rights with the prosecutorial needs.

¹² Baraybar, 2002, see *supra* note 2.

6.5. Conclusions

1. The International Criminal Court should establish a Scientific Advisory Unit.
2. Such a unit should be autonomous and attached to the chief of investigations.
3. The unit should carry out assessments on behalf of the prosecutor to determine the amount, quality and characteristics of forensic evidence that could be collected.
4. Since the investigations of the ICC will not be restricted to one geographical area, it will need to survey the presence of local technical capacity in the areas or neighbouring areas where it wishes to intervene.
5. The unit should also assemble a comprehensive directory of competent professionals to be possibly engaged in an *ad hoc* manner in forensic investigations as need arises.
6. The ICC should concentrate on local resources while imposing external standards.

The ICC should calculate the cost-benefit ratio of a forensic intervention to avoid undertaking one that may satisfy the prosecutorial needs but causes a humanitarian disaster.

Demographic and Statistical Expertise

Helge Brunborg*

There is often a need to know the numbers of victims in war crimes trials, especially in connection with genocide charges: How many people were killed? How many were deported? What is the age and sex composition of the victims? How thorough was the ethnic cleansing? What was the population size and ethnic composition before and after the armed conflict? Such concerns are the major rationale for the need for expertise in demography and population statistics at international criminal courts.

The Statutes of International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR') specify that genocide "means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as (a) killing members of the group; [...]". This Article does not state, however, the number or proportion required for a genocide charge. It is generally just assumed that the number or proportion needs to be significant.

Lack of data, especially of authenticated data, is the most serious problem when estimating the number of victims in a war, especially the

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number of deaths. Identifying and acquiring such data are important but difficult tasks. The quality of the data, when available, varies tremendously and much time has to be spent checking and revising the data. Thus, it is an important task for a demographer to identify, acquire, validate and improve relevant data. Much time has to be spent contacting national and international governmental and non-governmental institutions and organisations.

In my view, it is much more convincing, to a court and the world at large, to present reliable estimates of, say, 7,000 deaths in a given conflict, than poorly documented estimates of, say, 10,000 deaths. Thus, the estimation of numbers of victims has to be very cautious and conservative – much more conservative than what is usually required according to academic standards. If the deaths of only a handful of victims are seriously questioned in a trial, the credibility of the total estimate may be weakened.

For legal purposes, not all war-related deaths may be included in the documentation of a war crime. For example, deaths in combat or deaths resulting from collateral damage need to be excluded as such deaths are not covered by war crimes definitions. To be on the conservative side, the prosecution may in some cases choose to exclude war-related deaths occurring to all men of military age, often defined as widely as 15–60 years, even if most of the men were unarmed civilians when they were killed. But this depends on the actual situation. For the events following the fall of Srebrenica in 1995, for example, all men were included in the estimates of the number of missing persons, as few of the men were combatants at the time they disappeared.

In addition to the needs of the prosecution in a trial, there are many other reasons why people want to have estimates of the population changes due to the war, including political motives. Some groups want the estimates to be as *high* as possible, including victims and groups feeling attacked, whereas other groups would like the estimates to be as *low* as possible, such as those accused of attacks or crimes or being responsible for not preventing atrocities. Political and other interests may produce estimates that are difficult to rely on. On the other hand, it is important for posterity, including the reconciliation process, that there exist uncontested estimates of the number of victims that are accepted by all parties. This is, for example, the case for the number of Jews killed by the Nazis – the number of six million has not been seriously challenged.

Good civil registration and vital statistics systems usually cease to function or are severely hampered during conflict periods. Records and buildings are often destroyed accidentally or wilfully. The division of a country into several administrative territories contributes greatly to the problems of compiling data on the effects of the war on the population. Moreover, a traditional civil registration system is usually not set up to handle the effects of an armed conflict. To estimate the number of war-related deaths, for example, we would need to have good records on the *cause* of death. Moreover, even if cause of death were well recorded, we would usually not know whether a person was an *indirect* victim of the war, as a person may have died of a non-violent cause such as pneumonia due to lack of heating, nutrition or proper medical treatment.

When discussing the data needs for an international criminal court it may be useful to distinguish between macrodata and microdata, which are of a very different nature.

Macrodata, or aggregate data, are usually compiled and estimated by international or national institutions, and sometimes by individuals. Macrodata are usually made by aggregating microdata but they are sometimes derived from using estimation techniques. The quality of such statistics varies and is often unknown. With regard to estimates of the number of deaths, for example, we cannot be sure that the same deaths have not been included more than once or that some deaths have been omitted altogether, both of which are difficult to avoid in a chaotic situation. Consequently, estimates of the number of deaths are often wrong. They may be too low or too high, sometimes depending on the political perspective of the people producing the statistics.

Microdata, or data on individuals, sometimes called raw data, are usually easier to verify. If we have lists of deaths with particulars about the dead persons, such as name and date of birth, we can check that the persons listed as dead have not been double counted and that they actually existed and lived in a given area before the conflict started. The greatest advantage of working with primary data is, however, that it allows the analyst to run his or her own tables and do his/her own analysis, and not the least, that microdata enables the linking of data from different sources. This is useful both for corroborating the data and for obtaining additional information about the victims, for example, ethnicity and place of residence before the conflict. Different sources of data for the same individuals can also be used to check that people claimed to be killed or missing

do not reappear after the conflict in voters' lists, for example. The great drawback of microdata is, however, that acquiring and cleaning the data can be very complicated and time-consuming. We should also not forget that data on individuals can be of poor quality so the analyst needs to look into how the data were collected and check their quality through various demographic and statistical procedures. But it is more difficult to lie with microdata than with macrodata, because it is more feasible to cross-verify the former than the latter.

To sum up, a demographer or population statistician may contribute to an international criminal court in several ways.¹

First, regarding aggregate data:

- Acquire and evaluate relevant publications containing population data and analyses. This may seem a trivial task but investigators and lawyers are usually not familiar with demographic literature and statistical publications.
- Evaluate different data sources. This requires a thorough knowledge of the systems for compiling population data.
- Check the consistency of various estimates of population change, for example, of war-related deaths.
- Estimate population trends based on published data, such as the expected population growth and the number of deaths under normal, that is, non-conflict circumstances.

Regarding microdata:

- Acquire and compile lists or databases on both the pre- and post-war population, as well as of relevant events such as deaths, ex-

¹ The job description in the 2000 announcement for the position as my successor at the ICTY describes quite well the role of a war crimes demographer:

Functions: Under the supervision of the Senior Research Officer, the incumbent will participate in current investigation processes, by undertaking demographic projects as set, liaise with both Prosecution and Investigation teams to establish prioritisation of projects for court purposes as well as authenticate data and assess data both aggregate and individual. He/she participates in briefing and planning conferences, prepares reports and briefs, participates when appropriate, in the presentation of prosecution briefs, testifies in formal proceedings of the Tribunal and performs administrative functions pertaining to the implementation of policies and procedures. *Qualifications:* University degree in demography or related field. Extensive experience in applied statistics required. Four to eight years of experience with applied demography or statistics, international experience would be desirable. Excellent computer skills.

humed bodies, missing persons, internally displaced persons, refugee movements, as well as victims of rape, torture and other injuries. Studies of surviving family members, neighbours and witnesses are important data sources.

- Check and improve the quality of the available data, such as misprints in names, inconsistent dates of birth, identification and removal of duplicate records, and so on.
- Compare and check different data sources covering the same population and events, for example of missing persons and exhumed bodies.²
- Link or match individual-level data from different sources, such as lists of missing persons and deaths, censuses, local and central population registers, sample surveys and voters' lists.
- Estimate the number of victims, such as the number of dead and missing persons and the level of ethnic cleansing, if any.

In general:

- Advise investigators and lawyers on the availability of data, description of variables and of standards (for example, cause of death, disability) and the interpretation and use of various estimates of victims and population change due to the armed conflict in question.
- Write reports to be used in investigations and/or trials.
- Provide expert witness testimony at trials.
- Review and assess reports and statements presented by the defence in a trial.

Moreover, a conflict demographer should be familiar with the literature in the field,³ including methods, data sources, and estimates of the number of victims in some major conflicts, such as in the Holocaust, dur-

² In the trial against Radoslav Krstić, I presented and noted the similarity between the age distribution of missing persons and that of exhumed bodies related to the fall of Srebrenica in July 1995. This similarity was pointed out in the judgment. We also matched the list of missing persons with the (few) exhumed bodies for which the identity was known.

³ This is not yet a well-established field. However, the International Union for the Scientific Study of Population has formed a Working Group on the Demography of Conflict and Violence. The first activity of this group was to organise a scientific seminar (Oslo, 8–11 November 2003).

ing Stalin's regime, and in Cambodia, the former Yugoslavia and Rwanda.

It should perhaps be added that a demographer is usually not able, based on demographic data, to say anything about *who* the perpetrators were and *why* they committed the atrocities. He or she can only attempt at making reliable estimates of the number and compositions of the victims.

Thus, there is a need for a permanently employed population statistician and/or demographer who is familiar with the literature and methods for estimating the number of victims in armed conflicts. This person or persons should also be familiar with basic population statistics and mathematical statistics.⁴ For particular cases, investigations and trials, there may also be a need for hiring one or more consultants on a temporary basis, sometimes for several years, to collect and analyse data relevant for the conflict being investigated. The most challenging and time-consuming of such tasks is to collect individual-level data, on the number of victims, the population before and after the conflict. But this has also the greatest chance of resulting in high-quality evidence.

The organisation of demography and population statistics needs to be flexible, to allow for the needs of specific trials. At the same time, it is important to have a small permanent staff that is familiar with the basic issues, methods and data. This would require a long-term commitment by the International Criminal Court. It takes time to build up expertise and experience in this field. It takes a considerable amount of time for demographers working on this to learn about the methods and data sources but also about the statistical needs of lawyers and investigators. On the other hand, it may also take some time for the *lawyers* to learn about and appreciate the kind of evidence that a demographer may provide. The gradual build-up of demographic expertise at the ICTY, from one temporary demographer to a unit of five or six people, is a clear indication of this, as well as the growth in the number of expert testimonies by demographers at the ICTY.

There is a risk that a small demography unit may be too isolated in an international criminal court, which may lead to a gradual deterioration of the qualifications of the staff, as will making it difficult to keep highly

⁴ There may also be a need for a person trained in mathematical statistics. It is my impression, however, that estimates derived using complicated and/or indirect methods are often not properly understood by judges, or they may be challenged by the defence, and consequently contribute little or nothing to the collection and presentation of evidence.

qualified people for an extended period. To overcome the risks of isolation, the court can do several things:

- Let the demographers work together with other staff doing historical, social and political analysis, and also in close co-operation with lawyers and investigators.
- Support contact and co-operation with people doing related work in other international and national courts.
- Encourage participation in professional activities outside the court, such as participation in conferences and seminars, publishing in scientific journals and so on.

Project-Driven Processes in Investigations

Johan J. du Toit*

8.1. Introduction

Since 1991 I have held the position of Deputy Attorney General within the Office of the Attorney General, South Gauteng, Johannesburg. I have nearly 30 years of experience working within the criminal justice system, including from November 1994 at the International Criminal Tribunal for the former Yugoslavia ('ICTY') as leader of the strategy team and from May 1998 as legal officer/trial attorney in the investigation of persons most responsible within the Bosnian Serb leadership structures. In making these comments, I had the benefit of working with some extraordinary and highly efficient persons and have learnt from mistakes I made personally and by others. My remarks should not be regarded as the alpha and omega on the topic, but I believe that in general it may be the most appropriate way to proceed in the unique environment the International Criminal Court ('ICC') must operate.

Before I deal with the different projects that are, in my view, essential at this early stage of the existence of the Office of the Prosecutor, I would like to refer to the statement of the chief prosecutor of the ICC, Luis Moreno Ocampo, in New York on 22 April 2003: "First task of the Prosecutor's Office: makes its best effort to help national jurisdictions fulfil their mission". I fully agree. This has also been my experience working in South Africa from 1991 to 1994 in investigating human rights abuses

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prior to the first democratic elections in April 1994. In helping countries, the ICC will in the long run not only enhance its own credibility as an institution, but provide a solid platform for the gathering of evidence that will be crucial in the investigation of these highly complex cases.

Setting aside the role of senior management¹ in this project-driven investigation process,² the following remarks will focus on the different projects that can ensure the Office of the Prosecutor fulfils its early role in the most efficient and effective way.³ Each project should have a project leader at a P-level that will do justice to what is expected within the project and budget restraints.

8.2. Project: Policy, Legal and Operational Guidelines

This is probably the most important aspect of the initial work within the Office of the Prosecutor. It is crucial that these guidelines be prepared, discussed in an open forum, considered and approved by senior management, and constantly reviewed and updated if required. The deputy prosecutor plays a key role in ensuring that the guidelines are implemented on the ground. This can be done in various ways, in co-ordination and co-operation with the other members of senior management.⁴ It is also important that the leader of the project⁵ reports directly to senior management – in particular to the prosecutor and, if unavailable, the deputy prosecutor.

¹ This refers to the prosecutor, deputy prosecutor, chief of investigations and chief of prosecutions.

² The role of the deputy prosecutor will be essential in ensuring that the Office of the Prosecutor operates in a co-ordinated way once policy and other decisions had been taken by the prosecutor. It will also be essential that the responsibilities allocated to the chief of prosecutions and chief of investigations be clearly identified.

³ No one person will be responsible as the team leader for a specific investigation. If a decision is made to commence an initial assessment of the evidence, all relevant project leaders will be requested to assist. The evidence so collected will be reviewed by the person ultimately responsible for the direction of the investigation with assistance of a criminal analyst and case manager.

⁴ At least the chief of investigations and the chief of prosecutions.

⁵ The senior legal adviser.

8.3. Project: Requests for Information/Assistance from Relevant Countries

I played a role in the early days of the ICTY to ensure that the information requested and received from the republics of the former Yugoslavia was made known and distributed to relevant persons within the Office of the Prosecutor.⁶ It is essential to put structures in place to ensure that the Office has a good working relationship with relevant countries in order to be provided with relevant information.

8.4. Project: Documents, Including the Search and Seizure Thereof

This is an essential part of the work of the Office of the Prosecutor and at the end of the day, it is of crucial importance to link the suspect to the crime base. A lot of thought must go into the best way of resourcing this project. A good manager⁷ is needed, assisted by a group of data inputters, language assistants and investigators/lawyers who are familiar with big search and seizure operations.

8.5. Project: Open-Source Material, Both in Written and Electronic Formats

Experience at the ICTY suggests that in this modern and technological age, open source material is an essential source of lead-information. A person with some legal background can head it, with the help of qualified individuals who will have the necessary and relevant language and analytical skills.

⁶ This will also be important to determine who will hold the ultimate responsibility for running the project/signing the letters. It will be required to keep extensive notes of the meetings with countries as it may later become relevant to prove that a specific country is “unwilling or unable” to investigate.

⁷ It is essential that the person is aware of the practical use of computer software that can be used in sorting the documents chronologically and so on. I have learned from experience that, by using this method, the documents could tell a story and one can see holes in the evidence more easily. One seldom gets all evidence at the same time and the critical documents may only come into existence (and received by the Office of the Prosecutor) a few years later. It is therefore vital that the software used can create timelines.

8.6. Project: The Research and Analysis of Institutions

This is another important project, as it will assist the person responsible for the investigation to understand the inner workings of relevant institutions⁸ *vis-à-vis* the individual role played by the suspect. The ICTY has a leadership research team and a military analysis team that perform this task. The person employed within this project will also play a key part in the interviewing of key experts, international witnesses, insiders and suspects.

8.7. Project: The Evidence of International Witnesses

This project needs to be done by highly trained and experienced investigators and lawyers. The key aspect is proper co-ordination by the chief of investigations, as the same witness may be relevant to many investigations.

8.8. Project: Insider Witnesses, Classified Evidence and Intercepts

A senior investigator and lawyer under the direction of the chief and deputy chief of investigations should manage this project. According to my experience, if this is handled professionally, with the necessary checks and balances in the operational procedures of information-gathering, countries and individuals will provide the necessary. This is a long-term project and staff should be carefully selected. Procedures should also be in place that can relocate persons if their lives are in danger.

8.9. Project: Crime-Base Evidence

This project is essential. However, it may be rare to have individuals who have physically committed a crime to be prosecuted before the ICC. Senior investigators should not be appointed to head this project. In many instances, statements will be collected by investigators from the affected country. The most time-consuming and difficult aspect will always be to provide evidence that can link the suspect to the crime base. The distribution of the resources within the Office of the Prosecutor must also reflect that reality.

⁸ It may be a political, military or civilian institution.

8.10. The Persons Responsible for Making the Project-Driven Investigation Process a Success

It goes without saying that a project-driven investigation process cannot work if it is not managed and directed by experienced persons.⁹ It cannot, however, be done by the lawyer alone. My experience at the ICTY has taught me that a group of experts is needed, each in their own right, who will be jointly responsible for investigation of a specific matter. After many years of debate on where the criminal analysts best fit into the overall scheme, I am convinced that they should be members of the prosecution division, working together with the lawyer(s) responsible for the investigation. They should be assisted by a case manager who can, from an early stage, assist in preparing the dossier that will eventually be filed with the Pre-Trial Chamber.

8.11. Review of the Progress of the Investigation by the Lawyer Overall Responsible

It is necessary that there be frequent evidence reviews by senior management. The chief of investigation and/or chief of prosecutions can chair these meetings. This will ensure that the necessary checks and balances are in place in producing a professional end product.

8.12. The Overall Benefits of a Project-Driven Investigation Process

The main advantages are that it recognises and appreciates the combined skills of many individuals, avoids duplication of evidence collection, is cost-effective, and lets the project members feel that they all contribute to the overall success of an investigation.

8.13. Closing Remarks

The challenge is to appoint persons who are willing and able to work in this unique and challenging project-driven environment. I am convinced that if a project-driven investigation process is approved, in principle, it will play a meaningful role in the overall success of the ICC.

⁹ It seems that from an initial assessment of the persons that will be employed by the Office of the Prosecutor, no provision has been made for a post of investigation director similar to that of an investigation judge within the civil system. At the initial stages, it has to be a lawyer at the P-4 or P-5 level that will be part of the prosecution section.

Requirements in Leadership Investigations

Tore Soldal*

9.1. Introduction

It is always a danger when you try to transfer an experience from an organisation that it sounds like criticism or blind admiration. It is not my intention to criticise the International Criminal Tribunal for the former Yugoslavia ('ICTY') or promote the organisation as the only answer to how war crimes should be investigated. I am proud of what the ICTY Office of the Prosecutor has achieved, but this does not make me blind to things that we could have done better or in a different way.

Experience will always be individual, based among other things on personality, culture, background, success you have had and tasks you have dealt with. My background when I started as an investigator at the ICTY in 1997 was with the Norwegian police force, where I held the rank of assistant chief of police and, as a trained lawyer, I have also been a trial attorney in between 500 and 700 trials. This specific background makes me different from most of my former colleagues in the Investigation Section at the ICTY Office of the Prosecutor and the conclusions I draw from my experience will most likely be different from many other investigators.

My years as investigator at the ICTY Office of the Prosecutor can roughly be divided into three phases: 1997–1998, engaged in sexual as-

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sault investigation; 1998–1999, crime base investigation; and, 1999–2009, Serbian leadership investigation. These different kinds of investigations demand different skills on the part of the investigator. Sexual assault investigations require personal skills that are difficult to learn. You have to deal with victims who are very often ashamed of the crime committed towards them. Sometimes they have not even been able to tell their wives or husbands. You need to establish good contact with the victim, which is difficult to combine with a professional distance. Crime base investigation requires operational skills. In many cases you have to deal with exhumation, searches and, especially during the first stage of the investigation, you more or less live in the field. Leadership investigation requires good investigative skills and skills that are not normally needed for an investigator. First, interview skills are important. Many of the interviews, both of suspects and witnesses, will be with people from high-level positions in society, such as members of the political, army and police leadership. To conduct a successful interview you need detailed knowledge of history, the political and administrative structure, army structure, the different secret services, the constitution and the legal framework of the country. Another important skill when you are dealing with leadership investigation is the ability to recruit and deal with sensitive sources.

A successful investigation depends on many factors such as human resources, organisational issues and support functions.

9.2. Human Resources

Without the necessary human resources, it is impossible to conduct a successful investigation. The quality of the staff is more important than the quantity. A lack of investigators or lawyers will slow down the investigation but will, in most cases, not have any input on the quality. During my years at the ICTY Office of the Prosecutor, I worked with many highly qualified investigators from all over the world. But I also experienced that some of my colleagues had problems taking the step from crime base investigation to leadership investigation. They did not manage to understand the historical, political, ideological and military aspects of the investigation. Leadership investigations require more legal understanding than crime base investigation, and many investigators have problems understanding what we are investigating. Another problem is that many investigators come from systems where the investigation and the prosecution belong to different organisations and they are not used to working together

as we are supposed to do in war crimes prosecution services. On the other hand, I also experienced investigators who did not perform better than on average as crime base investigators, but became top leadership investigators.

A problem I have experienced is the lack of computer skills. Computer skills are required before you take up a position in war crimes investigations. But many investigators still have problems in using basic text management tools when they start and have no experience in using computers as analytical tools. Working in an organisation where the crimes you are investigating occurred a two-hour flight away, most of your time will be spent analysing in-house material and your analytical skills will be an important human resource.

The quality of the investigators can be improved on three levels: the recruitment process; internal education; and, quality control.

The quality of the recruitment process depends on the required skills and the selection process. At the ICTY Office of the Prosecutor, investigators were required to have a university degree and/or long experience as a law enforcement investigator. The reality was that most of the investigators did not have any university degree. The lack of formal education does not necessarily make an investigator less professional. Many of my best colleagues did not have any higher education. Still, I think that more investigators with a university degree in law or related topics would have increased the standard of the investigations. We would have gained most profit in the leadership investigations. I have met too many investigators who have not managed to adopt the specialised knowledge you need to understand the mechanism within the actual leadership they are investigating. A leadership investigation also requires a legal understanding that I have noticed that some of my colleagues did not possess. One way of recruiting investigators with university degrees will be to reserve certain salary levels or positions for investigators with law degrees or other degrees of relevance for the investigations, while other levels can be opened up for investigators without university degrees.

The selection process can be done better than it has been at the ICTY Office of the Prosecutor. The shortlisting process functioned well, as far as I have experienced it, but the interviewing process could have been done better. Interviews of investigators were done by telephone. It is very difficult to form an opinion of a person you cannot see, and there is also no guarantee that the person you hire is the one you have actually in-

interviewed. A telephone interview will in my opinion give an advantage to a native English speaker. They will, for obvious reasons, be able to answer questions with fewer words and to be more precise. In a live interview body language and behaviour will also be a part of the interview and it will be easier to get in real contact with the applicants. Language is perhaps the most important tool of the investigator, but when the required language skills are fulfilled a native speaker should not be given any advantage for language.

The education of the staff was an area where the ICTY Office of the Prosecutor could have done better. We had courses for new investigators, mostly about the different computer programmes used. Mandatory courses in history, politics, and military and legal issues would improve the investigative staff. It is a reality that some investigators do not have the initiative to improve their skills by reading, and mandatory courses would make this group better able to deal with the tasks they are given.

Quality control of the work done by investigators can always be improved. We often feel that we investigate for the ‘drawers’. Sometimes we feel that lawyers do not read our statements before they start the trial preparation, which may be several years after the interview was done. Without feedback from the lawyers, it is difficult to improve the work and resources may be wasted. In my opinion, it should not be possible to register and turn a statement into evidence before a lawyer signs that he had read it.

A serious challenge in war crimes prosecutions is the handling of exculpatory evidence. Sometimes there are no clear procedures for the handling of this kind of information. The ICTY Office of the Prosecutor has several million registered documents, which may all contain exculpatory evidence in the leadership investigations. The only way to be absolutely sure that every piece of exculpatory material is given to the defence is to read all the documents. This is, of course, impossible, especially since you need skilled people to do the reading. The best way of reducing this problem will be to assign a lawyer to control every document for exculpatory evidence before it is registered.

9.3. Organisational Issues

My experience both from the Norwegian police force and the ICTY Office of the Prosecutor is that the structure of the organisation is important for the quality, the effectiveness and the satisfaction of the staff.

I have worked under two different structural models at the ICTY Office of the Prosecutor. With both models I found it difficult to define the chain of command. Before 2000, the ICTY Office of the Prosecutor was very much led by people with an investigation background. Much of the executive power was held by the chief of investigation, and under him were the commanders and the investigation team leaders. Most of the lawyers were formally subordinated to the team leaders who normally had no legal training. The senior trial attorneys had more or less the role of a British barrister and were not really involved in the investigations. Many *de facto* chains of command or unofficial organisational structures were developed during this period. On some teams, we had strong lawyers who managed to reduce the team leader to more of a ceremonial figure, while other teams could have strong team leaders and weak lawyers. On the teams with strong lawyers and weak team leaders, investigators developed their own chain of command and we could see sub-teams develop. On teams with weak lawyers, the investigations could be overdone because no one was able to direct the investigations in a proper way and resources were wasted. With this structure, it was also common to bypass the chain of command and you were never sure who was actually tasking you.

In 2000, the ICTY Office of the Prosecutor was restructured and the senior trial attorneys were given total responsibility for the investigations. This model has given a better legal direction to the investigation, but it is difficult to combine with the team model: there may be several different senior trial attorneys in charge of different investigations on the same team. The chief of investigation and the team leaders have the resources while the senior trial attorneys are tasking the team. This has, in my opinion, been difficult for the team leaders because several trial attorneys may fight for resources and each of them obviously has the most important case.

It is my opinion that a model where the senior trial attorneys are in charge of the investigations may be preferable. Instead of a team model, a project model may be better. Every investigation should be conducted as a project where investigators and analysts should be assigned to the attor-

ney for a specific investigation. A P-4 investigator should be assigned as a project leader reporting to the lawyer in charge. I think this would also make the investigations more effective.

At the ICTY, the criminal analysts have been members of the investigation team. It is not a good idea to place criminal analysts in a unit of analysts with leadership analysts and military analysts. Criminal analysts and investigators of complex cases have to work together as closely as possible in order to obtain the best results. A criminal analyst will have an important co-ordination function in an investigation and no investigation should be conducted without the involvement of a full-time criminal analyst.

9.4. Computer Systems

Computer systems and evidence handling are important both for the quality of the investigations and the effectiveness of the organisation. Coming from a police force which was computerised many years ago and has since spent a great deal of money to develop new systems, I felt I was taking several steps back when I joined the ICTY. The systems were most likely developed for a much smaller organisation and no one was thinking of a future with almost 1,400 employees and millions of pages of potential evidence. The ICTY Office of the Prosecutor had too many systems, with a need to do separate searches on each of them. Most police forces in Europe, as well as Interpol, are today linking their different systems to enable more effective searches and to make them more user-friendly. There is also a need for a system for handling intelligence information. Especially when dealing with leadership investigation, you receive a lot of intelligence information. When going on mission, this information is mostly spread among different personal or team directories and no one is able to have an overview. An intelligence system with different levels of access, like most police forces have, would be of great help especially in leadership investigations.

Coming from a civil law system where we do not use the term exculpatory evidence but hand over all documents in an investigation, I see the value of a case manager database being used from day one in an investigation. In the Norwegian police force, we have a case manager system coming into force from the moment an investigation is ordered. You can access this system from every police station in the country and have to register all documents related to the investigation under the case num-

ber immediately. When the investigation is finished, the database sorts the documents automatically and prints the documents in the right order, ready to take to court. Without such a system, it takes weeks to prepare a finished investigation for an indictment review. These are resources that can be saved with better systems. I understand that a case manager system used from the start of the investigation is more complicated in common law (like) jurisdictions where just a selection of the documents is handed over to the defence.

9.5. Administration

My experience with administrative issues at the ICTY Office of the Prosecutor is that too much had to be decided outside the Office. It seemed unnecessarily cumbersome and could sometimes harm the investigation. Most people I dealt with in the administration were very professional, but they had a background in the United Nations system and had never dealt with police administration. In the police, you often need speedy decision-making when it comes to administrative issues. On mission for the Office of the Prosecutor, things often happen very fast and we needed a quick decision on, for example, the use of money. It may be a witness we have to hide, take a vehicle out of the mission area, or pay someone for expenses incurred. The ICTY Office of the Prosecutor had no authority to make such decisions and investigators often paid from their own pocket to avoid bureaucracy. It may be useful for war crimes investigation units to have administrative personnel with background from the police.

9.6. Witness Protection

Witness protection issues are something investigators have to deal with almost every day. Especially in leadership investigations you meet witnesses or suspects who are only willing to testify if we can guarantee them some sort of protection. My impression is that the ICTY witness and victim protection unit had a high professional standard, but it often confronted problems when it came to witnesses who needed relocation to a third country. These witnesses often had to stay in the Netherlands for several years before it was possible to get them relocated. This takes a lot of resources from investigators. Such witnesses often tie themselves to the investigator who takes them out of their country and interviews them, and consider him or her as the only person they can trust in the new country. Witnesses or suspects with a criminal background, which many of them

have, are particularly difficult to relocate. Other war crimes prosecution services should learn from the experience of the ICTY witness and victims unit and seek good agreements with countries for relocation purposes.

Leadership and Control of Investigations

Peter McCloskey*

I have jotted down a few pertinent thoughts based upon my six years at the International Criminal Tribunal for the former Yugoslavia ('ICTY'). I was a public prosecutor in the United States for 14 years prior to taking a job with the ICTY in October 1996. As a prosecutor in the United States I tried some 60 jury trials in both state and federal courts, ranging from cases of simple assault to capital murder. As a legal officer for the ICTY, I was assigned to the investigation team looking into the mass murders that occurred in Bosnia after the fall of the Srebrenica enclave in July 1995. In December 1998, Radislav Krstić, a Bosnian Serb general, was indicted and arrested for genocide in connection with this case. I was the number two lawyer in a three-man trial team that convicted Krstić after a trial lasting roughly one year. In 2002, I was promoted to the position of Senior Trial Attorney and began a four-defendant trial in May 2003, involving other Bosnian Serb officers charged with crimes related to the Srebrenica massacre.

10.1. Civil Law and Common Law

The International Criminal Court ('ICC') will draw lawyers from both common law and civil law jurisdictions and the court itself will contain elements of both systems, not dissimilar to the situation faced by the ICTY. In its first few years the ICC, like the ICTY, will struggle to find its own legal identity and ideally will eventually reach a balance, creating its own unique system of justice.

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One of the first things new lawyers at the ICTY are confronted with is the very real conflict in ideology between lawyers with common law backgrounds and those from civil law backgrounds. These conflicts often amount to no more than constructive debates between differing viewpoints that eventually assist staff from one background in understanding the viewpoint of staff from another. However, at times the conflict may become a serious problem and I believe has the potential of causing a major disruption in a newly formed tribunal.

A typical trap many of us fell into in our first months at the ICTY was the overreliance on our national legal system, stumbling over ourselves by citing our own system of law and potentially becoming at odds with the court or our colleagues because we did not understand their legal orientation and stubbornly held to our own legal background. We have also seen judges become adverse to one side because they did not relate to, understand or appreciate that counsel's legal orientation. The ICC lawyers and judges will undoubtedly face the same challenge.

In dealing with this problem, I recommend that the prosecutor and the president recognise and acknowledge this fundamental problem and formulate their vision of what kind system they want to create and work together, as much as appropriate, to allow the ICC to develop its own identity along the lines formulated in that vision. This would, of course, be based upon the rules, procedures and laws which form the backbone of the institution. I would hope the prosecutor's vision would not favour the common law over the civil law or vice versa, but would try to embrace the best of both.

In this process, I believe it would be extremely helpful to formally educate the lawyers in the various systems, including trips to courtrooms representing the best of both traditions. I would also recommend presentations to staff by experts in the fields of common law and civil law. The ICTY has had such programmes in the past and I believe they were effective and very much appreciated by the legal staff.

If the prosecutor develops his or her vision early, acknowledges the conflict between the world's two prevailing systems and educates the office in both systems, I believe he or she will be in the best position to develop the office's own legal identity as smoothly as possible.

10.2. Leadership and Control of Investigations

In many systems throughout the world, experienced investigators work on their own and bring finished cases to the public prosecutor for indictment and trial. In other systems, the police work closely with investigating magistrates prior to indictment and trial. Systems following these models are normally very effective in their home jurisdictions, especially in enforcing traditional criminal statutes such as murder, assault, narcotics, and property crimes. However, investigating and prosecuting violations of international criminal statutes (such as genocide, crimes against humanity and war crimes) in the context of an armed conflict will, in my experience, involve a whole new set of issues and concerns and will demand a very different approach than that in any one domestic system. As national criminal justice systems have had to adapt to increasingly sophisticated and complex conduct in the area of organized crime, political corruption and cyber crime, so too must international criminal tribunals be open and creative in their approach to war crimes investigations and prosecutions.

In my view, the lawyers and the investigators must work together from the very outset of the investigation and a senior, experienced attorney should be in charge of the overall investigation and responsible for carrying it out. It will be the senior trial attorney who will be responsible for trying the case and its eventual outcome. The experienced senior trial attorney is the person in the best position to understand what evidence he or she will need to charge and successfully prosecute an accused person. This is especially true in a new, developing system like the ICC. As investigations commence, investigators will have to spend time in the field or carefully evaluating and analysing materials in the office and will naturally be involved in the day-to-day details of the crime. It is the senior trial attorney who will be in the best position to see the big picture, and with his or her knowledge of the law, and overall experience, help guide the investigators to the most productive areas of pursuit.

In my view, a clearly established chain of command and putting responsibility in the hands of the senior trial attorneys must be established early and strictly enforced. Otherwise the inherent struggle for control between the lawyers and investigators will commence and threaten the very foundation of the institution.

10.3. Linking Superiors to the Crime

Armed conflicts many times will lead to criminal conduct on a massive scale involving hundreds or thousands of victims with crime scenes spread over large areas. When faced with mass graves and hundreds of surviving victims and witnesses it is natural for investigators to concentrate on establishing the crime scene and witness evidence in the initial phases of any investigation. However, in my view, it is equally important, if not more so in many situations, to begin an investigation with a strategy designed to link those most responsible for the crime to the crime itself. This should involve immediately seeking out documentary and other evidence of command and control, much of which will disappear shortly after the crime is discovered. In this regard, developing intelligence at an early stage through confidential informants or co-operating governments to help identify and locate relevant documentary or witness information could be crucial to the outcome of the investigation.

Understanding any foreign political, military or societal structure in the early stages of any major investigation will be critical to the overall success of the investigation. Without some basic understanding of the above, investigators and prosecutors will not know where or how to look for the key documents and materials linking superiors to the crimes and, in addition, will not truly know what they are even looking for. If this critical linkage evidence is to be identified and analysed before it is removed or destroyed, the prosecutors and investigators will have to acknowledge the importance of gaining such knowledge as quickly as possible and act decisively to gain the necessary knowledge. This is not something prosecutors or investigators normally have to do in their home jurisdictions and most will find it very difficult take on this challenge, and may instead find themselves concentrating on areas of the investigation that are the most familiar to them, collecting physical evidence from the crime scene and interviewing victims.

In dealing with this natural tendency to concentrate on crime base evidence, it will be necessary, in my view, in complex cases, to actually divide the investigation team into those people who do the crime base investigation and those who do the linkage investigation. In addition, any complex investigation will need experienced people to analyse the wealth of information obtained by both the crime base investigation and the linkage investigation. If the investigation is successful it will amount to a

huge jigsaw puzzle of pieces obtained by the investigators and put together by the analysts in co-ordination with the investigators and prosecutors. In my experience, there are few investigators who enjoy or are proficient at detailed documentary analysis, and many criminal or intelligence analysts come from backgrounds where they have developed a specific expertise in their own system, which in most cases has little or no relevance to the work of analysing complex materials in war crimes investigations. This is indeed unfortunate because it is the analyst, in my view, who has the most important job of assisting the prosecutor in building a case against high-ranking superiors. An experienced military intelligence analyst or officer is a crucial position for any military case investigation. Needless to say, recognising, recruiting and training experienced analysts and investigators with backgrounds in complex criminal investigations are crucial in setting up a successful prosecution team.

10.4. Translation and Interpreter Support

I cannot emphasise too strongly the importance of establishing the best possible team of translators and interpreters and the organisation to support them. Interpreting and translating will be critical from the very first field interview, through the trial, to the last argument in the appeal, and all areas in between. It is crucial in all prosecutions to have first-rate translation/interpretation support. Without effective translation/interpretation, leads will be missed, documents will not be analysed properly, delay and confusion will reign and the entire organisation will be threatened. In my view, major resources must be used and set aside to ensure all personnel at all levels of this department are paid and supported at the highest levels in order to ensure that the best people possible are available for recruitment.

Quelques considérations sur la direction des enquêtes d'un tribunal pénal international

Laurent Walpen*

Les problèmes auxquels un directeur des enquêtes d'un tribunal pénal international est confronté sont complexes et multiples. Les présentes considérations en donnent un aperçu général. Au besoin un document sur l'un ou l'autre problème plus spécifique pourra être établi.

11.1. Gestion du personnel

Les enquêteurs ont pour mission de collecter les éléments qui seront utilisés tout au long du processus judiciaire. Une affaire mal engagée ne se rattrapera que très difficilement en cours de procédure. C'est dire que le niveau du personnel de la division des enquêtes va influencer directement la qualité globale du travail fourni par le tribunal.

11.1.1. Recrutement

L'engagement sur dossier de candidature, comme cela se pratique pour des raisons budgétaires au Tribunal pénal international pour le Rwanda ('TPIR'), est inadéquat car ni les diplômes, ni le relevé des expériences ne

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révèlent les aptitudes réelles d'un candidat à une fonction d'enquêteur auprès d'un tribunal international.

Un postulant peut avoir un dossier excellent sur le plan académique et professionnel et se révéler quasi-inapte à ce type de travail par la suite. L'interview téléphonique donne quelques garanties supplémentaires mais la plupart du temps ne révélera rien de particulier si ce n'est la capacité de raisonner et de s'exprimer du candidat.

Il ne faut pas perdre de vue que la valeur des diplômes et l'expérience sont très inégales d'un pays à un autre en raison de la disparité des formations dispensées et de la différence des systèmes administratifs et juridiques.

Après avoir procédé à une première sélection sur la base des dossiers, l'idéal serait de construire un système avec plusieurs filtres de sélection, par exemple :

- Test de connaissances techniques
- Bilan de compétences et aptitudes personnelles
- Interview face à face

La mise sur pied d'une procédure de sélection prend beaucoup de temps et à un coût. C'est pourquoi il serait peut être utile de prévoir, une à deux fois par an, un concours d'admission. Tous les candidats ayant passé les épreuves avec succès pourraient être mis dans un registre dans lequel on pourrait puiser en fonction des besoins du bureau du procureur.

11.1.2. Formation

Il faut absolument éviter les formations « sur le tas » comme cela se pratique parfois pour les nouveaux arrivés qui, après deux jours d'introduction, sont intégrés à une équipe d'enquête et envoyés sur le terrain.

L'expérience internationale de beaucoup de candidats est insuffisante. Par ailleurs tous n'ont pas nécessairement une bonne connaissance des règles de procédure en vigueur à la cour. C'est dire qu'un cours d'introduction est indispensable. Ce cours devrait comporter deux volets principaux :

1. connaissances techniques et administratives spécifiques pour la Cour pénale internationale ('CPI');

2. développement des compétences nécessaires pour travailler dans un environnement international et des conditions de travail extrêmes.

Il va de soi que les spécialistes (crimes de nature sexuelle, analystes criminels, spécialistes forensiques, management des témoins, tracking, et cetera) doivent avoir, en plus, des cours spécifiques de mise à niveau.

11.1.3. Manuel de l'enquêteur

Dans ses activités, l'enquêteur doit faire face à une multitude de questions et de situations complexes. Il faut donc s'efforcer de régler à l'avance tout ce qui peut l'être par le biais de directives écrites tant pour le domaine administratif que technique.

Le Tribunal pénal international pour l'ex-Yougoslavie ('TPIY') a créé un manuel de l'enquêteur qui contient toutes les informations indispensables pour exercer la fonction. Le TPIR travaille sur ce même document. Il ne fait pas de doute que la CPI pourrait s'inspirer valablement de ce qui existe, en l'adaptant et le perfectionnant.

11.1.4. Protection et statut

Les laissez-passer délivrés par les Nations Unies pour les enquêteurs des TPI ne sont pas suffisamment reconnus. En effet, dans beaucoup de pays, surtout les pays peu stables, seul un passeport diplomatique est reconnu et respecté. Au TPIR, beaucoup d'enquêteurs ont la chance d'avoir, en plus du laissez-passer des Nations Unies, leur propre passeport diplomatique (de service) national.

Par ailleurs, pour certaines missions, une protection physique est indispensable. Lorsqu'ils se rendent dans des zones à risque, les enquêteurs du TPIR sont escortés par des militaires nationaux et un garde de sécurité des Nations Unies.

11.1.5. Assistants interprètes

L'expérience démontre qu'il est rare que l'enquêteur parle la langue des témoins ou des victimes. Les assistants interprètes jouent un rôle crucial en particulier lorsque les personnes interrogées ne parlent qu'un dialecte local. Le recrutement des assistants interprètes doit être fait avec le plus grand soin.

Le TPIR a été confronté à des problèmes majeurs pour ne pas avoir suffisamment d'assistants interprètes ou pour avoir engagé des interprètes peu fiables. Les interprètes doivent être en nombre suffisant. Il n'y a rien de plus frustrant que de devoir annuler une mission à la dernière minute parce qu'un interprète n'est pas disponible et ne peut être remplacé. Au TPIR, malheureusement, des missions sont régulièrement annulées faute d'avoir suffisamment d'assistants interprètes.

11.2. Matériel

11.2.1. Véhicules

Ceux-ci doivent être en nombre suffisant. Un véhicule pour deux enquêteurs et deux véhicules au minimum par mission dans le terrain. L'attribution des véhicules est un casse-tête et une source permanente de problèmes, de même que la maintenance. C'est pourquoi, il est vital que l'administration dispose d'un officier expérimenté, au caractère bien trempé, pour la gestion du parc automobile. L'utilisation des véhicules à des fins privées et durant le weekend doit aussi être réglée (liberty mileage) si l'on veut prévenir les abus ou inégalités de traitement.

11.2.2. Equipement personnel

Il doit être adéquat et bien entretenu. Le seul moyen d'en être certain est de procéder à des contrôles réguliers. Le travail en zone instable nécessite une grande discipline dans ce domaine. Pour les listes de matériel nécessaire, on peut se référer aux expériences des TPI existants.

11.2.3. La bureautique

Chaque enquêteur doit disposer d'un portable tout terrain avec imprimante le tout pouvant fonctionner sur la batterie des véhicules. Il est impératif que ce matériel soit contrôlé par un spécialiste avant chaque mission car la pratique démontre que la négligence individuelle dans ce domaine est importante. Combien de témoignages de victimes non imprimés, simplement parce que l'imprimante était en panne ou que l'on n'avait pas emporté de cartouche de rechange?

11.2.4. Télécommunications

Un bon système de communications n'est pas seulement important pour la conduite à distance des équipes dans le terrain mais est aussi indispensable pour assurer la sécurité du personnel. Souvent c'est le seul cordon ombilical qui relie le commandement et les équipes au front. Pour un directeur des enquêtes la perte de contact avec une équipe constitue une urgence opérationnelle.

Le moyen de communication par excellence est le téléphone satellite crypté. Le cryptage des communications est particulièrement important lorsque l'on enquête sur des agents du gouvernement du pays dans lequel on travaille ou que l'on prépare des arrestations. D'une façon plus générale, toutes les informations et dossiers judiciaires doivent être classifiés au minimum «confidentiel».

11.2.5. Matériel forensique (police scientifique)

Le matériel du TPIR est hétéroclite, insuffisant qualitativement et quantitativement. Souvent il s'agit de vieux matériel donné au TPI par des pays qui n'en ont plus l'usage.

Compte tenu du fait que la CPI est une cour permanente, il vaut la peine de s'équiper avec du bon matériel de base. Ceci permettra aux spécialistes d'affronter la plupart des situations pouvant se présenter dans le terrain, étant entendu que pour les cas particuliers on a toujours la possibilité de faire appel à des laboratoires spécialisés d'états membres.

Peut être serait-il utile pour l'administration de la CPI d'avoir un contrat avec un laboratoire, néerlandais par exemple. Il va de soi que tout le matériel photo doit être digital car plus convivial, plus rapide, plus facile à transmettre que le support argentique.

11.3. Témoins et victimes

11.3.1. Assistance aux victimes

Le succès d'un procès dépend souvent de la qualité du témoignage d'une victime. Une personne décédée faute de soins médicaux appropriés constitue une perte inestimable pour le bon déroulement d'une affaire en cours. L'aspect psychologique n'est pas à négliger non plus car une victime dont on se désintéresse risque de ne plus vouloir coopérer avec le tri-

bunal. La question est plus importante qu'il n'y paraît. En effet, au TPIR, le fait d'avoir aidé certaines victimes a été violemment critiqué par les avocats de la défense accusant le Bureau du procureur d'acheter ses témoins. Tout est question de balance.

11.3.2. Management des témoins

Au TPIR les témoins appelés par la Cour sont pris en charge par la Section de la protection des témoins qui dépend du Greffe. Cette section fonctionne bien et on peut valablement s'inspirer de son organisation en demandant au Greffier du TPIR les documents organisationnels.

Le problème, en revanche concerne les témoins **potentiels** du procureur. On ne sait pas avant que la Cour n'ait fixé la liste définitive des témoins, si ces personnes vont comparaître. Cette situation peut durer des années. Dès lors, il est primordial d'avoir un système informatisé pour le management des témoins potentiels du procureur, comme il est essentiel de maintenir le contact avec ces personnes. De même que pour les victimes cela implique souvent des mesures d'aide médicale ou sociale. Il est important de gérer au mieux ce « capital preuve ».

L'expérience démontre qu'il vaut mieux que ce soit les services du procureur qui gèrent ces témoins. Les services du Greffier prennent le relais lorsque ces témoins « potentiels » deviennent des témoins « officiels » du tribunal. Au sein du bureau du procureur il y a deux solutions : soit ce sont les enquêteurs qui ont interrogé le témoin qui gardent le contact avec lui, soit c'est une équipe spécialisée qui prend le relais après l'interrogatoire.

La deuxième solution, qui est en vigueur au TPIR, est meilleure car souvent les enquêteurs sont pris sur d'autres affaires ou, pire, ont quitté le tribunal. Une équipe de management des témoins, composée de personnes avec un background de psychologue ou d'assistant social, avec des spécialistes des crimes sexuels, semble être la solution.

11.3.3. Les témoins protégés

Normalement les témoins doivent être protégés dans le pays où ils résident. Hélas, la plupart du temps, la police locale est totalement dépourvue de moyens en personnel et matériel pour le faire.

Il faut alors envisager la relocalisation du témoin (ce qui implique parfois de relocaliser également de la famille). Quelques cas ont pu être

réglés en donnant une certaine somme d'argent au témoin pour quitter le pays et se réinstaller ailleurs. Mais la situation est souvent beaucoup plus complexe.

Il semble que ce problème soit insoluble car le bureau du procureur des TPI, en dépit de ses efforts multiples, n'est toujours pas parvenu à trouver de solution. Depuis le 11 septembre peu de pays sont d'accord d'entrer en matière pour recevoir des témoins protégés et, quand ils le sont, cela génère un coût important. Une famille relocalisée par le TPIR et entrant dans un programme de protection au Canada coûte plus de 100.000 dollars par an, ce qui, on s'en doute, pose de gros problèmes budgétaires au Greffier. Quid si 20 témoins menacés devaient être protégés? On n'ose même pas y penser et pourtant ...

Il faut absolument que la CPI prévoie des mécanismes et des budgets adéquats pour pallier ces lacunes.

11.4. Le service des dossiers et l'evidence unit

La situation que j'ai trouvée à Kigali en 2000 était indescriptible: pas de service d'archivage central des dossiers, lesquels restaient en mains des enquêteurs ou de certains conseillers légaux et tous les éléments de preuve matérielle entassés dans de vieux cartons et, pour la plupart, pas ou mal répertoriés. La situation a été corrigée en introduisant le même système qu'au TPIY lequel peut constituer un bon exemple pour la CPI. Il suffit de demander au procureur des TPI de fournir le concept les directives et les formulaires *ad hoc*.

11.5. Analyse criminelle

Un bon service d'analyse permet d'optimiser les enquêtes. Le problème est que l'on trouve difficilement sur le marché de bons analystes criminels car il s'agit d'une profession relativement nouvelle et peu répandue en dehors des profilers.

Il faudra donc certainement envisager de former des analystes. Interpol organise un cours de formation et la police anglaise semble être à la pointe dans le domaine. Il est sans doute aussi possible de trouver des synergies avec Europol.

Lorsque ce service sera mis sur pied, il conviendra de s'assurer qu'il recevra systématiquement tous les documents recueillis ou établis par les enquêteurs. La pratique, malheureusement, démontre que cela est

très difficile. Il vaudrait la peine d'étudier une solution dans laquelle l'analyse serait couplée avec l'évidence unit ce qui garantirait que toute pièce archivée a été analysée.

11.6. Le tracking

Lorsque les criminels sont localisés dans un pays ou une région cela ne pose guère de problème, pour autant bien sûr que les autorités soient d'accord de procéder à l'arrestation (*confer* TPIY).

En revanche, lorsque les criminels ont quitté le pays (*confer* TPIR), la région, voire le continent, la recherche devient très ardue et seule une équipe de spécialistes peut remplir cette mission. C'est la raison pour laquelle, au TPIR, on a créé le tracking team qui est une unité d'élite, très prisée par le personnel, qui a participé à la quasi-totalité des arrestations d'accusés en fuite.

11.6.1. Règles d'engagement

Le travail de l'enquêteur du tracking est très spécifique et se rapproche des méthodes des services de renseignements ou services dits «spéciaux» (manipulation d'informateurs, filatures, contrôles téléphoniques, collaboration avec les services « amis » tels MI6 DGSE, et cetera). Seuls des collaborateurs de grande expérience, pouvant travailler de façon autonome, peuvent être affectés à ce type de mission.

Ce domaine est délicat et les règles d'engagement doivent être très strictes si l'on veut éviter les dérapages et préserver la sécurité du personnel. Sur la base des expériences faites, le TPIR a développé des lignes directrices précises sur ce type d'action. Il suffit de demander les textes au procureur.

11.6.2. Traitement des sources d'information

La plupart du temps les sources ou informateurs sont rétribués. Il est dès lors impératif de fixer dans les directives opérationnelles ce qui est autorisé et dans quelle mesure. Sachant que les informateurs apparaissent sous des noms de code ou des pseudonymes, il n'est pas toujours aisé de faire correspondre les exigences opérationnelles avec les contraintes administratives (production de pièces justificatives par ex.).

Les renseignements fournis par une source doivent être analysés avec soin afin de coordonner l'activité globale du tracking. Chaque source doit être évaluée en permanence par une personne autre que l'agent traitant. Une cellule d'analyse et de coordination des sources, renforcée d'un comptable pour le contrôle des aspects financiers est absolument nécessaire.

L'évaluation de la qualité du travail des équipes du tracking est sans doute une tâche très délicate pour le directeur des enquêtes ou l'officier désigné par lui. En effet, il se peut qu'une équipe passe plusieurs semaines en mission à l'étranger et qu'il n'y ait pas de résultats utilisables, sans que l'on puisse faire de griefs aux enquêteurs. Il s'agit en permanence de mettre en perspectives les contraintes opérationnelles et les principes d'une saine gestion budgétaire.

11.6.3. Programmes de protection des sources

Certaines sources, surtout lorsqu'il s'agit d'agents gouvernementaux, veulent bien accepter de collaborer mais demandent au préalable qu'on leur garantisse, ainsi qu'à leurs familles, la protection et, au besoin, la relocalisation dans un autre pays.

Ce qui a été dit ci-dessus sous chiffre 3.3 est aussi valable pour la source protégée, sauf à dire que les sources sont souvent plus menacées que les témoins. Dans le cadre du TPIR des sources ont été assassinées, ont disparu ou ont été enlevés dans des circonstances pour le moins troublantes.

C'est pourquoi des mesures telles que le changement d'identité, d'emploi et de lieu de séjour doivent pouvoir être rapidement mises en place. La pratique du TPIR indique que les pays sont de plus en plus réticents à héberger des sources sensibles.

Ce problème est crucial et doit être l'objet de toute l'attention du procureur de la CPI au même titre que la protection des témoins menacés.

11.6.4. Matériel spécifique

La grande difficulté avec les équipes de tracking est de maintenir une liaison sécurisée afin de préserver le secret des informations et la sécurité des collaborateurs ; sans compter la source qui risque parfois sa vie en collaborant avec un tribunal pénal international.

Le moyen de communication privilégié est l'internet à condition que tous les échanges d'informations restent secrets. Le seul moyen d'y parvenir est de crypter les échanges, ordres, notes et rapports de mission.

11.7. Stratégie des enquêtes

Le choix des cibles est la clé de voûte de la stratégie du procureur. La réflexion doit précéder l'action. Il faut procéder par degré d'importance en prenant en compte les chances de capturer les cibles dans des délais raisonnables.

A titre d'exemple, quand j'ai repris la direction des enquêtes au TPIR, la division des enquêtes investiguait plus de 2.000 suspects, c'est dire que les enquêtes n'auraient pas été terminées avant 50 ans. Cela n'était guère réaliste au vu des moyens à disposition. D'entente avec le procureur nous avons établi une liste de 200 cibles prioritaires. Des membres du conseil de sécurité se sont alors émus de la situation et ont estimé que même 200 cibles c'était trop pour un tribunal *ad hoc*. Finalement la liste a été réduite à un peu plus d'une centaine de cibles et le programme des enquêtes devrait être terminé au début 2004.

Pour le choix des cibles il ne faut pas craindre de consulter les experts ainsi que les organisations internationales gouvernementales (le Haut commissariat des nations unies pour les réfugiés ['HCR'], le Haut commissariat pour les droits de l'homme ['HDCH', et cetera) ou non gouvernementales (Human Rights Watch, Amnesty, *et cetera*). Souvent ces organisations disposent dans leurs archives de renseignements très importants.

Une fois les cibles choisies, le programme de recherches doit être établi avec soin pour ne pas laisser des zones d'ombre ou, au contraire, faire le travail à double.

Une autre difficulté d'ordre stratégique est de doser le travail d'enquête et le travail de « trial support » lorsque les procès ont commencé. A titre d'exemple, plus de 60 percent du volume de travail actuel de la division des enquêtes du TPIR est consacré au trial support. Il est vrai que si le travail d'enquête a été bien fait au départ, les demandes de complément d'enquêtes durant le procès seront moins nombreuses.

Un autre problème important en relation avec la stratégie des enquêtes et des poursuites est la liaison avec la division des poursuites. Aux TPI, avant l'arrivée de la nouvelle procureur Carla Del Ponte, les

deux divisions étaient autonomes. Les enquêtes investiguaient et transmettaient le dossier complet à la division des poursuites.

Actuellement le système est très différent puisque les senior trial attorneys se voient confier la responsabilité d'une enquête dès le moment où elle est ouverte par le procureur. Cela a l'avantage de responsabiliser les senior trial attorneys mais a l'inconvénient majeur de créer une double hiérarchie pour la conduite des enquêtes. Le fait que les senior trial attorneys donnent directement des ordres aux enquêteurs ne permet pas un bon contrôle du travail et de la coordination des enquêtes. Cet aspect des choses est particulièrement important lorsque les enquêtes se déroulent à des milliers de kilomètres du bureau du senior trial attorney qui n'a ni la formation ni les structures pour diriger les enquêtes.

Enfin, vu la nature du travail qui attend la CPI, il n'est guère concevable que les enquêteurs partent en mission depuis La Haye. La constitution de field offices deviendra rapidement indispensable. En effet pour les deux tribunaux actuels l'éloignement du théâtre des opérations a nécessité la création d'une direction des enquêtes à Kigali, respectivement de field offices en ex-Yougoslavie. Si demain la CPI doit intervenir au Congo on voit mal comment elle pourrait le faire efficacement sans avoir une importante base opérationnelle sur place. On peut même se poser la question de savoir si le directeur des enquêtes ne devrait pas être sur place, à moins que l'on nomme des directeurs d'enquêtes *ad hoc* pour les grandes affaires.

Quoi qu'il en soit la création de field offices nécessite des accords avec les gouvernements concernés. Pour avoir mis en route un field office à Kinshasa pour le TPIR j'ai pu prendre la mesure de la difficulté. C'est un beau challenge.

11.8. Questions administratives

Souvent les enquêteurs se concentrent sur l'opérationnel et négligent les règles administratives. Il est capital que celles-ci soient établies le plus rapidement possible, qu'elles soient connues et respectées des nouveaux enquêteurs. Les contrôles doivent être stricts et les sanctions exemplaires. Une saine gestion des budgets est à ce prix.

Ceci dit, l'administration doit être au service de l'opérationnel et non l'inverse comme cela arrive trop souvent dans le système onusien. Les procédures d'approbation des missions d'enquête doivent être sim-

ples. Au TPIR, lorsque j'y suis arrivé, il fallait rien de moins que cinq signatures ... pour un ordre de mission (actuellement deux suffisent). Le DSA et les titres des transport doivent être délivrés à temps. J'ai vu de nombreuses missions reportées parce que l'administration, pourtant sollicitée à temps, avait fait preuve de négligence ou d'incapacité. Quant au remboursement des frais rien n'est plus décevant pour un enquêteur que de devoir se battre pendant des mois pour récupérer un dû.

En revanche, si les règles et procédures sont suffisamment précises, si les enquêteurs sont consciencieux et l'administration diligente, tout ira pour le mieux.

11.9. Collaboration internationale

La division des enquêtes n'obtiendra de réels succès qu'au prix d'une étroite collaboration avec un certain nombre de partenaires.

Il s'agit principalement des services de police, de justice, des officiers militaires, non seulement des états concernés par l'enquête mais aussi des autres états parties à la CPI, surtout en matière de tracking.

Interpol, Europol et autres entités sont des partenaires incontournables pour la publication, la diffusion et l'exécution des mandats d'arrêt internationaux, pour les programmes de recherche des criminels en fuite et la coopération policière et judiciaire internationale. Toutefois, cette collaboration doit faire l'objet d'une convention ou d'un memorandum of understanding.

Pour le TPIR, le projet de convention avec Interpol n'est toujours pas signé alors que cette institution dispose d'un instrument analogue pour la collaboration avec les NU civil police monitors. Toutefois, même en l'absence d'un texte formel, Interpol collabore et a donné au TPIR les mêmes droits qu'un bureau national: accès à la banque de données et enregistrement on line des mandats d'arrêt internationaux ou encore demandes de renseignements. La signature de telles conventions devrait être une priorité pour le nouveau procureur.

Quant aux memorandum of understanding existant entre le TPIR et le HCR, il peut servir de modèle pour l'élaboration de nouveaux accords avec la CPI. Entre le TPIR et le HCDH il n'y a pas encore de convention mais les services du procureur y travaillent. Dans l'intervalle le HCDH donne accès à ses archives sans restriction. Ces conventions sont im-

portantes dans la mesure ou elles règlent l'accès aux archives et l'échange d'informations.

La coopération avec les war crimes units des pays qui en sont dotés est importante également. Le TPIR entretient des relations très étroites avec l'unité canadienne et l'unité américaine. Cette dernière a d'ailleurs mis sur pied un reward programme de 5 millions de dollars pour tout renseignement pouvant conduire à la capture d'un fugitif sous mandat d'arrêt international du TPIR. De plus, comme directeur des enquêtes du TPIR j'avais obtenu l'accréditation pour avoir accès aux documents américains classifiés. Si une telle collaboration avec les États-Unis ne semble guère possible pour le moment, il est certain que l'on peut mettre sur pied ce type de programme avec d'autres pays.

Enfin, il s'agit d'aménager une collaboration étroite avec les missions de maintien de la paix qui sont dans le terrain, ont fait des constatations pertinentes ou disposent d'informations ou de documentation de qualité (cartes, plans, organigrammes de troupe, et cetera)

11.10. Conclusion

Les problèmes qui se posent au quotidien à un directeur des enquêtes sont multiples et complexes. La plupart du temps, ils se résolvent rapidement surtout lorsque l'on peut se baser sur des directives précises, émises préalablement par le Procureur ou le Directeur des services administratifs. Lorsque tel n'est pas le cas, une concertation rapide entre les parties concernées permet la plupart du temps de donner une réponse rapide aux questions posées.

Il serait souhaitable que la CPI, si elle ne les possède pas déjà, se procure auprès du procureur des TPI les documents suivants : Manuel des enquêtes – Lignes directrices pour le management des sources confidentielles – MOU avec le HCR – projet de convention avec Interpol et tous autres documents pouvant être utiles à l'organisation de la CPI. De même on peut obtenir auprès du Greffier du TPIR le dossier relatif à la protection des témoins.

Je suis conscient que le présent document ne fait que survoler la matière. Hélas, mes fonctions actuelles ne me permettent pas de présenter un document très détaillé, ce que je regrette. Toutefois, je serai ravi, sur demande, de développer l'un ou l'autre point d'intérêt particulier. Je suis de tout cœur en pensées avec ceux qui liront ce document et qui ont la

lourde tâche de mettre sur pied les structures d'enquête de la CPI et espère que ma modeste contribution leur sera utile.

Ce document a été établi à la demande de Monsieur Bruno Cathala, directeur des services généraux de la CPI, avec l'aimable autorisation du bureau de procureur du TPIR.

Effective Case Preparation

Ekkehard Withopf*

12.1. Objectives

The purpose of this chapter is to sketch out both an investigation system and a pre-trial system for the Office of the Prosecutor of the International Criminal Court ('ICC') by describing effective and efficient methods of an efficient and successful case preparation. In particular, the role of trial attorneys, investigators, analysts and language assistants in the process of case preparation is detailed. Simultaneously, the necessary co-ordination of their work is addressed. The memorandum will specify a number of principles. Only such principles that have been proven useful in the work practice of the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ('ICTY') are discussed. At the end of each section – and again at the end of the memorandum – these principles are summarised.

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12.2. Background

The principles advocated in this survey are based on my three years and eight months of relevant experience as both a trial attorney and (acting) senior trial attorney within the Office of the Prosecutor of the ICTY. First as a trial attorney, and later as an (acting) senior trial attorney, I was responsible for a number of large-scale ICTY investigations, including complex investigations into crimes committed by suspects from both the military and political sides. Particular experience was gained in the context of a comprehensive leadership investigation. In the framework of such investigations, I directed and supervised investigators, criminal analysts, military analysts, leadership researchers, language assistants, document managers and case managers. In addition, once the investigations had resulted in indictments, I was heavily involved as (acting) senior trial attorney in the Office of the Prosecutor's pre-trial preparation of two ICTY cases by leading two trial teams, both comprising of a number of trial attorneys and legal officers.

12.3. Basic Principles

The investigation focuses on the requirements of a future trial. All efforts in the course of the investigation to gather evidence aim at the future admissibility of such evidence. Emphasis is put on the question on how to use the evidence in trial. Trial attorneys know best about trial-related issues. Therefore, any investigation is directed and supervised by trial attorneys in line with two principles:

1. The investigation follows the requirements of a future trial.
2. The investigation is directed and supervised by trial attorneys.

12.4. Investigation Plan

The investigation plan forms the basis of any investigation. It keeps the investigation focused. The success of the investigation critically depends on the quality of the investigation plan.

Based on a careful and comprehensive analysis of all available material, the investigation plan details both the crime base incidents to be investigated and the individuals to be targeted as being responsible for these crimes. In accordance with the underlying legal theory, the investigation plan defines the aim of the investigation. At the earliest opportunity, a

draft indictment forms part of the investigation plan. The investigation plan describes the anticipated steps of the investigation to achieve the aim of the investigation in as much detail as possible. The likely outcome of each such a step is incorporated. Alternatives are developed.

The investigation plan is developed under the direction of the trial attorney at the very outset of the investigation. The trial attorney, investigators and analysts work closely together.

The investigation plan is permanently updated. The investigation plan and its updates are communicated and explained by the trial attorney to all members of the (broader) investigation team including investigators, analysts and researchers. The two principles are:

1. The investigation plan is crucial for the success of the investigation.
2. The investigation plan is developed at the very outset of the investigation; it is regularly updated.

12.5. Evidence Chart

The evidence chart is an efficient tool to control both the progress of the investigation and to keep the investigation focused. It is established at the very beginning of the investigation. The evidence chart details the evidence collected in the course of the investigation. It is linked to the draft indictment. Evidence is distinguished between witness statements, documents, and other types of evidence. Links between witness statements, documents and other types of evidence are identified.

In the evidence chart the evidentiary value of each piece of evidence is assessed. Credibility and availability of witnesses are covered. Issues relating to the authenticity of documents and their admissibility in trial are addressed. Exculpatory evidence is included in the evidence chart. It is clearly identified as such.

The trial attorney updates the evidence chart on a regular basis. On principle, after each mission to take witness statements and after the receipt of documents, in particular document collections, he or she incorporates the new – incriminatory and/or exculpatory – evidence.

The evidence chart is available to all members of the broader investigation team. Together with the updated investigation plan the evidence chart forms the basis for regular discussions with investigators and analysts/researchers. The two principles are:

1. The evidence chart is the tool to control the progress of the investigation and to keep it focused.
2. The evidence chart is regularly updated.

12.6. Missions

Missions are the key for the collection of evidence. They are carefully planned and executed. There are no ‘fishing missions’. The trial attorney approves missions on the basis of a written mission plan. The mission plan details the envisaged outcome of the mission based on a concise summary of the analysis of the available information. The anticipated result of the mission fits in the investigation plan. Potential witnesses are carefully selected. Quality trumps quantity.

Personnel to go on mission are selected in close co-operation between the trial attorney and the investigation team leader. The nature of the mission is crucial for the selection of the participants to the mission. Different categories of witnesses such as crime base witnesses, ‘notice and knowledge’ witnesses, or ‘link’ witnesses require different skills of investigators. In addition to investigators, analysts and researchers take part in missions to interview military personnel and/or politicians.

Trial attorneys participate in missions to interview suspects, ‘insider witnesses’ and key witnesses, in major search and seizure missions, and in missions with the purpose of meeting with and establishing contacts with key players in the mission area. The four principles are:

1. The anticipated outcome of the mission is clearly defined. There are no ‘fishing missions’.
2. Witnesses are carefully selected. Quality trumps quantity.
3. Missions are only approved after a comprehensive analysis of all available materials.
4. Personnel to participate in missions are selected pursuant to the nature of the mission.

12.7. Expert Witnesses

Issues to be addressed by expert witnesses are identified as early as possible. Potential expert witnesses are approached once the issues to be addressed are identified. Expert witnesses are comprehensively informed. They get all relevant materials, including both incriminatory and exculpa-

tory materials, as soon as practicable. The issues to be addressed in the expert opinion are clearly defined in the terms of reference. Only the necessary issues are addressed. The two principles are:

1. Topics for expert witness testimony and potential expert witnesses are identified at the earliest opportunity.
2. Issues to be addressed by the expert witnesses are clearly defined.

12.8. Interviews of Suspects and Accused

Any interview of a suspect or an accused is highly likely to be crucial in trial. It is the trial attorney's responsibility to guarantee that the suspect or accused is properly cautioned. The trial attorney ensures the admissibility of the interview as evidence in trial. Any necessary arrangements with defence attorneys are made as early as possible.

Investigators and analysts under direction of the trial attorney carefully prepare for the interview. All available material is included in the preparation. The interview team anticipates any potential argument of the suspect or accused and develops strategies on how to deal with them. The interview team is as large as necessary but as small as possible. One member of the interview team, regularly an investigator, is the main interviewer. The trial attorney plays an active role where appropriate.

A structured questionnaire is prepared. It covers all relevant topics. The questionnaire details topics only, not questions. The questionnaire is only a tool.

The interviewers direct the interview, not the suspect or accused. They keep the interview structured and the interviewee focused. They clarify all ambiguities. The interview takes as long as necessary. It is, however, as short as possible. The six principles are:

1. The interview of a suspect or an accused is comprehensively prepared.
2. The trial attorney ensures the admissibility of the interview as evidence.
3. A questionnaire covering topics, not questions, is prepared.
4. The interview team is as big as necessary and as small as possible.
5. The interviewers direct the interview, not the interviewee. They keep the interview structured and focused.
6. The interview takes as long as necessary. It is as short as possible.

12.9. Search and Seizure

Motions for search warrants are standardised. Such motions are updated in line with the jurisprudence of the Court. Search and seizure missions are carefully planned involving all members of the broader investigation team. Secrecy and security are paramount. There is only one opportunity to search.

Crucial is the quality of the materials seized, not their quantity. This requires being selective on the spot. Search parameters ('keywords') for the materials searched are clearly defined prior to the search.

Sufficient personnel participate in the mission. Language assistants are key. All participants, including the language assistants, are comprehensively briefed about the search parameters. The three principles are:

1. The search and seizure operation is carefully planned. There is only one opportunity to search.
2. The quality of the materials seized trumps their quantity. Focused search criteria are defined in time.
3. Language assistants are key. They are used efficiently.

12.10. Requests for Assistance

Requests for assistance are addressed to the right addressee. They detail the information provided to the extent necessary to enable the addressee to comprehensively respond.

The trial attorney approves requests for assistance. The originator of the request for assistance briefs the trial attorney at his/her request on both its factual and evidentiary background and the anticipated result.

Depending on either the nature of the request of assistance or its addressee, the investigation team leader and/or the trial attorney establish personal contact with the addressee. They establish personal contact to repeatedly approached addressees at the earliest opportunity. The two principles are:

1. Requests for assistance detail the information provided to the extent necessary, to enable the addressee to respond comprehensively.
2. Personal contact to repeatedly approached addressees of requests for assistance is established early on.

12.11. Communication, Tasking and Meetings

Efficient communication and tasking is important to keep the investigation focused. Misunderstandings and duplication of work are avoided by clear and detailed tasking. Deadlines are set and controlled.

Investigation policies are known to and understood by all members of the broader investigation team.

As few meetings as possible, as many as necessary. Regular meetings are preferable. The participants of the meetings are selected in line with the topics on the agenda. A detailed agenda to the meeting is provided in good time prior to the meeting. Meetings are duly and carefully prepared. It is ensured that all participants to the meeting have the same level of knowledge of the topics to be discussed. Timely distribution of materials referred to at the meeting ensures an informed decision-making process and avoids additional meetings on the same issues.

Decisions made at meetings are confirmed in writing. They are communicated to all those who have to know. Follow-up tasks are communicated immediately after the meeting. The five principles are:

1. Efficient communication and focused tasking is key.
2. Deadlines are set and controlled.
3. Investigation policies are known and understood.
4. As few meetings as possible, as many as necessary.
5. Results of a meeting are confirmed and communicated.

12.12. Investigators

The proper and efficient use of the investigators' skills is paramount to the success of any investigation. The professional (and cultural) backgrounds of the investigators are known to both the investigation team leader and the trial attorney. A thorough evaluation of the particular skills, strengths and weaknesses of each investigator is done to use his or her skills in the most beneficial manner for the investigation. Investigators are tasked accordingly.

Investigators collect evidence. In addition, investigators analyse evidence to the extent that it does not require the particular expertise of an analyst. The investigator's analysis is done on a regular basis.

Investigators are comprehensively briefed by the trial attorney on the elements of the crime. They are in detail aware of the nature of evidence required. The three principles are:

1. Investigators are tasked in line with their particular strengths.
2. Criminal analysis not requiring specific expertise is done by investigators.
3. Investigators know in detail the legal elements of the crime.

12.13. Analysts

Analysts are playing a key role in the preparation of the case. Their analyses facilitate the work of both investigators and trial attorneys. Analysts take part in the investigation from its very outset. They are included in the broader investigation team.

In order to make the best use of the analysts' skills, their particular expertise is carefully evaluated. Analysts are tasked accordingly. The particular expertise of analysts is communicated to the broader investigation team.

Analytical tasks are clearly defined and communicated. Duplication of investigators' and analysts' analyses is avoided. The analysts' work product critically depends on the input from all members of the investigation team and the trial attorneys. The three principles are:

1. Analysts take part in the investigation from the outset.
2. Analysts are tasked according to their particular expertise.
3. Duplication of analytical work is avoided.

12.14. Effective Case Preparation: Summary of Principles

Basic principles:

1. The investigation focuses on the requirements of a future trial.
2. The investigation is directed and supervised by trial attorneys.

Investigation plan:

3. The investigation plan is crucial for the success of the investigation.
4. The investigation plan is developed at the very outset of the investigation. It is regularly updated.

Evidence proof chart:

5. The evidence chart is the tool to control the progress of the investigation and to keep it focused.
6. The evidence chart is regularly updated.

Missions:

7. The anticipated outcome of the mission is clearly defined. There are no ‘fishing missions’.
8. Witnesses are carefully selected. Quality trumps quantity.
9. Missions are only approved after a comprehensive analysis of all available materials.
10. Personnel to participate in missions is selected pursuant to the nature of the mission.

Expert witnesses:

11. Topics for expert witness testimony and potential expert witnesses are identified at the earliest opportunity.
12. Issues to be addressed by the expert witness are clearly defined.

Interviews of suspects and accused:

13. The interview of a suspect or an accused is comprehensively prepared.
14. The trial attorney ensures the admissibility of the interview as evidence.
15. A questionnaire covering topics, not questions, is prepared.
16. The interview team is as large as necessary and as small as possible.
17. The interviewers direct the interview, not the interviewee. They keep the interview structured and focused.
18. The interview takes as long as necessary. It is as short as possible.

Search and seizure:

19. The search and seizure operation is carefully planned. There is only one opportunity to search.
20. The quality of the materials seized trumps their quantity. Focused search criteria are defined in time.
21. Language assistants are key. They are used efficiently.

Requests for assistance:

22. Requests for assistance detail the information provided to the extent necessary to enable the addressee to respond comprehensively.
23. Personal contact to repeatedly approached addressees of requests for assistance is established early on.

Communications, tasking and meetings:

24. Efficient communication and focused tasking is key.
25. Deadlines are set and controlled.
26. Investigation policies are known and understood.
27. As few meetings as possible, as many as necessary.
28. Results of a meeting are confirmed and communicated.

Investigators:

29. Investigators are tasked according to their particular strengths.
30. Criminal analysis not requiring specific expertise is done by investigators.
31. Investigators know in detail the legal elements of the crime.

Analysts:

32. Analysts take part in the investigation from the outset.
33. Analysts are tasked according to their particular expertise.
34. Duplication of analytical work is avoided.

Quality-Conducive Management of Investigators

Bernard O'Donnell*

13.1. The Quality-Conducive and Efficient Management of the Work of Criminal Investigators in the Context of an Investigation Team

Investigations of international crime are, by their nature, protracted and complex. Some of the difficulties facing investigation managers which, although not unique to international investigations, present greater difficulties than for the investigation of national crimes, are:

1. Effective recording and maintenance of information and evidence:
 - maintaining a record of steps taken to investigate exculpatory evidence, so as to satisfy the Office of the Prosecutor's obligations under Rule 54 of the International Criminal Court's ('ICC') Rules of Procedure and Evidence;
 - maintaining witness contact for perhaps several years between the time a witness is spoken to and the time of appearance in court;
 - reviewing and analysing of huge quantities of documentation, capturing relevant evidence and maintaining details to prevent duplication.
2. Induction and training of new staff from diverse criminal justice systems, bringing with them varying degrees of relevant skills.

* **Bernard O'Donnell** has extensive experience in conducting, leading and managing national and international investigations. His career includes service with the Australian Federal Police, the United Nations Civilian Police, the International Criminal Tribunal for the former Yugoslavia, the Independent Inquiry Committee into the UN Oil-for-Food Programme (New York), the Global Fund to fight Aids, Tuberculosis and Malaria (Geneva), the United Nations Development Program (New York), and the European Investment Bank (Luxembourg). The text of this chapter was originally submitted as part of an informal consultation process at the time of the establishment of the ICC Office of the Prosecutor. It reflects information available to the author at the time. The text – like the other chapters in Part 1 of the book – has deliberately not been updated since. Only minor textual editing has been undertaken. Personal views expressed in the chapter do not represent the views of former or current employers.

3. Introduction of a consistent methodology for each investigation activity (for example, interviewing of witnesses, interviewing of suspects, searching of crime scenes, seizure of evidence).

I will set out more detail in relation to each of these points.

13.1.1. Effective Recording and Maintenance of Information and Evidence

Databases and other management systems are essential for the effective management of international investigations. These systems need to assist each phase of an investigation from the receipt of initial information and potential witness details, to the investigation, the formulation of an indictment, trial preparation and disclosure, through to the trial and possibly later appeal process. The database should be designed to record the following details and their specific relevance to a particular investigation:

- *Document management*: seizure details of each document relevant to an investigation; seizure, chain of custody, corroboration and other matters relevant to admissibility (authentication); classification of relevance of document (for example, the selected document is relevant to *command and control*, *knowledge*, *notice* or *unlawful detention*); ability to generate exhibit lists; ability to produce a report by category (report: “what do we have on target 1’s command and control?”); tracking of disclosure.
- *Witness management*: potential witnesses (contact details, evidence that they can provide, security concerns, contact procedure, hyperlink to any statements provided to other organisations); witnesses (link to statement(s) obtained, contact details, protective measures, security concerns, witness assessment, log of ongoing contact, classification of relevance of evidence provided, tracking of disclosure).
- *Detention facilities*: link to witnesses held in each location; details of each detention facility; link to relevant documentary evidence on each camp.
- *Crime base*: general evidence on the area of crimes if appropriate: people in authority; demographic composition; details of detention facilities; media agencies, non-governmental organisations (‘NGOs’) and other possible sources of information who were operating in the area.

A case overview page is also of great assistance in the management of a large case. During the course of an investigation, thousands of documents are likely to be generated in hundreds of directories and sub-directories. The case overview page is an intranet-based (or word-hyperlink) investigation home page, which allows documents, charts, databases and spreadsheets to be linked together on a one-page form using hyperlinks. This can be easily created in html-format and run through the Office of the Prosecutor intranet. Alternatively, if security or other considerations prevent this, the page can be MS Word-based.

Other tools necessary for the effective functioning of investigation teams and efficient conduct of investigations are:

- Effective communication equipment (radios, mobile telephones, satellite telephones) between members of the team, between different teams operating in the field, with senior management and with field bases.
- Encryption capability for communications (secure fax/telephone).
- Laptop computers.¹
- GPS positioning equipment.
- Evidence/crime-scene kits.
- Tape recorders.
- Video equipment.
- Secure storage devices for data (external hard drive for data with biometric/encryption).
- Stationery (for example, pre-printed standard forms for seizure of evidence and chain of custody, electronic pro-forma for witness statements).

13.1.2. Induction and Training of New Staff from Diverse Criminal Justice Systems

This is addressed in section 13.5.

¹ Security is a necessary part of the work of all investigative teams and therefore will be an important consideration for ICC investigation teams. However, it is imperative that equipment such as laptop computers do not have their functionality impaired unnecessarily through arbitrary application of security measures. There is inevitably a trade-off between functionality and security, which can hamper investigation work without a proportional benefit to security.

13.1.3. Introducing a Consistent Methodology for Each Investigative Activity

This should be addressed in two ways. First, the implementation of relevant training for investigators (addressed in section 13.5.); and second, the implementation, monitoring and enforcement of prosecutors' regulations (addressed in section 13.4.).

13.1.4. Other Suggestions for Effective Management

- *Scheduled reporting and progress reports*: establish regular reporting on progress of each investigation to enable identification of problems and co-ordination of related investigations.
- Detailed review of investigation progress and findings.
- *Quality assurance reviews of investigations*: selected investigations from each team periodically reviewed in detail by separate team or delegate of chief of investigation to provide ideas, check quality of investigation and ensure proper recording of information and evidence, security of data, management of the investigation and soundness of recommendations.
- *Fluid team structure*: ability to redeploy resources between teams within the Office of the Prosecutor at short notice to allow each team to react more effectively to demands at different phases of an investigation.

Investigators should be kept informed of all ongoing investigations. It should be possible to change the size and composition of all teams as necessary, with investigators (along with analysts and language staff) moving from one team to another as required.

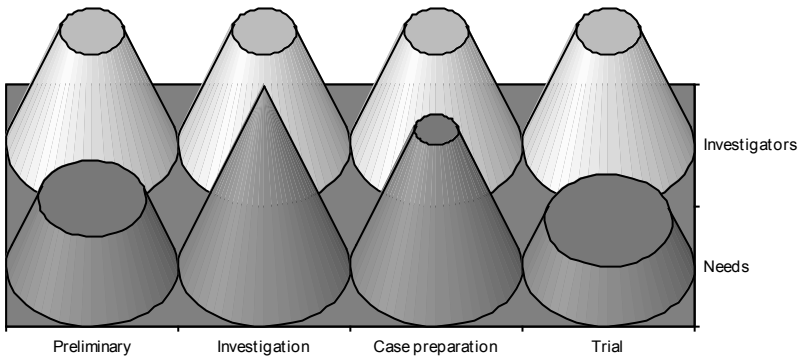


Figure 1: Composition of Typical Investigation Team.

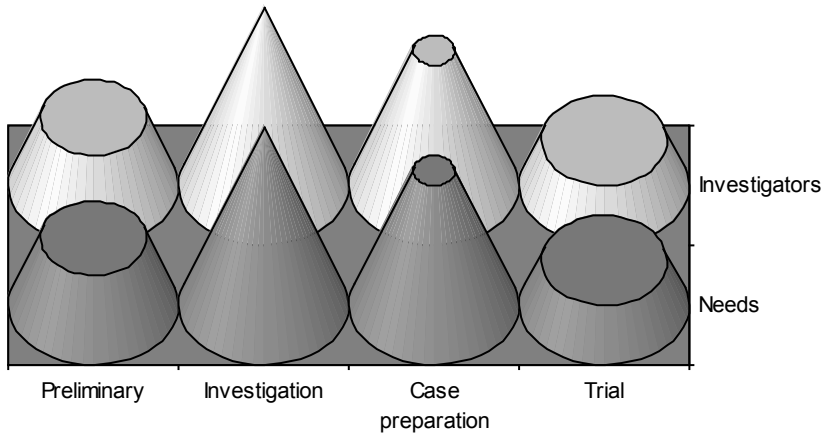


Figure 2: Suggested Fluid Team Structure.

An important part of the fluid team structure is the ability to draw on investigative resources at short notice, that is, the ability to call on investigators who have a satisfactory level of investigative skills; experience in the investigation of international crimes; and training in the investigation of crimes under the Statute and Rules of the ICC. This would allow a smaller number of permanent staff, but the ability to respond quickly and to deploy staff with appropriate knowledge, skills and experience. One option to enable the ICC to do this would be to develop a memorandum of understanding with an organisation capable of meeting the above

requirements, for example, the Institute for International Criminal Investigations ('IICI').²

13.2. How to Ensure the Recruitment of Competent Criminal Investigators

Key issues here are geographical diversity and obtaining investigators with relevant skills and experience. The ICC is likely to face the same difficulties as the *ad hoc* tribunals in developing a pool of suitably qualified candidates from as wide a range of countries as possible, and a depth of applicants to ensure that those selected are the best possible candidates from their national system.

Investigators recruited to the ICC will have significant differences in backgrounds, training, skills and knowledge. Interest in the ICC from member states is likely to result in a large number of applicants and, therefore, the ability to select investigators with significantly more experience than the minimum required. However, because of differences in national systems, the depth of experience and skill sets will differ significantly even between criminal investigators with a similar number of years of experience in criminal investigation. For example, investigators from Sri Lanka will, most likely, not have conducted suspect interviews (evidence from such interviews is not admissible); investigators from many jurisdictions will not have used computers; signed witness statements are rarely taken by investigators from the United States; investigators from Australia will not have been involved in witness proofing before trial (this would not be permissible under national law); investigators from large professional policing agencies such as Scotland Yard in Britain are unlikely to have hands-on experience in the processing of a crime scene (expert crime scene technicians would generally be used).

A further issue is the applicability of national investigative experience to the international context, given key differences in national and international investigations. Of particular note are:

- *The scale of crimes under investigation*: potentially thousands of murders in the international sphere, compared with one or several in any national jurisdiction.

² The author has been involved in the establishment of training for investigators through the IICI and in the development of the IICI.

- *The size of crime scenes*: possibly scattered across an entire country or region, each of greater size than any likely to have been encountered in national investigations.
- Differences in the elements of crimes.
- *The nature of international investigations*: more akin to organised crime investigation than street policing or general crime investigation. However, skills in these areas (for example, experience in processing crime scenes for physical evidence, experience in obtaining testimony from victims and witnesses of serious crimes of violence, experience in conducting suspect interviews with violent perpetrators) are an advantage to certain parts of international investigations.

The Rules of Evidence and Procedure of the ICC, being a combination of both common law and civil law systems, are different to any national system. This, coupled with the factors listed above, means that there are not investigators from any part of the world who will come fully prepared for investigations conducted by the ICC.

Specific training will be important for all investigators entering the ICC. However, applicants with the most appropriate experience and skills should be identified during the recruitment process. The most effective way of doing this is by identifying the *core competencies* of an investigator with the ICC. Investigators require a combination of *skills* and *knowledge* in a variety of areas and must be able to demonstrate their ability to perform tasks essential to the functions of an ICC investigator. Some of the core competencies for investigators working on ICC investigations are as follows.

Knowledge:

- Knowledge of crimes under international humanitarian law.
- Knowledge of the ICC Statute and Rules of Evidence and Procedure.
- Knowledge of the elements of crimes under the jurisdiction of the ICC.
- Knowledge of best practice for obtaining evidence from witnesses and crime scenes.

Skills:

- Ability to prepare comprehensive investigation plans, briefings, mission reports, search warrant information and all other strategic and tactical paperwork necessary for the investigation of complex and major international criminal investigations.
- Ability to liaise effectively with governments and other organisations to obtain information.
- Ability to interview a witness, through an interpreter as required, to obtain relevant evidence, and to record testimony accurately, while showing respect and sensitivity to the witness.
- Ability to arrange and conduct a mission to gather evidence, demonstrating a knowledge of security and safety considerations.
- Ability to understand complex criminal cases (experience in large-scale and protracted investigations).
- Ability to conduct the examination of a crime scene, using the assistance of experts where necessary (for example, forensic technicians, computer experts).
- Ability to obtain and handle physical evidence, demonstrating knowledge of factors such as chain of custody, admissibility, relevance and authentication.
- Ability to use computer software to search for data, find data and manipulate data as necessary.
- Ability to obtain information on the site of mass graves, sufficient to enable the deployment of expert teams for exhumation (probing, GPS position, assessment of special equipment needed).
- Ability to interview suspects: 1) in accordance with the Rules of Procedure and Evidence; 2) effectively using an interpreter where necessary; 3) structuring and conducting the interview in such a way that; 4) information of importance to the case is obtained.

After the core competencies have been developed, the recruitment process can be designed to assess the skill sets of applicants against requirements:

- The application of the investigator should be vetted against the core competencies.
- Applicants should be interviewed in sufficient detail to obtain precise information on relevant experience, knowledge and skills.
- Proof of qualifications should be obtained.

- Setting examinations as necessary to assess knowledge (and to determine what training will be necessary).
- A practical demonstration of skills should be required when insufficient evidence can be produced (for example, the ability to interview a witness, to interview a suspect or the ability to search for and record evidence). This could be conducted during a probation period.

The success in identifying applicants with the most relevant skills will have a significant positive effect on training requirements. It will also assist in reducing the time necessary to make the transition from a competent national investigator to a competent international investigator. Obviously, this process will also impact generally on the ability of the Office of the Prosecutor to respond effectively to investigations. However, to conduct this process effectively is resource intensive.

Consideration should be given to a period of probation, after which an assessment of suitability can be made, with a view of not extending the contracts of investigators (and other staff) who do not have the necessary knowledge and skills to satisfactorily perform duties assigned, despite training.

Suggestions for incorporation into recruitment strategy:

- Circulate vacancy announcements through member states: allow sufficient time for information to get to potential applicants.
- Establish liaison points with professional organisations for passing of information on vacancies.
- Incorporate information into any outreach programme developed by the ICC.
- Posting of all relevant information on the internet (including terms and conditions of service, information on recruitment process, information on The Hague and the ICC in general, contact persons for obtaining further information).
- Maintain control over recruiting process. To ensure that those with the most appropriate experience are selected for positions, it will be important that governments are not able to select staff for positions with the ICC.
- Develop core competencies for investigators at each level.
- Design a recruiting process (interview, examination, practical demonstration of skills) to identify candidates with most relevant

experience and most potential for transition from national to international jurisdiction.

- Integrate recruitment and training, identify general and specific training requirements.
- Build in an assessment/probation period if possible.

13.3. The Appropriate Role of Lawyers in Investigations

Differences in the backgrounds of investigators have already been highlighted. Similarly, the role of lawyers is significantly different from jurisdiction to jurisdiction and this should be recognised when considering the role of lawyers in investigations. Because of the different skill sets of lawyers from different countries, it is difficult to define the specific role of lawyers *vis-à-vis* investigators in an investigation.

In civil law countries and the United States, lawyers will generally determine what investigation is to take place and will be involved in serious investigations from an early stage. By contrast, in Australia, Britain and other common law countries, the role of lawyers is generally confined to the prosecution of cases in court. In these countries, all investigations are conducted by police/investigators up to the point of compiling a brief of evidence. In many jurisdictions, the appropriate charge will also be determined and formally laid by police investigators.

Although differences in national systems make it hard to generalise, the background of investigators is generally operational. That is, the identification and undertaking of investigative steps necessary to gather evidence for finalisation (prosecution/decision not to prosecute). However, many investigators also have legal backgrounds, formal studies in law or equivalent training. The background training and experience of lawyers will generally be the application of criminal law to available facts. However, many lawyers have experience in the actual investigation of crimes (including the interview of witnesses and suspects) and in directing the work of investigation teams.

Because of the difference in background of lawyers who will join the ICC, it is difficult to set roles and responsibilities. If a lawyer from a common law system is responsible for the management of an investigation team in the early stages of an investigation, he or she is unlikely to have had any comparable experience in the past. Similarly, some investigators from civil law systems will have limited experience in the conduct

of an investigation up to trial phase without active input and direction from lawyers.

The chief of investigations should have the flexibility to determine the composition of investigation teams and to appoint the senior investigator or lawyer with the most relevant experience as being responsible for the day-to-day management of the investigation and co-ordination of the work of other members (or certain other members of the team). This experience will necessarily include management of a team involved in the investigation of protracted and complex crimes (investigative magistrate/judge in the civil law system or senior investigator in the common law system).

Members of the team should be given clear reporting lines. Although the assignment of work to all members of the team should be done in consultation between the P-4 lawyer and P-4 investigator, one person should be responsible for ultimately making decisions as to duties of each team member. This may change as the investigation progresses towards the trial phase, for example analysts may report to the P-4 investigator until confirmation of an indictment and to the P-4 lawyer thereafter.

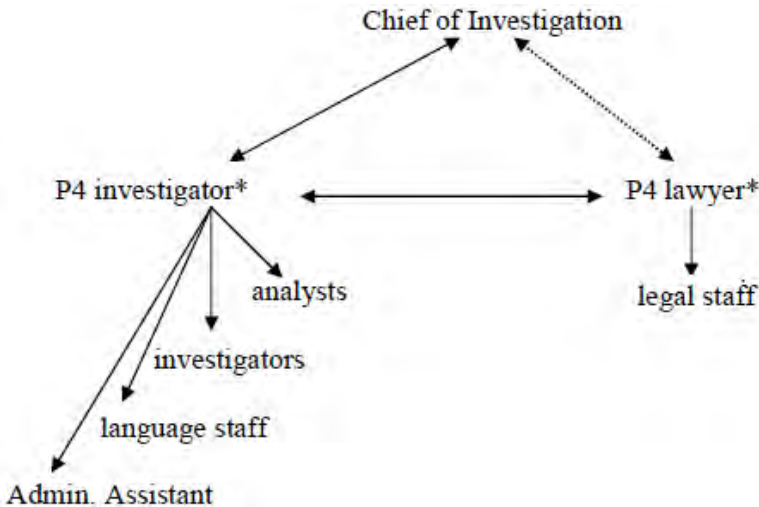


Figure 3: Initial Investigation.

All work in this phase is directed towards the investigation plan – developed jointly by P-4 investigator and P-4 lawyer and authorised by Chief of Investigations. Although co-ordination of team activities should be done jointly, reporting lines for tasking and performance appraisals should be clear. In the example above, the P-4 investigator has the final say on tasking of analysts, investigators and other non-legal staff of the team. The P-4 lawyer has the final say on the tasking of legal staff.

Although this is the suggested model where the P-4 investigator has experience in running an investigation team and the P-4 lawyer does not, the Chief of Investigations may alter the structure to have the P-4 lawyer primarily directing the work of the team.

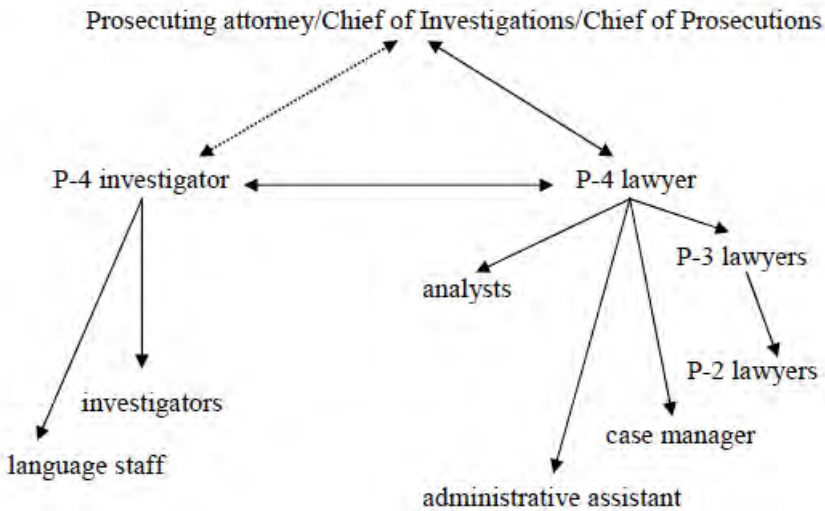


Figure 4: Trial Phase.

In the trial phase, all work of the team is focused on the needs of the trial. The P-4 lawyer in consultation with the P-4 investigator directs work. The P-4 investigator directs the methodology for any necessary investigation activities.

All matters referred to the ICC are likely to be large investigations, lending themselves to a modular approach. The development of distinct *modules* can assist in the effective tasking and monitoring of work during protracted investigations. Assigning a mix of lawyers, investigators, analysts and other professionals according to their skills/experience can lead

to synergies in this process. Examples of some modules likely to be required in ICC investigations are:

- *Military module*: involvement of the military in crimes, structure of the military, linkage evidence.
- *Civilian leadership*: involvement in crimes, linkage evidence.
- *ICC Article 54(1)(a)*: investigation of exculpatory evidence identified.
- Cultural and religious destruction.
- Unlawful detention.
- Crimes of sexual violence.
- *Child soldiers*: recruitment, use of minors in combat.
- *Insiders*: identification, interview, protection.
- *Open sources*: print media, videos, radio and television.

Assignment of staff to these modules could be done as follows, depending on the skills and experience of individual members of the team:

- *Military*: military analyst.
- *Civilian leadership*: criminal analyst.
- *ICC Article 54(1)(a)*: P-3 lawyer, investigator(s).
- *Cultural and religious destruction*: lawyer, criminal analyst, investigator.
- *Unlawful detention*: investigator, analyst.
- *Crimes of sexual violence*: analyst, investigator, lawyer.
- *Child soldiers*: military analyst, investigator.
- *Insiders*: investigator.
- *Open sources*: investigator, lawyer.

Similar considerations to those outlined for investigators in section 13.2. above also apply to lawyers and, therefore, proper training of lawyers to adapt knowledge and skills learnt in national jurisdictions should also be considered. A core set of knowledge and skills required by the ICC should form the basis of *general legal training*, coupled with specific training to assist lawyers from different systems to make the transition to international prosecutions.

13.4. The Need for Written Office of the Prosecutor Regulations on Questions Relevant to Investigations and Case Preparation

Because investigators will be drawn from many different countries – each with different legal systems, rules of procedure and investigation methodology – written regulations are essential to ensure consistency. Given the minimum requirements for ICC investigators, all candidates will have considerable experience and training. However, no national system is the same as the ICC’s mixture of common and civil law systems. Therefore, the ICC will have to write regulations setting out how each part of an investigation is to be conducted. Areas that need to be covered by Office of the Prosecutor guidelines, at a minimum, are:

- Review of cases referred for investigation.
- Initiation of an investigation.
- Composition of the team.
- Investigation management and reporting.
- Field operations.
- Security procedures.
- Document handling.
- Handling of sensitive information.
- Management of confidential sources.
- Interviewing of witnesses.
- Interviewing of suspects.
- Search of premises.
- Seizure of evidence.
- Compilation of evidence.
- Review of recommendations.

Written regulations are also necessary to set benchmarks by which to assess satisfactory conduct and as an integral part of employment suitability review. To determine that the conduct of an investigator is unsatisfactory can be difficult unless there are clear guidelines that have been developed and acknowledged by the investigator training. If regulations are to be meaningful, they should form part of the initial training for all investigators. Ideally, there should also be a system of workplace assessment and a mechanism for identifying and addressing breaches.

As well as having written regulations, a code of conduct for investigators will prevent many of the problems experienced in the early years of

the *ad hoc* tribunals and will make it easier to effectively resolve issues of unsatisfactory behaviour. The code of conduct should also be part of the initial training for all investigators, as well as a significant issue in recruitment and employment suitability issues (see Figure 5).

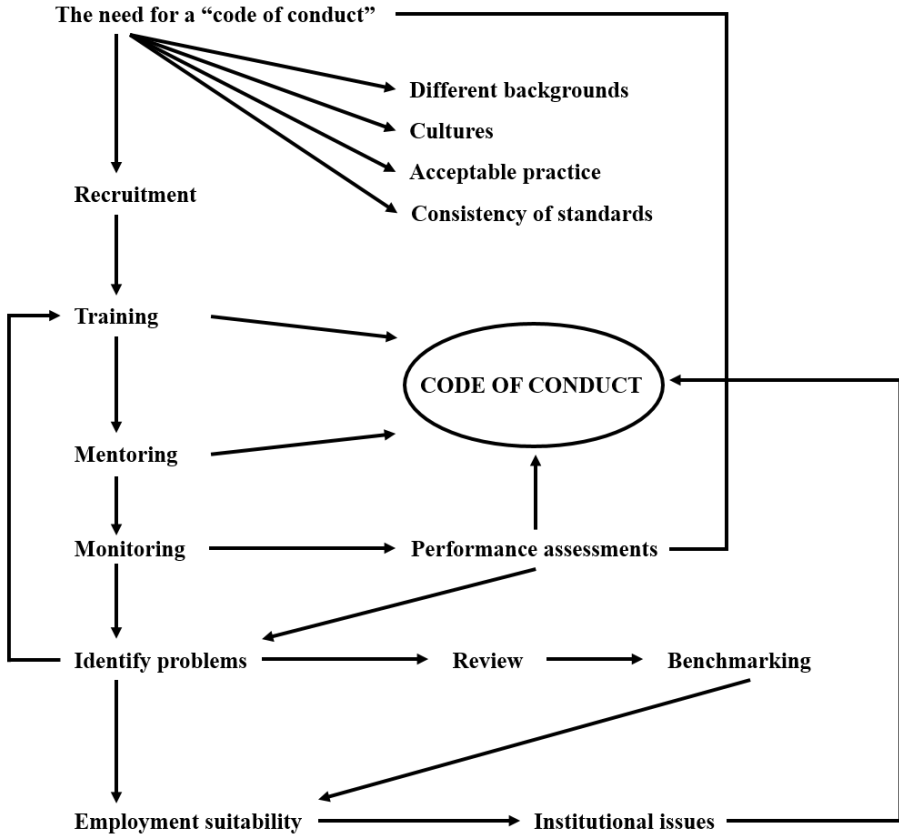


Figure 5: Code of Conduct.

13.5. Proper Training of Criminal Investigators in an International Jurisdiction

There are no systems of national investigation comparable to investigations in an international environment. Aspects of national investigative work are highly relevant and form a good background. However, some key differences are as follows:

- Scale of crime scenes: potentially stretching across an entire country or region.
- Elements of crimes.
- Scale of crime base: possibly thousands of murders in the international jurisdiction, single murders or incidents in national jurisdictions.
- Combination of aspects from common law and civil law.
- Teams comprising individuals from different disciplines and different countries/backgrounds/systems.

Investigators will bring many of the core competencies with them from their national jurisdictions. However, because of differences in the role of investigators from country to country, there will be major differences in the training required to ensure that all investigators have the necessary knowledge and skills to properly perform duties with the ICC. To train all investigators in all areas without regard to existing skills and knowledge would be an inefficient use of training resources. A better system would be to develop a basic training package for all staff (covering ICC-specific material) and supplement this with additional training modules as required (for example, modules on interviewing of suspects, interviewing of witnesses or computer training for those who do not have sufficient experience in these areas).

An example of the *modular* approach to training is shown in Figure 6. This approach recognises the experience that *national investigators* bring with them and provides the additional skills necessary to become competent *international investigators*. Fully implemented, this system is resource intensive. However, this model is the best way to ensure that the Office of the Prosecutor is staffed with experienced professionals and trained in all areas relevant to properly conduct ICC investigations.

It would be possible to set up a training model based on stages 3, 4 and 5 for the establishment of the Office of the Prosecutor, to be expanded as resources and systems allow.

13.5.1. Training Model

Providing training to experienced national criminal investigators allows them to properly undertake the investigation of international crimes. Key questions to be asked for each investigator recruited are:

- What competencies does an investigator bring with him/her? This is recognition of prior learning, experience, skills and knowledge.
- What additional training is required?

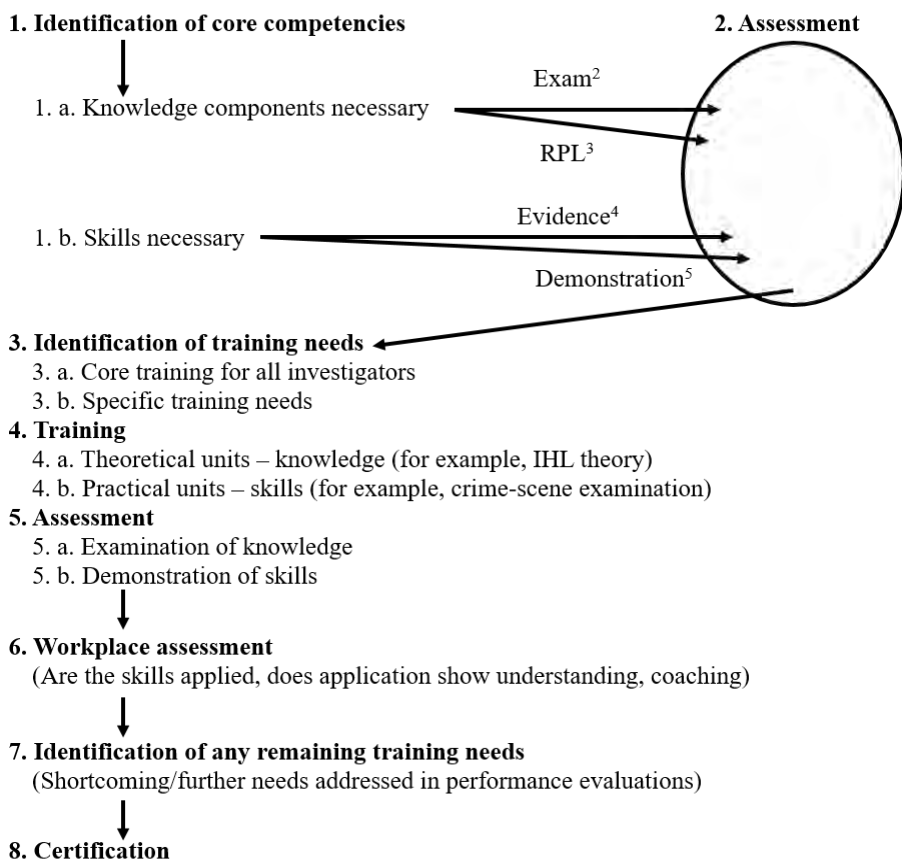


Figure 6: Modular Approach to Training.

Modular training would then be undertaken as required. All investigators would undertake the following training:

- International humanitarian law (including the ICC Statute and Rules of Evidence and Procedure).
- Military overview: security, safety, weapons and ammunition awareness, order of battle.
- Evidence handling procedures according to ICC guidelines.

- Standard operating procedures of the Office of the Prosecutor and prosecutor's regulations.
- Investigation management at the ICC.
- ICC-specific computer systems.

Examples of modules to be undertaken as required (modules required would be based on competencies, once these are developed):

- Working with interpreters, cultural awareness.
- Interviewing of witnesses.
- Suspect interviews.
- Four-wheel drive training.
- Computer training.
- Language training.

The training should involve a demonstration of both knowledge and skills. Investigators should not only know the theory of each core competency but also be able to demonstrate an ability to perform the task. Ideally, there should be structure ongoing professional training and staff development.

Other questions for consideration by the prosecutor or chief of investigations:

- Should the training be conducted in-house or by external bodies? If training is conducted internally, the ICC has control over content, can ensure relevance and has greatest flexibility.

Negative aspects are:

- The time necessary to develop a course of sufficiently high standard to be of benefit to personnel with a current level of relevant experience.
- Establishing contacts with experts in each relevant field (military, international law, forensic death investigation, witness issues, investigation management).
- Development of a curriculum, training material, agreements for engagement of instructors.

Any external training would have to be considered against the following:

- Relevance of content.
- Quality of training material and course delivery.

- Ability to modify programme if necessary.
- Ability to run on-site ICC-specific training if required.
- Relevant experience of trainers.

13.6. The Use of Criminal Investigators under General Temporary Assistance and Gratis Personnel Arrangements

The ICC is likely to need an ability to respond at short notice to allegations referred for assessment by conducting preliminary investigations in the field. Some possibilities would be:

1. Employ a full-time investigation staff of sufficient size to meet requirements.
2. Use national investigative agencies of member states to conduct the investigation in the area (this is, presuming a situation where local authorities in the area where crimes are alleged are no longer functioning).
3. Use NGOs to conduct the preliminary assessment or rely on information from NGOs operating in the area.

Point (1) is not likely to be a realistic option. Because investigative requirements will vary from time to time, it would be difficult have a permanent staff large enough to respond to any situation. Employing additional staff for possible requirements is also obviously likely to lead to inefficiency in the Office of the Prosecutor.

Point (2) also brings with it certain significant problems. National policing agencies will generally collect evidence in accordance with the rules of evidence applicable to their jurisdiction. Therefore, different methodologies for collection, handling, recording and processing of evidence will be used by different agencies.

Point (3) will not be a realistic option in the case of many NGOs, even though they may have staff already deployed to the area. NGOs conducting work for the purpose of raising an alarm may not adequately identify details relevant for admissibility (for example, details of where documents or other items were located, circumstances, people involved in locating and handling of the documents). In this case, there is a real possibility of evidence being lost through failure to handle documents and real evidence in accordance with a methodology designed to ensure chain of

custody and preservation of intrinsic evidence (ability to conduct fingerprint/document examination).

Points (1) and (3) may also result in difficulties with access to full documentation because ownership is with the NGO or national investigative agency.

Having outlined the difficulties, it will be necessary for the ICC Office of the Prosecutor to find a solution that allows the maximum flexibility, safeguards potential evidence, provides the ability to respond at short notice without having to recruit new staff, while not having an unnecessarily large permanent staff. One option may be to use NGOs established for the purpose of conducting investigations into breaches of international humanitarian law, such as the IICI. Investigators engaged by the IICI (and possibly other NGOs) have been trained in the ICC Rules of Evidence and Procedure, and have experience and training conducive to conducting an investigation that could form the basis of a further ICC investigation.

Two significant issues in the use of investigators from any outside agency would be control of staff and control of investigation material. Therefore, it would be necessary to enter into a memorandum of understanding with any agency providing assistance to the Office of the Prosecutor.

Close collaboration would also be necessary between ICC and groups that could potentially conduct preliminary investigations to ensure that any investigation conducted by external groups could form the basis for a further investigation and that evidence from witnesses (for example, identification evidence from witnesses) is not tainted. Wherever possible, the Office of the Prosecutor should attempt to ensure that the initial team has been trained in the Rules of Procedure and Evidence of the ICC, that it has been instructed to conduct crime scene work in accordance with ICC methodology, and will document all investigations in such a way that all information can be combined into later inquiries and vital evidence is not lost. The Office of the Prosecutor should also be actively involved in training of any investigators who are likely to be engaged in work to assist the ICC, so as to ensure that ICC requirements are adequately addressed.

13.7. The Relationship between Criminal Investigators and Analysts during Investigations³

The field of criminal analysis as a distinct stream of study and professional practice is not known in some national jurisdictions. Therefore, in a multinational team undertaking investigations requiring extensive analysis, one of the most important points to cover at the outset is the roles of an analyst.

Investigators focus on the collection of evidence and intelligence. Analysts focus on reviewing, assessing and assimilating the evidence and intelligence collected, in order to provide analysis of what all the evidence and intelligence means. Investigators in a large investigation may be focused on one particular area of the case, or be involved in the interviewing of unconnected witnesses within an investigation. Properly trained and deployed analysts can assist the team by maintaining an overview of the case – fitting all the pieces of the jigsaw together, including: evidence and intelligence gathered by the investigators; product from military analysts; material from political/leadership analysts; open source material; and document collections.

Experienced criminal analysts also have the skills to move from intelligence-based analysis (overviews of evidence already gathered, identifying leads, potential witnesses, interview questions and so on) to evidence-based analysis (which areas of the case are complete, which areas need further investigation), as the case moves from assessment to investigation and on to trial.

Some investigators and lawyers will not have worked with analysts in their home jurisdictions. To effectively use the skills of analysts it is essential that all members of the team are aware of the training that analysts have undertaken and the potential input they can give during different phases of an investigation. This type of understanding is also important to ensure that a valuable resource is properly used and not deployed to data-inputting or administrative duties.

Properly trained and experienced analysts have the ability to process and analyse large volumes of data and to structure information for better understanding by the team.

³ Tracy Holyer, a senior analyst with the ICTY Office of the Prosecutor, was consulted and has provided input into this section.

Analysts should consider all new intelligence and evidence in conjunction with existing conclusions, and have the ability to reconsider existing conclusions. This assists the investigation by preventing the seeking of evidence to fit preconceived hypotheses, and instead enables the evidence to inform the hypotheses. Analysts are trained to think beyond the obvious and consider all possibilities. This skill is essential in preventing an investigation from developing tunnel vision and in considering all possibilities. However, prosecutorial action must be based on evidence available for presentation to a court. Therefore, there must be a careful review of analytical product and the focus must change progressively towards compilation of evidence as the case progresses.

Having said all of the above, it must be recognised that many jurisdictions do not distinguish between analysts and investigators – the role performed by analysts in certain jurisdictions would be seen as part of the normal duties of an investigator. In other jurisdictions, analysts are primarily investigators who have moved into the field of analysis for a portion of their career. Therefore it is necessary to look at the training, experience and skills (the skill sets) of applicants – not only at the titles or positions occupied during their career. This also requires an understanding of the system from which the applicants come and the roles of investigators, analysts, lawyers and others in the investigative process.

13.8. Working Relationship between Criminal Analysts and Investigators

Criminal analysts and investigators must work as a partnership if a team is to function effectively. The dissemination of investigation product (for example, witness statements and crime site reports) should include the analyst to ensure their analysis is fully informed.

13.9. The Role of Analysts during Investigations

The dissemination of analytical product to the investigators and P-4 investigator/P-4 lawyer should be ongoing, in the form of:

- Participation in interviews.
- Providing additional areas for questioning of witnesses.

- Formal presentations of analytical product (investigation overviews, themes within an investigation, analysis of particular document collections; analysis of a crime base).
- Identification of investigative leads.

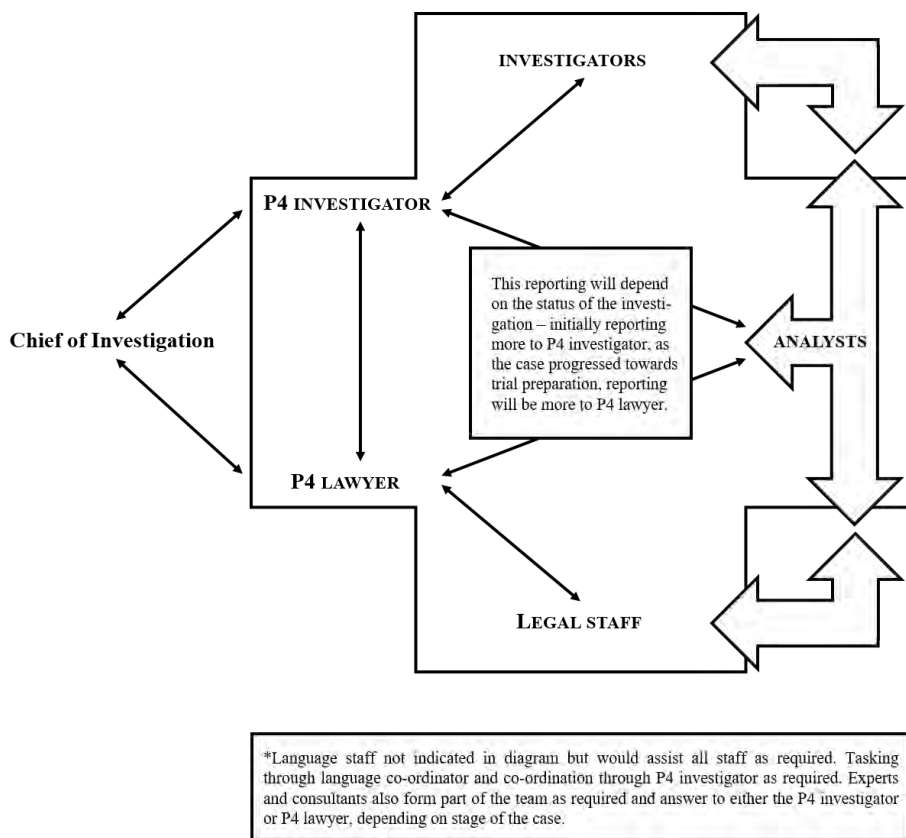


Figure 7: The Dissemination of Analysis.

Criminal analysts can be used at two levels of the investigation, which are not mutually exclusive and, depending on the size of the investigation, can be tasks for the same analyst or shared between analysts.

- The criminal analyst can work at a strategic level to maintain an overview of the case and assist with the status of the information and evidence collected. This level of analysis is essential as it is where the different components of a case are brought together: mili-

tary analysis; political analysis; open source material; document collections; crime base evidence; and linkage evidence.

- The criminal analyst can work on specific projects, for example: the analysis of a document collection; the analysis of available linkage evidence from the crime base to leadership level suspects. This type of analysis would feed into the analysis being conducted by the strategic analyst.

Consideration should be given to the physical location of analysts. There are advantages and disadvantages to having them as part of the team or located separately.

13.9.1. Located within an Investigative Team

The role of criminal analyst means that they must be kept abreast of all developments with a case. This can only be achieved if they are physically located in the team. Analysts located at a distance from the team are often not kept informed of developments and become an underutilised resource. Dissemination from analyst to investigator and on to team leader and legal staff is more effective when the analyst is part of the team. However, if the analyst is to perform strategic analytical work, with input from different sections, this can be more difficult if physically located with one team.

13.9.2. Located as Part of a Separate Analytical Team

Criminal or military analysts located separately from the team are less likely to be used for data-inputting or other tasks inappropriate to their skills. In this situation, the analysts can also exchange ideas with other analysts and concentrate on producing an unbiased analytical product without the unconscious influence of the team environment. However, analysts located away from the investigation team are often a forgotten or underused resource, not included in the investigative plans or information collection process. They are more likely to create product of an academic nature, not appropriate to the needs of an investigative team and unaware of recent developments in the case. Dissemination of analytical product is less likely to be done naturally or incorporated into the investigative planning of the team.

13.9.3. Recruitment and Training of Analysts

Developing basic training for trainee analysts specifically tailored to the needs of an organisation is time and resource intensive. There are several courses available for training analysts with no prior experience or with some experience in the field. It would be possible for the ICC to negotiate with Europol, the National Criminal Intelligence Service, the Intelligence Study Centre or other organisations for courses.

Bearing in mind cost-effectiveness and the time necessary to develop a professional analysts' course, it would be better for the ICC to initially recruit trained intelligence analysts – with at least the basic Anacapa-style course and several years of experience in a law enforcement environment, preferably one dealing with large scale organised crime cases.

Other skills that the ICC should be looking for when recruiting analysts are:

- Computer skills: Microsoft Office (Access, Excel, Word, Power-Point).
- i2/Harlequin (basic analytical charting tool).
- Proven ability in report-writing.
- Proven ability in giving presentation/briefings.

The recruitment process should be designed to ensure that the selected analysts have not only undertaken above training but can demonstrate an ability to effectively use the software, produce results and present those results to members of a team. In addition to a face-to-face interview, the ICC should consider an examination for candidates. It should also consider asking for a presentation to be given as part of the interview process.

ICC-specific training will, most likely, be necessary for all analysts, including:

- Elements of ICC crimes.
- Rules of Procedure and Evidence.
- Strategic analysis – relevant to ICC investigations.
- Field practices (safety, security, document seizure and handling according to ICC guidelines).
- Manipulation of large volumes of data (even those analysts who are experienced in large investigations are unlikely to have worked on such large-scale crimes as ICC cases are likely to be).

On Insiders and Financial Lines of Inquiry

Nicola Piacente*

The structure of the Office of the Prosecutor of the International Criminal Court ('ICC') should draw on previous experiences in international offices such as the Offices of the Prosecutor at the International Criminal Tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR'), but also from positive outcomes from national jurisdictions. My ideas are developed from a consideration of my experience as a prosecutor in the Italian jurisdiction (since 1988) and at the ICTY (from June 1999 to May 2001).

14.1. The Internal Organisation of the Office of the Prosecutor of the International Criminal Court: The Role of Trial Attorneys, Investigators and Experts

The nature of crimes the Office of the Prosecutor at the ICC should investigate is such that a multidisciplinary approach is necessary. Attorneys and investigators must therefore rely on experts in specific matters related to the offences: military experts, analysts, historians, coroners, pathologists, psychologists, chemists, experts in evaluating the impact of chemical and other weapons on the environment, experts in demography and experts in constitutional law. All these experts provide a relevant contribution during the whole enquiry and the preparation of cases in court. What should be crystal clear from the very beginning is the chain of command and responsibility within the investigations and the trial.

This drives straight to the issue of the relationship between prosecuting trial attorneys and investigators. The role of the former is very rel-

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evant. This role should be clearly set up through internal directives issued by the prosecutor or the management. This would avoid or at least limit the risk of never-ending discussions between attorneys and investigators, as often happened at the ICTY. I will try to support my view with some basic thoughts.

If the perspective of any investigation is to collect good evidence, in full respect of the rights of the victims and defendants, and bring a case before the court, the direction and co-ordination of the investigations, together with the ultimate responsibility of the outcome, should be given to attorneys with prosecuting experience. Their role cannot be limited to preparing an indictment and presenting a case before the judges (as has sometimes happened at the ICTY). The participation of attorneys should start much earlier. They should have responsibility for the investigations and the cases in court. The aim is not to set up a structure dominated by attorneys (the participation of investigators in setting up the strategies during the investigation is recommended and must be specifically contemplated), but to give a judicial dimension to the investigations, so that they are directed in order to collect the evidence that is strictly necessary in court, in full respect of the rights of the suspect and the victims and of the procedural rules.

This approach becomes even more of a priority when investigations are not aimed at identifying and prosecuting low-level perpetrators but political and military leaders. In the latter case, it is crystal clear that taking good statements from the victims is not the only priority. The more complicated a case is (requiring a sophisticated investigation strategy), the more attorneys with prosecuting experience should be entitled to direct the investigation (together with the investigators' team leader) so that they can better present the case in court.

The role of the attorneys should therefore not be confined, during the enquiry to that of mere advisers, whose advice is neither mandatory nor binding, nor to that of mere evaluators of the evidence collected. Otherwise, in the course of the investigations and until an indictment is prepared, prosecutors run the risk of being randomly consulted and having limited access to the file and very limited knowledge of it. Such an approach would make the preparation of the case before the judges extremely complicated.

Presenting a case in court that has been fully set up and investigated by the same trial attorney in charge is much easier than dealing with a

case coming from investigations made by others. In the former instance, full consistency between the strategy in the investigations and strategy in court is ensured.

The ICC Statute corroborates this opinion. Article 54 implies the involvement of prosecutors from the very beginning of a case. This involvement is contemplated from when, pursuant to Article 53, it must be decided whether to initiate an investigation. Articles 5 and those that follow and Article 25 of the Statute provide detailed descriptions of the crimes falling within the jurisdiction of the ICC and of individual criminal responsibility. It must be the prerogative of the attorneys to set up what is needed from the beginning of any enquiry in order to prove the perpetration of those offences and the criminal liability in specific cases. Article 25 of the Statute contemplates the responsibility of groups of people in the perpetration of the crimes listed under Articles 5 and those that follow. This requires an articulated investigation and analysis of the contribution made by the individuals concerned to the commission of the crime with which the group is charged – one more reason to involve attorneys in the direction of the investigations.

Attorneys are, in fact, expected to know what is the best evidence to be tendered in court, and how it must be collected, in order to be fully appreciated by the judges. This implies that the direction and co-ordination of the investigations must be concentrated in the hands of the prosecutors and that they do not have to lead the process only when there is a case in court. This also implies that the members of the ICC Office of the Prosecution should have specific expertise in the co-ordination of the investigations. Prosecutors and investigating judges from Continental European countries might fully fit this position.

The recruitment of prosecutors and investigating judges having a specific expertise in cases against criminal and terrorist organisations (and having, of course, investigated war crimes and crimes against humanity) is highly recommended. The lesson learned at the ICTY is that war crimes and crimes against humanity are at the highest political and military level planned, financed and instigated by groups of people acting within strategies that are very similar to those of criminal and terrorist organisations. On the other hand, investigators should not only expect to simply implement the directives issued by a prosecutor. The prosecutors and the investigators' team leaders should jointly plan the strategy of the investigation

in each case. The former must have, however, the ultimate decision in case of disagreement.

In order to avoid wasting precious time when a preliminary report or information on the commission of crimes falling within the ICC Statute is delivered to the Office of the Prosecutor, investigators should be entitled to set up an investigation and take their own initiatives until the case is assigned to an attorney and the attorney in charge has set up, together with the investigators' team leader, the strategy of the investigation.

If the Office of the Prosecutor decides to have the same internal team organisation as the Office of the Prosecutor at the ICTY, the investigation team leader should be expected to plan the strategy of the investigation with the attorney in charge of a case. Of course, any formal or informal suggestion and contribution on this specific issue from other investigators would be welcome. The team leader should also have to coordinate the work of the other investigators in order to implement the directives issued by the attorney in charge of the case.

The participation of experts in the subject-matter relevant for the investigation of each case is highly recommended. It is clear how vital the contribution of pathologists, historians, military analysts and psychologists can be to investigations. It must be pointed out that experts in constitutional law can also be vital, in so-called leadership cases, in order to identify the chain of command in a government or any other institution involved in the commission of a crime. Experts should be involved in the enquiry and in the preparation of the case as soon as the attorney in charge and the team leader think it necessary. They should give their help to the attorney and team leader in charge to direct the investigations. They should respond directly to the attorney in charge or to the investigator expressly delegated by the attorney. I therefore envisage three sections in the Office of the Prosecutor:

1. Investigation: comprising teams of investigators.
2. Legal: comprising teams of attorneys with prosecuting experience that are expected to direct and co-ordinate the investigations, together with the investigative team leaders and perform in court; attorneys dealing with issues of international law and international criminal law, treaties and conventions; attorneys dealing with appeal matters.

3. Experts: comprising historians, analysts, military analysts, coroners and pathologists, experts in constitutional law, chemists and environmentalists.

A specific case should be assigned therefore to a team of investigators and to one or more attorneys. A senior attorney should take the ultimate responsibility of the investigations and of the results in court. According to specific needs, the senior attorney in charge, together with the team leader, will ask for a contribution of one or more experts with regard to specific relevant matters. The experts will assist the attorneys and the investigations, but will have to respond to the attorney in charge of the specific case or to the investigator delegated by the attorney.

Setting up field offices directed by an investigator in places where crimes to be investigated have been committed or nearby would be extremely helpful. Field offices should be more directly involved in the investigation and not only facilitate the missions of investigators and attorneys from the duty station in The Hague.

Experts in international and comparative criminal law must assist the work of the attorneys in charge of the investigations and the case in court each time these kinds of issue are raised.

A specific team of lawyers should deal with any appeals issue with the assistance, if requested, of the attorneys who dealt with the case during the investigations and in court. This team should be expected to review judgments and orders of the Trial Chambers and advise on grounds of appeal, review trial records, and prepare and draft of appeal briefs, motions, responses and legal and factual memoranda as necessary, and attend court hearings before the Appeals Chamber.

14.2. Specific Investigations: Interviewing Insiders and Tapping

The evidence that can be collected (during the investigations and in court) through the co-operation of insiders and as the result of telephone/conversation tapping can be quite relevant. Specific teams of investigators aimed at finding and dealing with potential insiders should be set up. The Office of the Prosecutor should also set up specific instruments in order to intercept the conversations of suspects or seek the co-operation of state parties (pursuant to Article 93(b) of the ICC Statute).

In many national systems, the results of telephone/conversation tapping operations can be tendered and used as evidence in court, if au-

thorised by a specific order issued by a judge. No ICC rule expressly prevents the Office of the Prosecutor from collecting evidence through these specific means. In investigations against terrorist and criminal organisations an enormous quantity of information and evidence has been collected thanks to these operations and the information provided by insiders. In investigating crimes falling within the ICC Statute, the Office of the Prosecutor should have the same approach and select the same strategies.

14.3. The Importance of Financial Investigations and Co-operation with States and International Institutions

The actions of the Office of the Prosecutor should also be focused on financial inquiries. The means used to perpetrate crimes falling within the jurisdiction of the ICC have often been financed through the perpetration of other crimes. In fact, proceeds and assets derived from the perpetration of crimes such as drug, cigarettes, weapons and human smuggling were used in the past to finance military and paramilitary groups that were responsible of serious crimes during previous conflicts. Financing these crimes must be deemed a form of individual criminal responsibility pursuant to Article 25 of the ICC Statute (providing the means for its commission). Running investigations – not only against individuals or groups that finance the commission of such serious crimes, but also on their assets, assets that financed and allowed the perpetration of those crimes, and assets that derived directly or indirectly from the perpetration of those crimes – would allow the ICC to comply fully with its tasks.

The freezing, seizure and confiscation of the assets of individuals and groups responsible of these serious crimes must be perceived as an aim which is no less important than the arrest and the conviction of war criminals. Investigations should therefore also be aimed at finding and seizing proceeds, property and assets derived directly and indirectly from the perpetration of the crimes falling within the jurisdiction of the ICC in the perspective of their forfeiture pursuant to Article 77 of the Statute.

Attorneys and investigators with specific expertise in this field would be extremely helpful. The recruitment of investigators having a background in financial investigations involving banks, money transfers and so on would therefore be highly recommended. Setting up specific means and equipment (databases, and links with banks and financial institutions and national authorities dealing with the fight against economic

crimes) to run these enquiries would facilitate the tasks of the investigators.

In order to comply with all its tasks, the Office of the Prosecutor, through appropriate agreements, should have access to international databases and information systems that have already been set up by international agreements, such as the Schengen Information System. This is an operational and search system containing, among others, data relating to persons wanted for arrest or extradition purposes, and objects sought for seizure or evidence in criminal proceedings.

Agreements and co-operation not only with states parties (pursuant to Article 93 of the ICC Statute), but also with transnational institutions such as Europol, the European Union's Judicial Cooperation Unit ('Eurojust'), or judicial networks (such as the European Judicial Network) that were set up by the European Council would also help the Office of the Prosecutor to fully comply with its own responsibilities.

Europol is a centralised, multilingual, multidisciplinary intelligence-support organisation for combatting international organised crime by the law enforcement authorities of the member states of the European Union ('EU'). It is a framework for the exchange of information and experience. Areas of criminality for which Europol has a mandate are defined in the Europol Convention (ratified by all EU member states and coming into force on 1 October 1998). Europol can be involved in preventing and combatting terrorism, unlawful drug trafficking, and other serious forms of international crime when there are factual indications that an organised criminal structure is involved and two or more member states are affected. In addition to these crimes, Europol can also act in cases of trafficking in nuclear substances, illegal immigration and trafficking in human beings, motor vehicle crime, counterfeiting of the euro, money laundering related to these areas of criminality. It is clear that all these forms of misconduct can be connected to the preparation, financing and perpetration of crimes falling within the jurisdiction of the ICC. Europol offers member states, within all these areas of criminality, the possibility of pooling their information at an early stage of investigations and identifying links that could not have been seen from studying national data only. Europol is also entitled to obtain information from third countries and all international public bodies.

The judicial interface of Europol is Eurojust. It was created to reinforce the fight against serious organised crime. It is composed of national

prosecutors, magistrates or police officers of equivalent competence, detached from each member state according to its legal system. Eurojust has the task of facilitating the proper co-ordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol's analysis as well as of co-operating closely with the European Judicial Network, in particular in order to simplify the execution of letters rogatory. Eurojust also provides prosecutors from EU member States all the relevant information they might need to continue their enquiries and to decide whether to ask for judicial co-operation from one or more member states.

The European Judicial Network was created by the joint action of the European Council on 29 June 1998. It is a network of prosecutors and judges who have been appointed in their capacity and have the task to provide a constant amount of up-to-date background information, notably by means of an appropriate telecommunications network, and to facilitate the execution of the requests of judicial assistance.

The accomplishment of the tasks of the Office of the Prosecutor will therefore depend not only on the dedication and professional skills of its members but also on its capability to:

- collect the evidence necessary to present a case in court with all the legal means available nowadays;
- operate in the widest possible scenario of international co-operation; and
- effectively prosecute and deprive individuals and groups responsible for the crimes falling within the ICC Statute of all the assets and proceeds that were used to commit those crimes or that derived from them.

Section 2: Prosecution

Characteristics of Large-Scale Crimes

Hanne Sophie Greve*

For someone like me, whose previous experiences in terms of investigation were limited to contemporary or almost contemporary large-scale crimes of genocide and crimes against humanity in particular, it is an interesting challenge to undertake a historical reconstruction. The latter experience has, *inter alia*, confirmed my previous understanding that:

1. Large-scale crimes are invariably impossible to commit in a manner that cannot be traced.
2. To understand large-scale crimes – here used to mean crimes within the jurisdiction of the International Criminal Court (‘ICC’) – it is fundamental to have a sound understanding of the society in which the crimes took place, prior to the crimes, as the disparity between the society before and after will offer a variety of inroads to investigate the crimes (a successful post-mortem presupposes an intimate knowledge of the live entity).
3. The very nature of large-scale crimes is such that a crime by crime-focused approach, not to say a focus limited to separate categories of crimes, can never provide what an in-depth understanding of the

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overall suffering of an entire community or society will contribute in terms of a profound comprehension of the entirety of crimes committed.

4. It is counterproductive to exclude sources of information believed to be biased – the key to remedying this problem is, more or less constantly, to check and countercheck the validity of *all* information.

It appears to me to be crucial to distinguish between three main circumstances under which large-scale crimes are most likely to occur:

5. ‘Ordinary’ wars where crimes are more incidental or at least not part of the ideological basis for the war.
6. Wars where terror (in terms of large-scale crimes) has been chosen as a deliberate *modus operandi*, for example, as it was done by the Nazis during the Second World War.
7. Large-scale crimes committed by war-like means.

It is appreciated that in real life there exists almost every possible mixture of these situations. I do believe, however, that it is advisable to make the above division into different overall circumstances. This appears furthermore to be indispensable for any investigation to meet with the ethical standards that should be expected from the Office of the Prosecutor of the ICC.

The very circumstances in which the Office of the Prosecutor will work ought to make anyone and everyone involved humble – both *vis-à-vis* the human suffering involved, and also in respect of the precarious balances needed not to augment but to alleviate that very suffering.

It is my firm belief that the *raison d’être* for the ICC is to alleviate the suffering of people due to the odious scourge that impunity for large-scale crimes has represented and still represents. The United Nations is based on and committed to respect for *the unique human worth and dignity* for *all* members of the human family. This is a value-based position, and no effort to promote basic human worth and dignity can as such acceptably be construed as partisan or biased. The latter may be illustrated by a situation in which entity A is adamant to exterminate entity B. As extermination of entity B is an affront to the basic values that the Office of the Prosecutor of the ICC has been set up to protect, it is fully in line with its mandate to bring the extermination to a halt if possible. The United Nations will be expected to be neutral to conflicting interests, but not to

the values that the organisation has been established to protect. An inmate in an extermination camp and a camp commander in that very camp are not to be treated as if they were on equal terms – no more so than the police are supposed to be even-handed when they interfere in an attempt to prevent a potential murder, for example. This should be self-evident, but war crimes investigations from the last decade show that it is far from generally appreciated.

In wars and other large-scale crime situations, the people entangled in these events are particularly vulnerable. Prosecution work that is not utterly mindful of this could easily do more harm than good. Personally, I find that the following reflections from Hugo Grotius in *The Rights of War and Peace* still convey significant guidance:

It is the Duty of those that are not engaged in the War, to sit still and do nothing, that may strengthen him who prosecutes an ill Cause, or to hinder the Motions of him that hath Justice of his Side cause, as we have said before; but in a dubious cause to behave themselves alike to both parties.¹

This is particularly so if, for example, an occupying power behaves in flagrant violation of the laws of war with the consequence that the population in the occupied territory is entitled to revert to self-defence – meaning that it is no more bound to respect *all* the same rules as if the occupying power did more or less behave according to the law of war as far as the occupation was concerned. In such situations, and where there is pressure on a prosecutor to be seen to do something, it could be tempting but it is likely *not to be wise* to proceed with available cases when these are only minor cases that originate more or less exclusively from alleged perpetrators on the oppressed side.

“War is a mere continuation of policy by other means.” The truth of this statement made by Carl von Clausewitz also entails that when the war is over political goals are still pursued but by other means. The kind of information that becomes available in a post-mortem examination of a war is easily abused in the political arena. Moreover, there are frequently extremely strong vested interests in not making information about even the most egregious crimes available. Such vested interests are also found among peoples and entities that may not themselves have any direct part

¹ Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck, Liberty Fund, Indianapolis, 2005, vol. 3, ch. 17, § 3.

in the responsibility for the crimes. In particular, many secret services have a tendency both to want to cover up crimes and to establish a monopoly on information about crimes committed – also when the crimes were committed outside their own countries and without their direct involvement. More often than not, outsiders to large-scale crimes will look at them from the angle of “what is in this for me” and not from a purely humanitarian point of view. As for the work of the Office of the Prosecutor of the ICC this has implications both for the availability of important crime-related information, and for how the Office of the Prosecutor should itself treat the kind of information that it will generate, and how and where this ought to be stored.

Policy and Organisational Questions

Fabricio Guariglia*

16.1. Introduction

This chapter does not purport to provide an exhaustive analysis of the multiple and quite complex problems that the prosecutor of the International Criminal Court ('ICC') will have to tackle during his or her term of office, either stemming from the normative framework of the Court or from the unique position of the Court as an international body in charge of adjudicating criminal responsibility. Rather, it deliberately focuses on selected areas that, in the author's view, may require a careful and even creative approach by the prosecutor. Those areas first relate to certain organisational matters that have proven to be extremely difficult in the light of the International Criminal Tribunal for the former Yugoslavia ('ICTY') experience, and second, to particularly complex legal and policy questions stemming from the ICC constituent documents (Statute and Rules of Procedure and Evidence). In relation to these areas only, this chapter contains some recommendations that are based on the author's experience as a per-

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son involved in the negotiations leading to the adoption of ICC Statute and subsequently as a member of the Office of the Prosecutor of the ICTY.

A preliminary overarching consideration should be borne in mind. The ICTY benefited from generalised (and sometimes excessive) indulgence by both the international community and civil society. Such broad tolerance may be explained by the fact that the creation of the ICTY had been the first successful attempt to establish an international criminal jurisdiction since Nuremberg, and the general perception of the Tribunal at its initial stages as an extremely fragile creature. The ICTY was largely not scrutinised and could thus remain unscathed despite the existence of a number of quite controversial decisions made both within the prosecutorial and judicial provinces, especially during its early years. It is reasonable to expect that the ICC will not benefit from similar advantages. Quite on the contrary, it is easy to imagine an ICC pressed by generalised high expectations and demands. The ICC will be expected to develop those successful aspects of the *ad hoc* tribunals' experiences and to improve their perceptible shortcomings, and close scrutiny of its activities should be expected.¹ The ICC prosecutor will have to take pains to reroute unrealistic expectations and not to frustrate legitimate and reasonable ones. In any case, it is clear that he or she will never be in a position merely to ignore them.

Hence, it is the very perception of the ICC's legitimacy what will be at stake from the very early stages of the Court's existence. The type of decisions reached by the prosecutor in matters ranging from staffing to interacting with victims' groups (only to provide a couple of rather basic examples), and the manner in which those decisions are taken, will undoubtedly have a direct impact on that perception.

¹ At the time of writing, representatives from key non-governmental organisation had already expressed informally that they will ensure that the almost scrutiny-free environment that surrounded the work of the *ad hoc* tribunals is not reproduced in the case of the ICC.

16.2. Organisational Issues

16.2.1. Creating an Atmosphere of Cultural and Legal Integration within the Office of the Prosecutor

In contradistinction to the basic documents governing the *ad hoc* tribunals, largely carved out of the common law tradition, the ICC Statute presents a unique and creative blend of different legal systems, an amalgam that reflects, on one hand, the consensual basis of the ICC, and, on the other, a perception of the international community that no single legal system could provide an overall effective and fair framework for an international criminal jurisdiction. This notion of legal multiculturalism, not only as a necessary value but also as an opportunity for an enhanced effectiveness of the Court, should be embraced by the ICC prosecutor, and should be reflected both in the composition of Office of the Prosecutor staff and in the development of policies and legal positions to be adopted by the prosecutor.

Unfortunately, as it is generally perceived by informed observers, that was not the case in the early days of the Office of the Prosecutor of the ICTY, which still today presents gross geographical imbalances in its composition that become even more perceptible at the higher hierarchical levels. In turn, those imbalances, coupled with lack of proper dialogue and understanding between the overly represented legal cultures and those constituting a minority, led at the early stages to unfortunate divisions within the staff, such as between common law and civil law attorneys, with several negative consequences for the institution. Instead of the enriching effect of lawyers stemming from different backgrounds working together in the development of a truly international prosecutorial tradition, and modelling legal and policy decisions taken by the Office of the Prosecutor, an atmosphere of division and legal chauvinism was created, and valuable human resources were underutilised. This may have been a main contributing factor in the development of feelings of distrust towards the institution not only among legal operators in the states of the former Yugoslavia, but also in those countries and legal cultures that were underrepresented in the Office of the Prosecutor.² Perceptions of this type,

² I was the first South American attorney to be hired by the ICTY Office of the Prosecutor. A second South American attorney (from Brazil) was hired shortly after my arrival at the Tribunal, in late October 1998. To date, we are still the only two South American attorneys to have been hired under the normal fixed-term contract regime.

once created, are extremely difficult to modify, and the ICTY is a living example of this problem. Subsequent efforts to change that status quo and to promote further inclusion of lawyers from underrepresented countries and the adoption of more balanced legal and policy positions seem to have been insufficient to alter the generalised perception in some quarters of the institution as a northern hemisphere-, common law-dominated one.³

The ICC prosecutor should make all possible efforts to ensure that an atmosphere of constructive legal multiculturalism be created in his or her Office. Such efforts should be reflected in the hiring policy, including, if necessary, reaching out to those geographical areas that are underrepresented in the Office of the Prosecutor and encouraging applications from those countries,⁴ without compromising the requisite professional excellence. Similarly, it appears to be critical to avoid any impression of a dominant legal culture emerging, either in the Court as a whole or individually in each of its constituent organs.

A particularly relevant aspect deals with the hiring of applicants from non-states parties. Whereas the traditional principle in international bodies has been that in all instances applicants from states parties should be preferred, there are good reasons for rethinking the scope of application of this principle in the ICC context. The ICC is not a traditional, dispute-resolution type of international body. It is a criminal court that purports to do justice in the name of the international community, applying norms of universal character. Those who challenge the very existence of the court and its jurisdictional regime precisely consider the Court to be an ‘ordinary’ treaty body that nonetheless applies the law stemming from that treaty beyond the circle of its signatories. I personally see clear disadvantages in following a traditional treaty body approach. Whereas an

³ The author has had the opportunity to acquire direct knowledge of this distrust in multiple discussions with jurists from Spanish-speaking countries. An additional contributing factor may be the lack of Spanish translations of the ICTY decisions and judgments, which means the ICTY jurisprudence is largely unavailable to the Spanish-speaking legal community.

⁴ Despite my earlier criticism at the Office of the Prosecutor of the ICTY, it has to be acknowledged that a recurring problem in the ICTY has been lack of qualified applications stemming from underrepresented geographical areas. The Office of the Prosecutor tried at some point to at least reduce this problem by sending letters to different attorney generals in a number of countries, requesting that job opportunities in the Tribunal be disseminated and by utilising the International Association of Prosecutors. I do not have in my possession any information as to the outcome of these efforts, but my personal impression is that at least a limited additional number of applications were received as a result.

application of the principle whereby, all other things being equal, candidates from states parties are preferred does not appear to be *per se* problematic, a hiring practice where highly qualified applicants from non-states parties are systematically rejected may operate in detriment of the Court's perceived legitimacy and universality and foster hostility towards it.

Finally, it also seems to be vital that, while shaping the multiple legal and policy decisions that the prosecutor will have to make, all voices within the Office of the Prosecutor be heard (within reason), and that the position ultimately adopted by the prosecutor be the outcome of a mature process of collective discussion, enriched by the general expertise of the Office and the different backgrounds of its staff. The ICC Statute and the Rules, despite their degree of detail, contain numerous key areas that are entirely dependent on interpretation and policy decisions. Matters such as whether there will be an investigative dossier, or what type of access to the prosecution files, if any, will be given to the defence, or how the Office of the Prosecutor should interact with the victims' legal representatives, to only name a few examples, are entirely in the hands of the prosecutor. Other matters, while falling chiefly within the judges' province, nonetheless demand meaningful prosecutorial input. For instance, the regime of presentation of evidence and conduct of trial proceedings in the ICC is almost entirely open.⁵ Presumably, the ICC judges will adopt regulations under Article 52 to fill these lacunae. However, this is a critical matter on which the prosecution should be heard before any decision by the judges is taken, which presupposes that a policy position should be promptly developed.⁶ It is also a highly sensitive matter, as reflected by the very origin of these lacunae: the fact that consensus at the negotiation stage of the ICC Rules could not be achieved between states with different legal traditions. Consequently, the prosecution should provide insightful input, considering at all times the careful balance between different legal tra-

⁵ ICC Rule 140 envisions a rather peculiar regime, whereby the presentation of evidence will be decided either by agreement between the parties or by directions stemming from the presiding judge. As it is apparent, this regime can easily lead to complete anarchy, with different Trial Chambers following entirely different procedures. See ICC, Rules of Procedure and Evidence, adopted 3–10 September 2002, ICC-ASP/1/3 ('ICC Rules of Procedure and Evidence') (<http://www.legaltools.org/doc/8bcf6f>).

⁶ The ICTY judges generally request prosecutorial input in relation to possible amendments to the Rules. It must be presumed that ICC judges will seek similar input before adopting or amending the Regulations of the Court, or at least the most significant ones.

ditions enshrined in the various provisions of the Statute and the Rules, and the need to ensure fair, predictable and efficient trial proceedings.⁷

16.2.2. Fostering a Career Path

A particular feature of the Office of the Prosecutor of the ICTY has been its dynamism in terms of movement of staff. Staff members with more than three or four years of experience in the office are the exception. It is probably accurate to say that the *ad hoc* nature of the ICTY and the lack of a formal career path in the Office of the Prosecutor have been decisive factors in this process. Whereas some degree of dynamism is undoubtedly beneficial, to the extent that it ensures renovation and incorporation of new ideas and approaches, in the context of an international criminal tribunal, constant changes in the composition of the staff can have multiple negative effects.

First, international criminal tribunals operate in a peculiar context: the law is rather new and very often unsettled and the practices necessarily differ from those followed in domestic jurisdictions. Even well-trained domestic prosecutors must adjust themselves to the new context, starting with basic and yet quite taxing steps, such as learning an entirely new body of law. Expertise in international criminal law, as with any area of the law, must be developed with time. Constant staff migration can seriously conspire against the desired goal of ensuring high technical expertise in the Office of the Prosecutor. This, in turn, may lead to an inefficient performance of the Office as a whole. For instance, new staff may be unaware of the existing accumulated experience in relation to certain legal or practical problems, or of the existence of specific policy guidelines in relation to certain matters, and may be entirely dependent on the amount of ‘veterans’ in the institution, including senior staff, to receive guidance and to have access to the institutional memory of the Office. If there is no career path in the Office, that pool of veterans may be extremely small or directly non-existent.

Most significantly, the lack of a proper career path – whereby commitment to the institution and professionalism are rewarded through promotions or otherwise – can lead to the absence of a feeling of institu-

⁷ As a general matter, it appears to be of critical importance that the ICC prosecutor ensures that his or views be heard and adequately considered by the ICC judges while exercising their limited legislative functions under Article 52.

tional belonging in Office of the Prosecutor personnel and foster short-term ‘legal adventures’ instead of long- or even mid-term institutional commitment. By short-term legal adventures, I refer to cases such as an attorney who decides to join the institution to prosecute a single case, only for the sake of the experience, and leaves once the case is completed. The success of his or her case becomes the only focus. Questions such as institutional image, the need to abide by existing policy or legal positions, even future problems that the case may face on appeal – long after he or she is gone – are in his or her mind marginal or directly non-existent. The general lack of accountability inherent to such ‘parachute prosecutions’, which are not unfamiliar to the ICTY, can be extremely detrimental to the Office’s efficient functioning and even to its reputation. Replacing the ‘legal adventurer’ for the professional international attorney by means of establishing a clear career path with a view to creating an ICC Office of the Prosecutor meritocracy, should, in my view, be a prime objective of the prosecutor’s managerial policy.

16.2.3. Promoting Collective Legal/Technical Discussion

16.2.3.1. Legal Advisory Meetings

Apart from the necessary periodic meetings of senior staff in order to discuss management and policy issues, the ICC Office of the Prosecutor should organise regular meetings involving all legal staff to discuss specific legal and policy issues, with a view to stimulating communication between all staff members (including contact between lawyers and senior staff) and to provide the prosecutor with all relevant views if and when a significant policy decision is required. These meetings should also foster consistency in the positions taken by members of the Office of the Prosecutor, and should be chaired by a person entrusted with the task of ensuring co-ordination between the attorneys within the office.

The Office of the Prosecutor of the ICTY established the practice of holding weekly legal advisory meetings, which for a number of years proved to be quite successful. The practical importance of those meetings, however, seems to have decreased with time for two main reasons: the decision to have a legal co-ordinator chairing the meetings and ensuring that they were fully utilised was abandoned, and senior staff appear to have distanced themselves from the meetings. This has led to unfortunate situations, such as senior management adopting decisions that, when

communicated to the legal advisory meetings, are rejected by the vast majority of the legal staff, for reasons that had not been previously considered by senior management.

16.2.3.2. Internal Review of Draft Charging Instruments

Similarly, the original ICTY Office of the Prosecutor practice of establishing a formal process of internal scrutiny of draft charging instruments before they were submitted for confirmation to the confirming judge (the so-called indictment reviews) should be imported into the ICC Office of the Prosecutor practice. The convenience of adopting such a practice is very clear when taking into account the complexity and adversarial nature of the process of confirmation of the charges enshrined in the ICC Statute (Article 61). Although the Office of the Prosecutor of the ICC must take pains to ensure that the confirmation of charges hearing before the Pre-Trial Chamber does not become a mini-trial, it is apparent that, in sharp contrast to the ICTY's summary confirmation procedure, Article 61 envisions a process of thorough judicial scrutiny of the legal correctness and factual support of the charges brought by the prosecution within the context of an adversarial hearing, which may even include presentation of rebuttal evidence by the defence. In-depth internal review of the draft charging documents and of the evidence underpinning the charges, including presentation of the charges by the team in charge of the case, can ensure that only those charges that are adequately substantiated be brought before the Pre-Trial Chamber, and also adequately prepare the prosecution team for the confirmation hearing.

16.2.4. The ICC Appeals Section

The adopted structure of the Office of the Prosecutor of the ICC follows that of the ICTY in including an independent Appeals Section, that is, a unit composed by counsel with the primary task of dealing with appeals either lodged by the prosecution or by the defence. The ICTY Office of the Prosecutor Appeals Section has become, since its creation in late 1998, a key component, growing both in importance and in size through the years, as its workload has increased exponentially.⁸

⁸ The Appeals Section comprises today about 14 members, including appeals counsels, an analyst and a language assistant.

An appeals unit detached from the prosecution of the case, capable of providing objective opinion on matters such as the convenience of appealing a particular decision or not, or the merits of a particular ground of appeal raised by the defence, has proven to be a vital component in an Office of the Prosecutor in charge of international cases. The complexity of the cases, the need to efficiently use the existing resources, the importance of preserving at all times institutional integrity and of presenting a unified and consistent legal position, *inter alia*, are all factors that indicate the importance of an independent section.

The Appeals Section should be in charge of conducting all appeals – that is, both interlocutory appeals and appeals against final decisions – at the initial stages of the Court’s existence, where interlocutory appeals will decide critical issues such as the contours of the Court’s jurisdiction, the scope of the principle of complementarity or the instances that allow direct investigation in the territory of a state party under Article 57. These issues will all be finally decided by the Appeals Chamber, from where gradually a body of ICC law will develop. Consequently, the quality of the ICC Office of the Prosecutor’s appellate submissions – including written briefs and oral advocacy before the Chamber – will be of critical importance, which highlights the importance of having attorneys with appellate experience conducting this litigation. Needless to say, this primary responsibility or leading role in the conduct of all appeals does not detract from the desirable and required involvement of other sections of the Office of the Prosecutor during the appellate litigation stage. As the jurisprudence develops and the main critical legal issues are clarified, and as the first trial cases are completed, the Appeals Section may begin to focus on appeals against final decisions, providing only external advice in relation to interlocutory appeals. The latter appeals should be assigned to the trial team dealing with the case, unless the prosecutor, because of the particular nature of the case, decides otherwise.⁹

The Appeals Section should also provide advice in the formulation of policy decisions and in the adoption of legal positions before different Chambers of the Court. The Appeals Section is the natural custodian of the consistency of the legal positions taken by the prosecution before the Appeals Chamber, both internally and with those formulated before lower Chambers. Similarly, timely intervention of the Appeals Section may neu-

⁹ This, in essence, is the current ICTY Office of the Prosecutor practice.

tralise or minimise the risk of points of appeal being raised during pre-trial or trial litigation. Such preventative intervention will also ensure that damaging decisions which run contrary to Office of the Prosecutor's position stemming from the lower Chambers of the Court be timely appealed.

16.3. Formulating a Prosecutorial Policy

16.3.1. The Importance of Lowering Unrealistic Expectations: The Limits of the Court and the Exercise of Prosecutorial Discretion

The unique and unprecedented nature of the ICC as a treaty-based international criminal jurisdiction and its particular features, including its broad territorial scope, but also its apparent legal and practical limits, require, in my view, that the prosecutor explain to the international community, right from the outset, at least the main aspects of his or her prosecutorial policy. Such presentation should include, but not be limited to, the broad parameters of the relevant criteria for exercising prosecutorial discretion in the decision to initiate or not an investigation or prosecution, or the scope and function of the principle of complementarity as viewed by the prosecutor.

While it is clear that the prosecutor should not unnecessarily limit him or herself by formulating rigid limits to his or her discretion, formulating and explaining the main general features of his or her prosecutorial policy from the early stages of the ICC's existence may have a number of positive effects. A public explanation by the prosecutor of the nature of the Court, its complementary nature and the scope of its jurisdictional regime, coupled with an accurate description of the Court's practical limitations and of the need to focus on the "most serious crimes of international concern" (Article 1), and within those, on those cases that are of sufficient gravity to justify the Court's intervention (Article 17(1)(d)), may help to foster an adequate understanding of the ICC and to lower unrealistic expectations.¹⁰ An explanation of the general type of cases and perpetrators the prosecutor considers appropriate to focus on "in the interests of justice", including the interests of victims and of the international communi-

¹⁰ The misperceptions as to the Court's mission under the Statute and its forecast practical functioning appear already to be considerable at this stage. The relevant organs of the Court should adequately address such misperceptions. It would be highly undesirable that a proper performance of the Court's functions, as envisioned by the Statute be nonetheless criticised as insufficient or shy due to a misunderstanding of the Court's nature and role.

ty to have a fair and efficient system of international criminal justice, would put both states parties and other organs of the Court on notice of the prosecutor's interpretation of the proper scope of his or her authority to initiate investigations and/or prosecutions or to decline to do so under Articles 15 and 53.

Considering the Pre-Trial Chamber's broad supervisory powers under Articles 15 and 53 of the Statute – which include the Chamber's authority to, contrary to the prosecutor's decision, instruct the commencement of an investigation or prosecution when the decision not to do so is based on “the interests of justice” only (see Article 53(3)(b) and Rule 110(2)) – the open formulation of broad criteria as to the situations, incidents and perpetrators to investigate and/or prosecute could help to avert disputes as to the reasonableness or appropriateness of the exercise of prosecutorial discretion in a given case. On this particular issue, while it is important for the ICC prosecution to observe and abide by the regime of judicial review enshrined in the Statute – and not, for instance, to try to circumvent it by disguising decisions taken solely under the basis of Article 53 paragraphs (1)(c) or (2)(c) as taken pursuant to other sub-provisions – it appears to be equally critical that the prosecutor be ready to defend his or her authority as the sole organ in charge of formulating prosecutorial policy in the ICC, and to confront the Pre-Trial Chamber, if necessary, to defend the independence of the prosecution.

It is to be expected that Pre-Trial Chamber and prosecution engage in a constructive relationship of working together, within their respective fields of competence. If that does not happen, though, and if the Chamber attempts to micromanage the prosecution's resources or to otherwise interfere in the prosecutor's province, the whole scheme of investigation and prosecution enshrined in the Statute may be paralysed. The regime of judicial review enshrined in Articles 15 and, more significantly, 53(3)(b) has been adopted to neutralise the dangers of an unreasonable, discriminatory or otherwise abusive exercise of discretion. It has not been created to substitute prosecutorial policy for a judicial one. By openly formulating a selection policy, subject to scrutiny by the international community, based on the practical limitations of the Court and the values enshrined in the Statute, the prosecutor may reinforce his or her position as the organ in charge of such policy decisions, and neutralise from the outset any temptation of judicial interference.

16.3.2. Ensuring Prosecutorial Fairness and Effectiveness

16.3.2.1. ‘Objective Investigations’ and Identification and Disclosure of Exculpatory Material

The ICC Statute establishes that the prosecutor shall “in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility” under the Statute, and, in doing so, “investigate incriminating and exonerating circumstance equally” (Article 54(1)(b)). The Statute appears to have adopted what in certain jurisdictions is called “the principle of objectivity”, that is, the maxim that the prosecution is not a mere party to criminal proceedings, but rather an organ of the administration of justice only committed to truth and justice, in the traditional civil law formulation of the principle.¹¹ The duty to investigate incriminating and exonerating circumstances equally – unknown to the prosecutor of the *ad hoc* tribunals – is parallel to, and independent from, the duty to identify and disclose to the defence exculpatory information in the prosecution’s possession, as established in Article 67, paragraph 2 of the Statute (a duty also imposed on the ICTY prosecutor by ICTY Rule 68). Both duties appear to be central features of the ICC prosecutor’s role as envisioned by the Statute, and lack of adequate compliance with them may seriously jeopardise the image of the ICC Office of the Prosecutor, and compromise the fairness of proceedings before the Court.

The ICTY experience on disclosure of exculpatory information (or Rule 68 disclosure) has been problematic and is illustrative of the numerous difficulties that may stem from lack of proper guidance on, and implementation of, the statutory duties imposed on the prosecution. In the absence of a clear and comprehensive policy defining not only the scope and meaning of the expression “exculpatory information” but also the proactive steps to be taken in order to fully comply with the duty, an in-

¹¹ See, *inter alia*, Claus Roxin, *Strafverfahrensrecht*, 25th ed., C.H. Beck, Munich, 1998, p. 52; and Julio B.J. Maier, *Derecho Procesal Penal*, Editores del Puerto, Buenos Aires, 2002, pp. 581 ff. Both authors explain that a characteristic feature of this principle is the prosecution’s authority to launch an appeal on behalf of the convicted person, an authority that has been granted to the ICC prosecutor by virtue of Article 81(b) of the ICC Statute. Interestingly, the ICTY prosecution has also stated in public submissions made before the Appeals Chamber that they did not see themselves as a mere party, but rather as “ministers of justice assisting in the administration of justice”, a characterisation that the ICTY Appeals Chamber has subsequently followed in some decisions.

formal, rather anarchic and inconsistent approach to those duties, whereby each trial team dealt with them the way they deemed fit, took over. The outcome has been a number of instances in which the prosecution has failed properly to meet its duties, as it has been forced to recognise before different Chambers of the ICTY.¹²

The importance of adequately complying with this particular duty requires that a comprehensive and clear policy be adopted and effectively implemented from day one. Such policy should contain, at a minimum, the following elements:

1. Broad construction of the terms “evidence in the prosecutor’s possession or control which he or she believes tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence”, within the terms of Article 67(2). A broad construction of the language of the Statute allows the prosecutor to ‘err on the safe side’ and minimises the risk of lack of proper disclosure on the basis of errors of judgment.
2. In case of doubt as to whether certain material falls under the abovementioned category or of possible collision between the duty to disclose and any of the duties of confidentiality enshrined in the Statute, resort to the relevant Chamber of the Court in order to seek a ruling under Article 67(2) and Rule 83, as a matter of general practice.
3. Instructions that all collections of material stored in the ICC Office of the Prosecutor be proactively searched pursuant to *ad hoc*, relevance-based search parameters, and that the product of those searches be reviewed by prosecution officers.
4. Duty of each trial team, to be implemented by the senior trial attorney, to keep a proper record of all steps undertaken to ensure proper compliance with the duty and to keep an accurate log of disclosure of exculpatory material.
5. Duty to file with the Chamber seized with the case periodic status reports on disclosure.

¹² It was not until the Appeals Section of the ICTY Office of the Prosecutor began conducting its review of the steps taken at the trial stage to ensure compliance with the duty to disclose exculpatory material that it became clear what the real magnitude of the problem was.

6. The possibility of engaging the defence in the exercise.
7. Periodic review by senior management of the degree of compliance by each trial team with these duties.

Undoubtedly, the additional duty to equally investigate incriminating and exonerating circumstances will create its own complex problems. Depending on how it is construed, that duty, in the context of grave crimes of international nature, may prove to be excessively burdensome, or even impossible to perform. The prosecutor will unavoidably have to make a policy decision as to how that duty can be meaningfully fulfilled, in a manner consistent with the rights of the accused and with the prosecutor's mission to efficiently conduct investigations and prosecutions before the Court (Article 42(1)). In so doing, the prosecutor will unavoidably have to define the scope of the duty and provide guidelines to his or her staff as to the steps to be taken in the course of an investigation and/or prosecution in order adequately to comply with this duty.¹³ It may be useful to have research conducted as to the manner in which national jurisdictions that recognise a similar duty have approached the issue, with a view to obtaining a solid basis for such decision. It could further be considered to establish a group of external experts – such as renowned academics and practitioners – in charge of undertaking a comparative study and presenting conclusions to the ICC prosecutor.

16.3.2.2. Processing, Identifying and Assessing In-House Material

It is my assumption that other persons with direct expertise in the storage, processing and indexing of material will extensively cover this topic. Hence, I will only stress here the importance of ensuring that right from the outset there is a proper functioning system in place, capable of processing all material transmitted to the Office of the Prosecutor, and that the practice of immediately submitting any incoming material for processing be promptly implemented. Lack of such practice in the early days of the ICTY Office of the Prosecutor led to the unfortunate consequence that entire collections of material received in The Hague were kept unprocessed – and accordingly, their contents unknown – for large periods of time. This was not only dysfunctional to a proper investigation but also conspired against a proper fulfilment of the prosecutorial duties of review,

¹³ The ICTY and ICTR practice can provide little guidance on this particular matter, due to the absence of a similar principle in their basic documents.

identification and disclosure of exculpatory material, which, in turn, could have seriously damaged on appeal cases that had gone through trial without such collections having been adequately reviewed.

Similarly, the ICC Office of the Prosecutor should ensure that it is at all times capable of analysing and assessing the documentary material that it has obtained. The ICTY Office of the Prosecutor's original investigative structure appears to have been chiefly conceived to deal with the so-called crime base, that is, the underlying crimes committed in the field (murders, looting, unlawful attacks and so on). The critical importance of having a system in place capable of adequately analysing documents seems not to have been realised until quite recently. In the context of the ICC Office of the Prosecutor, which, as will be explained below, may find itself in situations in which it primarily depends on material transmitted to it by cooperative states and NGOs for investigating crimes under its jurisdiction, being unable to conduct proper field investigations (or only very limited ones), the need to establish such a system becomes even more urgent.

16.3.3. Dealing with States

16.3.3.1. 'Leads-Only' Information

The ICC Statute provides for the transmission by states to the Office of the Prosecutor of materials destined solely to generating new evidence, pursuant to an agreement of confidentiality and non-disclosure (Article 54(2)(e)). This particular provision, almost identical to ICTY Rule 70, provides for a secure channel of communication between the prosecutor and national agencies that allows the latter to share with the prosecutor sensitive material that, in the absence of such a channel, would ordinarily be kept confidential by the state. Thus, the provision undoubtedly has a significant practical value and may prove to be extremely useful in the context of the work of the ICC Office of the Prosecutor. The prosecutor should promptly establish this type of communications with relevant states parties' authorities with a view to efficiently conducting investigations of crimes falling under the jurisdiction of the Court.

However, the prosecutor should at all times be aware of the problems that misuse of this provision may bring about. The provision may be abused by national authorities that may seek to use it as an extended protection of their national security (which is covered by a different provision, namely Article 72 of the Statute) and to have included, for instance,

material that is already in the public domain or has been acquired by the prosecution through independent sources. Similarly, national authorities may seek to turn this rather exceptional channel of co-operation into the rule pertaining to transmission of information to the ICC Office of the Prosecutor, thereby keeping at all time control of the presentation of evidence by the prosecution, which would necessarily require their consent. Such an approach – unfortunately not infrequent in the experience of the two *ad hoc* tribunals – may frustrate the effective prosecution of crimes under the Statute, for instance, if the material provided for lead purposes only is the main, or only, evidence pertaining to a given incident or to the involvement of the accused in the crime. It can also generate serious problems *vis-à-vis* the prosecutor’s duty to disclose any exculpatory information in his or her possession, if the provider refuses to disclosure of the material in question to the defence.

The prosecutor will thus have to carefully balance the indisputable need to promote an atmosphere of mutual trust and co-operation with national agencies pertaining to the provision of sensitive material and the equally important duties to effectively investigate the crimes enumerated by the Statute and to honour his or her duties of disclosure. Resisting from the outset attempts to misuse the provision, and promoting a last resort approach to its use may be required in order to adequately achieve this balance.¹⁴ The prosecution will also have to establish a policy in relation to possible ‘conflicts of duties’ involving this sensitive information, which may include seeking an *ex parte* ruling from the Chamber of the Court seized with the matter, if necessary.

Finally, honouring the promise of confidentiality made to the providers and the conditions that were agreed for the purposes of disclosure of the information will require that accurate records of the material obtained and their conditions of provision, as well as the manner of their subsequent presentation at trial, be adequately kept in the ICC Office of the Prosecutor. The practical relevance of such records becomes apparent when one imagines requests by accused in related cases to material that was tendered under seal in different proceedings due to an agreement of confidentiality between provider and prosecutor.¹⁵

¹⁴ It must be stressed that there are numerous safeguards protecting national security information in Article 72 of the ICC Statute.

¹⁵ It has happened in the ICTY that material was tendered under seal without any record being kept as to the reasons underpinning the protective measures (for example, Rule 70 con-

16.3.3.2. Execution of Requests for Assistance and Arrest Warrants

A particularly problematic feature of the ICC Statute is its entire reliance on national authorities and the system of international co-operation enshrined in Part 9 of the Statute for the purposes of conducting an investigation and collecting evidence. On-site *investigations* conducted by the ICC Office of the Prosecutor in the territory of a state party are the exception, and take place only in the event of a total breakdown of the national system (Article 57(3)(d)). In addition, the prosecutor may take certain rather minimalist investigative steps directly in the territory of a state party and without the involvement of national authorities, as provided by Article 99(4).

This quite conservative regime has as an immediate consequence what could be described as the ‘complementarity paradox’: the Statute requires that an investigation before the ICC be started only where the state that would ordinarily exercise jurisdiction is unwilling or unable to investigate or prosecute, yet mandates that precisely that state be in charge of investigating for the Court. In cases where the state lacks an adequate system capable of timely and efficiently complying with the Court’s requests for assistance (but falling short of the ‘breakdown’ scenario enshrined in Article 57), this regime may unfortunately result in an inadequate or inefficient investigation. Further, in cases where there is collusion between the state authorities and the perpetrators of the crimes, the dangers posed by this regime in terms of safety and well-being of victims and witnesses and of preservation of critical evidence are apparent.

At the same time, the Rules of Procedure and Evidence have established specific technical requirements for the admissibility of evidence. For instance, under Rule 68(a) written or otherwise pre-recorded statement is admissible *in lieu* of live testimony only if the defence had the opportunity to cross-examine the maker of the statement, or, alternatively, if the Pre-Trial Chamber became involved in the process through the mechanism enshrined in Article 56 of the Statute (unique investigative opportunity). Hence, if, in a given case, a statement is taken by national authorities without defence counsel being present, or without allowing for that counsel to ask any questions, or those national authorities refusing to

confidentiality, danger of identification of a protected witness and so on). An absence of such records makes it extremely difficult to determine whether access to third parties with a legitimate interest should be granted without further steps being taken or not.

allow that the ICC Pre-Trial Chamber be in control of the proceedings under Article 56, then the statement obtained by those national authorities pursuant to a request stemming from the ICC will be inadmissible under the Court's own rules of evidence.

The above scenarios are examples of how the ICC prosecutor will have to face the potential short circuits between different provisions of the Statute, and the Rules and the overarching duty to efficiently investigate and prosecute crimes of international concern, and find constructive ways to solve them. Building consensus with states as to the importance of allowing the ICC to decide on the modalities of execution of requests for assistance and of authorising prosecution officers to be involved as much as possible in the process is essential. In addition, the prosecutor could, perhaps jointly with the ICC judges, prepare guidelines for the drafting of effective and flexible implementing legislation, as the ICTY judges did at the early stages of the Tribunal's existence. Similarly, the prosecutor will have to be in a position adequately to assess in the instant case the risks of resorting to a particular national jurisdiction for the purposes of conducting certain investigative steps. If persuaded that involvement of that state's authorities may pose dangers to the integrity of the investigation and the safety of victims and witnesses, he or she will have to be able to develop creative alternative mechanisms for investigating the relevant crimes within the framework of the Statute and the Rules.

Similarly, the ICC prosecutor must take pains to ensure that the rights of suspects and accused persons, as well as all other protections under the Statute, are properly observed by the authorities co-operating with the Court. Violations of the rights of persons during the process of co-operation with the Court not only will most likely render those co-operative efforts fruitless, by leading to the release of suspects or the exclusion of evidence, but may also seriously compromise the image of the Court.¹⁶

¹⁶ Obscure situations such as the never clarified alleged kidnapping of the ICTY accused Todorović, which included allegations of a bounty-hunting operation co-ordinated by the Stabilisation Force, or the prolonged detention of Jean-Bosco Barayagwiza in the territory of Cameroon pursuant to a never-executed request of the ICTR prosecutor, should be avoided at all costs.

Prosecutorial Policy, Strategy and External Relations

Christopher Keith Hall*

17.1. Prosecutorial Policy and Strategy Questions

The prosecutor will first need to define his or her goals in shaping the Office of the Prosecutor in the International Criminal Court's ('ICC') first decade and his or her aims for its impact on the framework of international justice in that period. In seeking to achieve these goals, the prosecutor will have to address a broad range of policy and strategy questions, including the principles of interpretation of the ICC Statute, the Elements of Crimes, the Rules of Procedure and Evidence and other supplementary instruments; guidelines for selecting cases for a preliminary examination or investigation, including for determining whether states are unable or unwilling genuinely to investigate or prosecute crimes; a complementarity strategy designed to encourage effective joint international/national solutions to impunity in given situations; guidelines for prosecution; guidelines for appeals; policy with respect to seeking a Security Council or

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state referral of a situation; policy with respect to requests by the Security Council for a deferral of investigations or prosecutions; policy with respect to ratification and implementation of the ICC Statute and the Agreement on Privileges and Immunities of the International Criminal Court; countering threats to the Court, such as Security Council resolution 1422 and immunity agreements signed with the United States, practices to ensure a fair trial and practices to ensure due regard to the interests and rights of victims with regard to security, participation and reparations.

Many of these issues, as well as the issues discussed below, overlap and the various headings are simply one way of trying to give some order to the topics. For convenience, some of these issues are discussed in the second part of this chapter dealing with external relations of the Office of the Prosecutor.

17.1.1. The Desired Shape of the Office of the Prosecutor a Decade from Now

In developing policies and a prosecutorial strategy, the prosecutor should have a clear idea of what sort of an institution he or she would like the entire Court, not just the Office of the Prosecutor, to look like in 2012 when his or her term of office ends. In building the institution, the following seem to be desirable outcomes a decade from now:

- The most highly qualified staff from all regions and legal systems of the world, with a fair representation of men and women, as the result of a recruitment policy that does not discriminate against persons because of irrelevant factors such as nationality, age, physical impairment or gender.
- A standard of excellence and probity that is a model for prosecution offices around the world.
- An approach to developing and implementing international criminal law and procedure that draws from the best in civil and common law systems the lessons learned from the four *ad hoc* international criminal tribunals, with a view to creating an effective and fair new international criminal justice system.
- An institution that has sufficient resources to carry out its programme of work.

- An institution that is able to investigate promptly, thoroughly, independently and impartially the worst possible crimes committed in all regions of the world.
- An institution that is able to prosecute accused persons promptly, efficiently and fairly, with due respect for the interests and rights of victims.
- An institution that has a humane working environment for staff at all levels.
- Completion of the move to permanent headquarters that fully satisfy the needs of the Office of the Prosecutor, as well as the rest of the Court.
- Establishment of permanent and temporary field offices wherever needed.
- Public perception of the Court as an effective, independent, impartial and fair institution.

17.1.2. The Desired Impact on the System of International Justice a Decade from Now

The overall policies and prosecutorial strategy should also be designed to strengthen the international framework of justice in the coming decade. Measurable goals for the prosecutor, operating both independently and with the rest of the Court, would include the following:

- Successful investigations and prosecutions by the prosecutor of a significant number of persons in several regions around the world responsible for the gravest crimes within the Court's jurisdiction.
- Substantial progress towards universal ratification of the ICC Statute and the Agreement on Privileges and Immunities of the International Criminal Court.
- Adoption by the Assembly of States Parties of carefully selected amendments to the ICC Statute if certain flaws cannot be corrected through creative interpretation.
- Enactment by all states parties of effective implementing legislation for the ICC Statute and the Agreement on Privileges and Immunities.

- Effective and routine co-operation with states parties and other states in the investigation and prosecution of crime above and beyond that required by the ICC Statute and national legislation.
- Evidence of some deterrent effect in the form of adoption of new legislation, issuance of orders and changes in practice in armed forces and security forces designed to prevent and punish crimes at the national level, and, although this will be much more difficult to document, some deterrence of crime.
- A reconceptualization of genocide, crimes against humanity and war crimes from political and diplomatic events to be resolved by politicians and diplomats to serious crimes like murder, abduction, assault and rape that deserve to be investigated and prosecuted with a sufficient proportion of the global resources devoted to all crime.
- A catalytic effect leading to increased investigations and prosecutions of crimes at the national and regional level.
- Public perception of the Court as a key, but not exclusive, part of a new system of international justice based on complementarity.
- A decline in hostility by states currently opposed to the Court having jurisdiction over their citizens and the beginnings of co-operation with the Court by such states in the investigation and prosecution of citizens of other states.

17.1.3. Principles of Interpretation

An important part of the foundation for an effective and comprehensive prosecution policy and strategy should be a clear and consistent approach to interpretation of the ICC Statute and its supplementary instruments in all aspects of the work of the prosecutor and the Office of the Prosecutor. As a treaty establishing an international organisation, the ICC Statute should be interpreted teleologically to ensure that the Court is effective in achieving its purposes, and it will be important for the prosecutor to identify in advance aspects of the Statute that are problematic where this approach can minimise or eliminate the problem rather than wait until these questions arise in individual cases. There are, of course, countless aspects of the ICC Statute and its supplementary instruments that will require such interpretation.

The prosecutor and the Office of the Prosecutor should incorporate this approach in all aspects of his work and advance it in all external relations, in particular in all submissions to the Chambers. Of course, a considerable amount of discretion should guide the implementation of this approach. In some situations, it may be better simply to try to ensure that positions taken by the Chambers on a particular point do not preclude a more expansive interpretation later, in different circumstances, when such an interpretation would more likely be accepted.

However, as the ICC Statute itself makes clear, the Statute must be interpreted strictly in favour of the accused and consistently with human rights. How these two purposes – effectiveness and strict construction – can be harmonised will pose an important challenge for the prosecutor and the Chambers, but prosecutors and judges resolve similar tensions at the national level all the time, so it should not be insurmountable to do so in the International Criminal Court.

17.1.3.1. The Principle of Effective Interpretation of Constituent Instruments of International Organisations

The starting point for the prosecutor in developing a comprehensive interpretation strategy is that the ICC Statute is the constituent instrument of an international organisation and, as such, must be interpreted not simply in accordance with the law of treaties, but primarily in a manner that will ensure the effective accomplishment of its purposes. As the International Court of Justice declared in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case,

[t]he constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realising common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organisation created, the objectives which have been assigned to it by its founder, the imperatives associated with the effective performance of its functions, as well as its own practice,

are all elements which may deserve special attention when the time comes to interpret these constituent treaties.¹

Scholars, such as Malcolm Shaw, have emphasised:

the special nature of the constituent instruments [of international organisations] as forming not only multilateral agreements but also constitutional documents subject to constant practice, and thus interpretation, both of the institution itself and of member states and others in relation to it. This of necessity argues for a more flexible or purpose-orientated method of interpretation.²

He adds that the principle of effectiveness in Article 31(1) of the Vienna Convention on the Law of Treaties of 1969

is of particular importance in the case of international organisations since such organisations, being in a state of constant and varying activity, need to be able to operate effectively, and this therefore militates towards a more flexible approach to interpretation.³

17.1.3.2. Interpretive Guidance in the Rome Statute

The ICC Statute provides some guidance to the Court in sources and principles to apply in interpreting the Statute, in particular in Articles 21 and 22. First, the International Criminal Court is required under paragraph 1 of Article 21 (applicable law) to examine, if appropriate, three bodies of law. That paragraph provides:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

¹ International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, para. 19 (<http://www.legal-tools.org/doc/d97bc1/>).

² Malcolm N. Shaw, *International Law*, 4th ed., Cambridge University Press, New York, 1997, pp. 914–15.

³ *Ibid.*, p. 915.

- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

These three sub-paragraphs provide some opportunities for the prosecutor. Sub-paragraph (a), together with Article 9(3), makes it clear that in the case of conflict the ICC Statute prevails over the Elements of Crimes. Although the Elements of Crimes instrument will be of enormous help to the prosecutor in clarifying what must be proved and in narrowing the focus in evidence gathering, there are a number of elements of particular crimes, such as the contextual element of the crime of genocide, that would appear to be inconsistent with the definition in Article 6 of the ICC Statute and Article II of the Convention on the Prevention and Punishment of the Crime of Genocide. It will be useful for the prosecutor to undertake a review, in consultation with experts in international law and criminal law, to identify possible conflicts that will need to be addressed in investigating and prosecuting cases.

Sub-paragraph (b) will be an essential tool in addressing challenges by the accused on the ground of ambiguity in the wording of crimes in the ICC Statute and in the elements of particular crimes or based on a literal interpretation of those crimes and their elements. It will provide a fair and reasonable way to deal with many of the difficult questions of legality and *ne bis in idem* that are likely to arise in the early years of the Court. It will be useful in addressing in defining the scope of principles of criminal responsibility, such as command and superior responsibility, and defences, such as the defence of superior orders with respect to war crimes, where the ICC Statute departs from long-settled international law, particularly when faced with the countervailing principle of strict construction of definitions of crimes in Article 22(2) (see below). Sub-paragraph (c), however, is more problematic. It leaves some room for arbitrary choices of applicable principles that could favour either the prosecution or the defence. Some further thought will need to be given to devising guidelines for applying this sub-paragraph.

In addition to the guidance in Article 21(1), when applying and interpreting law under this article, the ICC is required to do so consistently

with international human rights and without any adverse distinction. Paragraph 3 of that article provides:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

A specific example of this rule is found in Article 22(2), which provides:

The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

Other articles in the ICC Statute provide guidance to the Court, including the prosecutor, in interpreting and implementing the Statute, particularly in the difficult area of ensuring a fair trial while giving due regard to the interests and rights of victims.

17.1.4. Guidelines for Preliminary Examination, Investigation, Prosecution, Appeal, Revision and Compensation, as Part of a Global Anti-Impunity Complementarity Strategy

The prosecutor will need to develop clear, simple and workable guidelines to determine which crimes should be subject to preliminary examination or investigation, which cases to prosecute, when to appeal a judgment, and when to seek or oppose revision and principles concerning compensation for miscarriages of justice. Such guidelines should be developed in consultation with civil society, as in this particular consultation before the prosecutor takes office and in others afterwards. As in both civil and common law systems where prosecutorial discretion exists, to the greatest extent possible such guidelines should be made public, where such publication would not undermine the effectiveness of the Office of the Prosecutor by subjecting it to micromanaging criticism from external sources.

The failure of the prosecutors of the ICTY and ICTR to publish a comprehensive and regularly updated set of such guidelines has not helped public understanding of their work, particularly since prosecution strategy has undergone a number of important shifts over the past decade. Although there have been a number of articles and statements indicating

that various internal guidelines do exist covering these areas, for example, the explanations in the report on North Atlantic Treaty Organisation ('NATO') bombing in Kosovo, the adoption of the Rules of the Road and statements about the development of a completion strategy, they do not appear to have been pulled together in any one place publicly. Indeed, even some members of the Office of the Prosecutor have indicated on a confidential basis some doubts about the scope of the prosecutor's guidelines or the consistency of their application on these matters.

A number of civil law jurisdictions have made their guidelines public. For example, the Belgian Collège des procureurs généraux publishes guidelines on prosecution policy on the Ministry of Justice website. In France, the Ministry of Justice issues official circulars on prosecution policy with regard to particular crimes and legal textbooks describe prosecution policy. In Germany, where there is some limited prosecutorial discretion, prosecution circulars at the level of the *Länder* have been published containing guidelines for prosecutors on when to close cases. In Italy, where the legality principle has run into the problem of insufficient resources to prosecute cases, there have been proposals for public guidelines for prosecutors in dropping cases, decisions that require court approval.

Some common law jurisdictions have made their prosecution guidelines public. For example, the Crown Prosecution Service in England and Wales has made the Code for Crown Prosecutors public:

The Code is also designed to make sure that everyone knows the principles that the Crown Prosecution Service applies when carrying out its work. By applying the same principles, everyone involved in the system is helping to treat victims fairly and to prosecute fairly but effectively.

Publication of Office of the Prosecutor guidelines will help ensure that public expectations are realistic and that judicial review of decisions not to investigate will be conducted in an appropriate manner. Such guidelines should be reviewed and amended in the light of experience. In developing and implementing these guidelines, they should be part of a global prosecution strategy based on complementarity designed to build a truly global system of international justice operating harmoniously at both the international and national levels.

17.1.5. Guidelines for Selecting Crimes for a Preliminary Examination or Investigation

Perhaps the most important challenge facing the prosecutor will be determining which crimes to select for a preliminary examination *proprio motu* pursuant to Article 15(1) and (2) of the ICC Statute, for an investigation pursuant to Article 15(3) and for investigations based on referrals by the Security Council pursuant to Article 13(b) or by a state party pursuant to Articles 13(a) and 14. Although there will be significant differences between a preliminary examination and an investigation, the decision whether to conduct a preliminary examination or an investigation will usually involve most of the same considerations, so, to minimize duplication, the discussion treats the guidelines for both decisions as the same. In addition, although there will be a number of important differences between investigations based on the trigger for them, as Rule 48 makes clear, in determining whether there is a reasonable basis to proceed with an investigation under Article 15(3), the prosecutor shall consider the factors in Article 53(1)(a) to (c), which apply to state or Security Council referrals.

The prosecutor will face enormous pressures from the general public, the press, some national non-governmental organisations and some victims to investigate and prosecute every crime within the jurisdiction of the Court and many that are not within the jurisdiction of the Court. There will be calls for geographic balance in terms of the crimes investigated and prosecuted, regardless of the scale of the crime or other factors. Some sectors will continue to contend that this is a court of the North targeting the South. The prosecutor will also face calls to act when particularly horrifying crimes are committed that capture public or press attention, even if they fall outside any guidelines previously enunciated, particularly if the crimes are committed by nationals of European or North American states or by members of United Nations peacekeeping forces. At the same time, the US administration will persist in claiming that the Court is planning unfounded, politically motivated investigations and prosecutions of US nationals.

In determining whether to conduct a preliminary examination or investigation, the prosecutor will have to determine:

1. In accordance with Article 53(1)(a) of the ICC Statute, whether a crime, as defined in Articles 6, 7 and 8 was committed, taking into account whether thresholds for the crime were met.

2. Whether the Court can exercise jurisdiction over the crimes because they were committed in the territory of a state party or state that has made a declaration under Article 12 (3) or by a national of one of those states or because the Security Council has referred a situation to the prosecutor pursuant to Article 13(b).
3. In accordance with Article 53(1)(b), whether the three non-discretionary factors in Article 17(1)(a), (b) and (c) that make a case inadmissible were present.
4. Whether certain guidelines that the prosecutor has developed have been met, including the largely discretionary factor in Article 17 of sufficient gravity.
5. Once admissibility has been determined, whether the somewhat duplicative factors listed in Article 53(1)(c) are absent.

Finally, it is important to note that a state or Security Council referral can upset all the calculations concerning caseload in applying the prosecutor's guidelines.

A recurring theme in the approach suggested below, consistent with the principle of effective interpretation suggested above in section 17.1.3., is to interpret the non-discretionary factors as broadly as possible to ensure that the Court will preserve the potential power to act in a broad range of situations, thus strengthening its deterrent effect. At the same time, the guidelines would be designed to ensure that the discretionary factors can be used to meet both the problem of limited resources in the coming decade in a principled way (the gatekeeping function) and the need to ensure that the Court is complementary to national courts, not a replacement for them.

17.1.5.1. The Definition of Crimes and the Problem of Thresholds

The scope of the definitions of the crimes in the ICC Statute and the Elements of Crimes, as well as of principles of criminal responsibility and defences, is outside the scope of this chapter, apart from the general point made above about effective interpretation of the Statute. The subject is also covered in a number of commentaries. However, it would be useful in the context of developing the prosecutor's guidelines for preliminary examinations and investigations to note that the threshold in Article 8(1) for war crimes is a discretionary, not mandatory, one. It states: "The Court shall have jurisdiction in respect of war crimes in particular when com-

mitted as part of a plan or policy or as part of a large-scale commission of such crimes”. Although this threshold will necessarily inform the development of guidelines for the selection of war crimes for preliminary examination and investigation, the prosecutor should ensure that states, armed political groups and the press and general public understand that the Court’s jurisdiction extends to *any* war crime in Article 8 and that he or she could examine preliminarily, investigate or prosecute any such crime if the case is admissible and it fits the prosecutor’s guidelines. Potential perpetrators anywhere in the world should understand that there is at least *some* risk of prosecution and conviction by the Court even if the war crimes were not part of a plan, policy or large-scale commission of such crimes. This point needs to be made publicly, as part of the press and outreach work of the prosecutor and the rest of the Court, to ensure that the Court does not completely give up the deterrent effect of Article 8(1), even though the prosecutor’s guidelines will for pragmatic and complementarity reasons seriously limit the number of crimes the prosecutor can investigate or prosecute.

It will also be useful in developing guidelines for the preliminary examination and investigation of crimes against humanity to make clear to states, armed political groups, the press and general public that the threshold for crimes against humanity in Article 7(1) does not require that the specific prohibited act, such as murder, has been committed on a widespread or systematic basis, but only that it is one of a number of acts, which could include other acts, such as torture or rape, that together were committed on a widespread or systematic basis. In addition, in developing such guidelines it is important to make clear to the targets mentioned above that ordinary persons who take advantage of circumstances to commit the prohibited acts – for example, a civilian who kills members of a neighbouring house for private gain – as part of a widespread or systematic attack, even if the persons are not state agents or members of organisations, can be prosecuted and convicted for crimes against humanity. These points need to be made publicly, as part of the press and outreach work of the prosecutor and the rest of the Court, to ensure that the Court does not give up the deterrent effect of Article 7.

17.1.5.2. Jurisdiction

This subject is thoroughly covered in commentaries. However, the prosecutor will have to make one very important and sensitive policy decision

concerning temporal jurisdiction at an early stage. There are a number of continuing crimes which will have begun before 1 July 2002 or the date of entry into force of the ICC Statute for a relevant state. These include the crime against humanity of enforced disappearance, the crime against humanity of torture when the torture is the extreme mental pain and suffering inflicted on families of the victims of an enforced disappearance as long as the fate of the victim is unknown, and the crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law. The Elements of Crimes would, if they are determined to be consistent with the ICC Statute, probably exclude an enforced disappearance where the victim was seized before the date of entry into force of the ICC Statute, but this matter is not entirely free from doubt and is likely to be the subject of a challenge. The other two examples present a stronger claim to be within the Court's jurisdiction.

These questions will have to be addressed with great sensitivity. On the one hand, if the prosecutor adopts an expansive reading of the Court's jurisdiction over these crimes, this approach will upset some of the strongest supporters of the Court that thought they had achieved more restrictive reading in the Elements of Crimes that provided the necessary reassurance to permit ratification to proceed. It could slow or prevent for a considerable ratification time by certain states, unless the prosecutor's guidelines made it clear that such crimes would be a low priority. On the other hand, a narrow reading would upset many of the non-governmental organisations that have been among the Court's strongest supporters.

17.1.5.3. The Preliminary Question of Admissibility

It is true that many of those involved in the drafting of Article 17 hoped that it would be read restrictively and many commentators have also read this article in an extremely restrictive way. For example, at first glance, it would appear that the Court could only exercise its jurisdiction in a situation akin to the situations in Cambodia in the 1970s, Rwanda in 1994, the former Yugoslavia in 1991 and Burundi, Democratic Republic of the Congo, Liberia and Sierra Leone in the 1990s, where the legal systems completely or substantially collapsed, but not in situations such as the one in Colombia today because, as one academic writer suggests, the courts in that country remain open, even though witnesses, prosecutors and judges are routinely the target of death threats. Such an interpretation should be

resisted by the prosecutor, even if the guidelines adopted by the prosecutor for preliminary examination and investigation in the early years lead to preliminary examinations and investigations in only a few large-scale situations.

Three non-discretionary factors. The prosecutor should make every effort to ensure that the Court gives an expansive reading in principle to the three non-discretionary requirements of unwillingness, inability and the exception to the *ne bis in idem* principle in Article 17(1)(a), (b) and (c) to increase the long-term deterrent effect of the Court. However, even if for very pragmatic reasons of resources and complementarity, discussed below, the guidelines for preliminary examination and investigation will for a considerable length of time have to apply the fourth admissibility requirement of sufficient gravity (the scope of which is largely discretionary) restrictively.

The apparently contradictory approaches to the non-discretionary and discretionary factors suggested here can be justified. Potential perpetrators in the largest number of situations should understand before they decide whether to embark on a course of crimes that they risk prosecution and conviction by the Court, as well as by national authorities, even if current resource constraints limit that risk in practice given contemporary levels of crime. Once a non-discretionary factor is given a restrictive interpretation by the prosecutor or a Chamber, it will be difficult to change it, but it will be easier to give a more expansive reading to a discretionary factor in the future if resources made available to the Court increase or the number and scale of situations decreases. The following discussion is not intended to cover all aspects of Article 17, but simply to note the possibilities that may exist for a more expansive interpretation than the one commonly accepted.

A non-exhaustive list of factors. Article 17(1)(a) and (b) requires the Court to declare a case inadmissible where a case is being or has been investigated or prosecuted except when the state is unable or unwilling to investigate or prosecute genuinely. A number of factors that the Court “shall consider” are identified in Article 17(2) and (3) when determining unwillingness or inability in a particular case. Although it is mandatory for the Court to examine the factors listed in paragraphs 2 and 3, neither paragraph says that they are an “exclusive” list of factors that should be considered by the Court. In addition, neither paragraph says that a case is inadmissible if all of the factors that must be considered are missing. The

drafters could easily have expressly stated that in making the determination of unwillingness or admissibility the Court “shall determine” that a state is unable and unwilling “only” when one or more of the listed factors is present. They did not. Indeed, the approach in paragraph 2 is the exact opposite of paragraph 1, where the drafters excluded any room for discretion by the Court and directed it to determine that a case was inadmissible when any one of four factors was present (although the scope of one of the four – sufficient gravity – is largely discretionary).

Possibility of an expansive interpretation of the factors. Finally, there is some room for an expansive interpretation of the factors listed in each of the paragraphs. Article 17(2) provides:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice[.]

Several points should be noted about the scope of these factors. First, the term “the national decision” would include an amnesty that precluded a judicial determination of guilt or innocence, the emergence of the truth or full reparations to victims or their families. As Amnesty International has explained elsewhere,⁴ such amnesties for crimes under international law are prohibited by international law. Second, a “national decision” could also include the failure to define the crimes in the ICC Statute

⁴ See, for example, Amnesty International, “Universal Jurisdiction: The Duty of States to Enact and Implement Legislation”, AI Index: IOR 53/002-018/2001, September 2001, ch. 14.

as crimes under national law, with principles of criminal responsibility and defences that are consistent with international law. Such amnesties and failures to enact necessary legislation could also be seen as evidence that the state was unable to investigate or prosecute (see below). Third, the concept of “unjustified delay in the proceedings” must necessarily include the complete absence of criminal proceedings and official statements that an investigation was underway, without any further evidence of such an investigation. Fourth, the concepts of independence, impartiality and manner of conducting proceedings must include proceedings that nominally are continuing, but where the judges are routinely subjected to death threats or murder in cases involving crimes under international law or other serious crimes, such as drug trafficking or organised crime.

Article 17(3) states:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

This paragraph, like the previous one, has, unfortunately, received an extremely restrictive reading. From the perspective of effective interpretation of the ICC Statute, another reading is possible. With regard to collapse, a first point to note is that the requirements under the rule of law are strict, both with respect to the need for competent, independent and impartial courts, and for the conduct of criminal proceedings. Therefore, whether examined from the point of view of the accused, the victim or victim’s family or the international community, it does not take much damage to a criminal justice system before one can speak of a substantial collapse. Second, this factor will be considered in the context of “a particular case”. Therefore, if the national judicial system has collapsed in the region where the crime occurred and the rest of the national judicial system does not have – or cannot exercise – jurisdiction over the crime, this localised collapse should be sufficient to satisfy Article 17(3). There are all too many states where the criminal justice system has ceased to function effectively in a particular region, generally in the context of internal armed conflict.

The concept of substantial unavailability (a natural reading would be that the term “substantial” applies to unavailability so that complete unavailability need not be demonstrated) should not be seen as the ab-

sence of a criminal justice system, but only its unavailability. There are different types of unavailability and collapse. First, the system could be functioning perfectly in a region or the state for the general population, but be unavailable to religious, ethnic or political groups or, on certain issues, women. Second, the system could be functioning perfectly well in a region or in the entire state for all crimes, except the crimes in the ICC Statute. If the state had given amnesties for these crimes that prevented a judicial determination of guilt or innocence, the emergence of the truth or awards of reparations to victims (see below), its courts would be unavailable. If the penal code does not define the crimes with which the accused person is charged by the Court as crimes under national law, it would be impossible to say that the national criminal justice system is available. The examples of the consequence of collapse and unavailability cited in Article 17(3) are relatively broad. If warrants for arrest, subpoenas for the production of evidence or subpoenas to witnesses to appear are not executed in a national criminal justice system that confirms unavailability. Finally, the phrase “or otherwise unable to carry out its proceedings” gives the Court scope to consider a range of other serious flaws in the system.

Inability to provide reparations. One factor that could be considered in determining whether a state was unable or unwilling genuinely to investigate or prosecute is whether it was able and willing to provide reparations to victims, even if that factor alone might not be determinative. This suggestion is likely to be controversial, but there are a number of aspects of this issue that deserve further exploration. In some civil law systems, certain forms of reparations are awarded in the criminal trial itself, so it is perfectly possible to conceive of reparations as an integral part of the new criminal justice system now under construction. Given that Article 75 recognises reparations as a fundamental component of the Court’s work and provides that states are obligated to give effect to Court decisions under Article 75, it would not be unreasonable to consider that states parties, at least, are under a similar obligation to award reparations to victims, whether in the course of a criminal proceeding or otherwise. A number of other related aspects concerning reparations could also be taken into account on the question of inability is whether a state is able to locate, freeze and seize assets and on the question of unwillingness a refusal of a state to locate, freeze and seize assets of suspects and accused.

The exception to the ne bis in idem principle. Article 17(1)(c) provides that a case is inadmissible if a person has already been tried for the

conduct which is the subject of the complaint in the Court when a trial is not permissible under Article 20(3). That provision contains two exceptions to this rule of *ne bis in idem*:

No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

The principle of effective interpretation would suggest that these exceptions should be read broadly to avoid a situation of impunity when national courts fail to fulfil their responsibilities.

17.1.5.4. The Preliminary Question of Admissibility: The Discretionary Factor of Sufficient Gravity

The concept of sufficient gravity can be examined both as an admissibility factor under Article 17(1)(d) and as a separate question under Article 53(1)(c) when deciding whether to investigate, and under Article 53(2)(c) when deciding whether to prosecute. It is not contradictory to suggest that the prosecutor use the final admissibility factor – sufficient gravity – in a restrictive manner in determining which crimes to examine preliminarily or to investigate for pragmatic reasons. An expansive approach to the first three factors could increase the deterrent effect of the Court by encouraging national parliaments and criminal justice systems to take stronger steps to avoid the Court exercising its jurisdiction. However, the prosecutor will never have the resources to examine and investigate all the crimes within the Court’s jurisdiction. In addition, it would be contrary to the fundamental principle of complementarity underlying the ICC Statute, which places primary responsibility on states to investigate and prosecute crimes, if the prosecutor were to try to investigate and prosecute every crime, even if the prosecutor did have immense resources. Therefore, the

concept of sufficient gravity will be a key component of the guidelines for preliminary examination and investigation (discussed below).

17.1.5.5. Developing Guidelines for Determining Whether to Conduct Preliminary Examinations and Investigations

In deciding what are the appropriate guidelines for determining when the prosecutor will conduct preliminary examinations and or investigations of crimes (as opposed to selecting individuals for prosecution, discussed below in section 17.1.7.), the starting point will be considerably different from the starting point of most national prosecutors or investigating judges (where the investigations are prosecution led) or of police (where the investigations are primarily the responsibility of the police acting independently). In most countries, the criminal justice system will attempt to ensure that the majority of most types of crimes in the jurisdiction will be investigated. At the international level, the assumption will be the opposite. Most crimes under international law within the jurisdiction of the ICC will not be investigated by the prosecutor of the Court, even if it is envisaged that under an effective system of complementarity the goal would be to ensure that most crimes not investigated by the international prosecutor would be investigated by national authorities (for suggestions on developing an effective complementarity strategy, see section 17.1.6. below).

Given the above, the prosecutor will need to have clear ideas about the desired caseload, in terms of numbers of crimes, numbers of suspects and accused, and numbers and locations of situations where crimes occur that he or she wants to investigate each year. Once these difficult decisions are made about desired outcomes, various types of guidelines can be developed for deciding when to conduct preliminary examinations and investigations. This threshold issue is separate from the question of which individuals should be selected for prosecution by the prosecutor, as opposed to national authorities (discussed below in section 17.1.7.), the distinction is somewhat artificial, since often potential suspects and accused persons will be known with respect to particular crimes, but the distinction would appear to be a useful rough guide in addressing some of the issues.

For the sake of simplicity, I focus on two possible model outcomes, although there are other possible variations.

The three very large situations model. One model, which I understand some advocate, is for the Court to focus primarily on investigating crimes committed in large situations at the scale of the current situations in the eastern part of the Congo and Colombia, or the past situations in the former Yugoslavia in the 1990s or in Rwanda in 1994, with the Court building its caseload slowly from beginning to investigate one situation of comparable scale in the first year, then two and finally at a maximum level of three such situations at any one time. There is much to be said for this model in terms of logic, simplicity and efficiency. However, experience suggests that it may not be politically feasible to sell such a limited model to the Assembly of States Parties or the general public over the long term, particularly given the unrealistic expectations and pressures the Court will face.

Multiple, variable size situations model. An alternative model that might be politically more acceptable, but more burdensome on the Court, would be to recognise that not every situation is of the same magnitude or equally difficult to investigate. Therefore, under this model, the prosecutor could employ the same resources, investigate fewer crimes and prosecute fewer individuals in the same situations as in the first model, but would be able to act in more, but smaller, situations in different places or regions. Of course, situations, crimes and suspects are not fungible goods, and one cannot simply say that if the prosecutor were to reduce the number of crimes in situation A that are investigated from ten thousand killings to five thousand and the total number of individuals prosecuted from 100 to 50 that the prosecutor could then, shifting these same resources from situation A to two other situations, investigate a total of five thousand other crimes in situations B and C and 50 persons in those two situations. Even apart from the different types of resources that will be needed in each situation, there will be significant start-up and situation overhead costs for each new situation.

However, even if the prosecutor could only investigate, with the same resources that would have been allocated in situation A to five thousand killings and 50 persons, three thousand crimes and 35 persons in the situations B and C, this shift in resources might well make a greater contribution to international justice. These benefits could occur when situations B and C took place in small countries where the total number of crimes was smaller than in situation A and the impact of investigations and prosecutions as a deterrent in both the territorial state and neighbour-

ing states and as a way of helping to create a lasting peace might be greater. Other factors might also be present suggesting such an allocation of resources. Situations B and C might be in different regions of the world or involve victims from different cultures in the same region. It might be easier to investigate and prosecute in situations B and C for a variety of reasons, including the size of the country, the existence of a co-operative successor government, easier access of outsiders to the region where the crimes occurred or better documentation from seized government files, as in Chad, or from international or government truth commissions, as in El Salvador, or non-governmental organisation documentation, as in Chile and Guatemala. Court investigations might have a greater impact on complementary national investigations and prosecutions in the territorial state or in regional arrangements.

Although the following suggested guidelines for preliminary examination and investigation are based on the second model, they could be modified to be used to select situations in the first model. Although the suggested guidelines will require considerable judgment and discretion in their application, it is to be hoped that they would not be susceptible to arbitrary application. To help ensure that the guidelines are applied in a consistent manner, it will be necessary to have in place procedures that require decision-making to take place in a way that minimises the danger that decisions will be taken by the prosecutor on the basis of improper considerations. These improper considerations include widespread press coverage of one situation while others are ignored, public calls by states for investigations of particular situations or incidents (as opposed to formal referrals) or informal approaches by members of the Office of the Prosecutor outside the normal procedures. As stated above, they are designed to be used once the prosecutor has determined: 1) that a crime has been committed; 2) that the crime is within the jurisdiction of the Court; and 3) that states are unable or unwilling to investigate or prosecute the crimes genuinely (of course, these preliminary stages could be incorporated into the guidelines). They are also designed to permit the prosecutor to defend publicly his or her decision to conduct a preliminary examination or investigation or not to do so to victims, their families, the press, the public and the Pre-Trial Chamber. They are simply guidelines and some could be modified or omitted in the light of competing considerations. Indeed, in some instances the individual guidelines could lead to contradictory conclusions. If the approach suggested of publishing such

general guidelines is followed, they could be supplemented by internal guidelines in more detail that would not be public in the same way that the United Kingdom's Code for Crown Prosecutors is supplemented by confidential internal guidelines.

17.1.5.6. Suggested Guidelines for Determining Whether to Conduct a Preliminary Examination or an Investigation

- *The total number of the crimes committed in a particular situation should be on a large scale.* The priority for preliminary examinations or investigations should certainly be situations where there were large numbers of victims of crimes. This is one way to interpret the sufficient gravity factor, both from the point of view of admissibility under Article 17(1)(d) and investigation under Article 53(1)(c). Such a priority would ensure that there were economies of scale in the work of the Office of the Prosecutor and would usually be the easiest choices to justify to international public opinion and the Assembly of States Parties and, if not examined or investigated, the hardest to justify. The limited international outcry that followed the killings of up to half a million ethnic Chinese in Indonesia in the 1960s would probably not occur again.
- The total number of crimes committed has had a major impact on the country, even if they did not reach the scale of other situations. Examples of situations where the number of victims would be relatively small in comparison to other situations, but where the impact was devastating to the countries concerned include Côte d'Ivoire in the past few years (hundreds of murders of civilians and prisoners), Chile between 1973 and 1975 (approximately 3,000 deaths and enforced disappearances and many more cases of torture), Argentina in the 1970s and early 1980s (9,000 to 30,000 enforced disappearances) and Chad in the 1970s (40,000 murders). If the prosecutor were to adopt the first model – a maximum of three situations – it is highly likely that he or she would never investigate such situations. However defensible the first model may be, the prosecutor could face a credibility gap if he or she does not examine and investigate crimes committed in situations of this magnitude or does not have a convincing reason for not doing so.

- The prosecutor is likely to be challenged in particular on the resources analysis by non-governmental organisations and criminal justice experts. For example, lawyers and investigating judges who were involved in putting together the cases against Pinochet in Spain, against Habré in Senegal and Belgium, and in Mali against the former ruler of that country, may well argue that the resources required to investigate a significant portion of the crimes committed by the three former heads of state involved was far less than the resources estimated by the prosecutor (even taking into account translation, transportation and salaries). Others may argue that the main problem in investigating and prosecuting leaders has been the restrictive approach of certain prosecutors and courts to command and superior responsibility and that the Court, with a carefully argued brief by the prosecutor, may decide on a more expansive concept of such responsibility without far too loose approach in the *Yamashita* case. Therefore, if model one is chosen, it will be essential for the prosecutor to be able to document the resources needed carefully. In addition, if model one is chosen, it could be a wise move for the prosecutor to offer to work with other jurisdictions to develop a complementarity policy for those jurisdictions to investigate and prosecute the crimes. Not only would it, to some extent, protect the prosecutor from attack but it would remind the international community that the Court is a key part of the system of international justice, but not the sole place to go.
- It is likely that it will be possible to obtain sufficient evidence about the crimes committed to mount successful prosecutions of those who bear the greatest responsibility, without at this stage focusing on particular suspects. It is likely that the ability to gather evidence about crimes in particular situations will vary greatly and will vary over time, for example when there is a change of government or one side in an armed conflict is defeated. In some situations, there may well be vast amounts of essential intelligence information in a non-territorial state, but that state's current government may not be willing to provide that information to the Court. In other situations, a non-state party where persons who have fled the conflict are located may be unwilling to cooperate with the Court. Such problems may affect only the scope and timing of a preliminary examination or investigation, but they will have to be taken into account in allocating

resources. If all other factors relevant to the decision were equal, the relative degree of difficulties in gathering evidence might be determinative in choosing which situation to examine or investigate first.

- The preliminary examination, investigation and eventual prosecutions would have a catalytic effect, both in the territorial state and in the region, on investigations and prosecutions by other jurisdictions. If all other factors were equal, this complementarity factor could be decisive.
- *There is a possibility that the Security Council will refer the situation to the prosecutor.* If the Security Council is considering a situation under Chapter VII, the mere fact that the prosecutor was conducting a preliminary examination or investigation might well prompt the Security Council to refer the situation to the prosecutor, freeing up resources for other situations and increasing the authority of the prosecutor in obtaining co-operation. While the prosecutor should not let the Security Council set his or her examination or investigation strategy, the Security Council would have many, although not all, of the situations where crimes on a large scale are being committed under Chapter VII scrutiny and it would be prudent to bear that in mind, both when the prosecutor receives information about crimes committed in the territory of a state party or by its nationals and in other situations. In addition, as noted below, the prosecutor has some possibilities for urging, directly or indirectly, the Security Council to make a referral.

17.1.5.7. The Impact of State and Security Council Referrals

In developing the guidelines for selecting crimes for a preliminary examination or investigation, it must, of course, be borne in mind that the prosecutor will not have complete control over his or her docket and that these guidelines will always have to take into account the possibility of state and Security Council referrals that will require substantial adjustments to previously decided strategy. However, even with regard to such referrals, the prosecutor will not be entirely helpless. In most instances, it is likely that the prosecutor will be aware of situations that would be likely candidates for such referrals and may even be approached directly or indirectly by a state contemplating a referral or planning to seek a Security Council

referral, although such contacts may come after annual budgets and strategy for the year have already been determined.

In addition, the prosecutor may well be able to encourage state referrals, publicly or privately, and Security Council referrals (see discussion below in section 17.2.5.2 on relations with the Security Council). The prosecutor could encourage state referrals of specific situations that are under preliminary examination or even investigation as a way of giving greater political weight to an investigation and increasing the pressure on national authorities to co-operate effectively. However, in the early years it may well be better for the prosecutor to proceed cautiously and discreetly to avoid criticism from certain quarters.

Referrals by the territorial state, something few drafters of the ICC Statute and subsequent commentators contemplated, may prove to be particularly valuable. Indeed, one territorial state has already indicated that it may make such a referral in the near future. Of course, it will be essential for the prosecutor not to accept automatically the limits of a situation as referred by a state or the Security Council. First, the prosecutor should, as a general rule, give the broadest possible interpretation to the situation referred. This approach is fully consistent with the intent of the drafters of Article 13(b), who rejected the possibility of the Security Council referring “matters” as too specific for the independence of the Court and replaced it with the current term of a “situation”, thus leaving it to the prosecutor to select cases within a situation for investigation and prosecution. Second, it is entirely possible that states, or even the Security Council, might identify a situation in a particular region of a state, crimes committed by a particular group, or crimes committed in a particular period that intentionally or inadvertently omitted very grave crimes that should be investigated or prosecuted. If the crimes were committed in the territory of a state party or by nationals of a state party, the prosecutor could conduct a preliminary examination or obtain authorisation for an investigation of other crimes, although it might be difficult to do so effectively without the added authority and power of the Security Council. If these omitted grave crimes were in the territory of a non-state party and committed by a national of a non-state party, it would be appropriate for the prosecutor to draw this omission to the attention of the Security Council in the hope that the Council would broaden the referral to include these crimes to avoid the perception of the Court as acting in a manner that was not impartial.

17.1.6. Complementarity Strategy Designed to Ensure Joint International-National Solutions to Impunity

As suggested above in section 17.1.5, in determining which crimes should be preliminarily examined or investigated and in deciding which crimes and individuals should be prosecuted, the prosecutor should consider what the role of national criminal justice systems will be in dealing with the crimes that are not investigated or prosecuted at the international level. Although the prosecutor will not be able to investigate and prosecute every crime within the Court's jurisdiction, the prosecutor's investigation and prosecution strategy should be seen as part of a global partnership in building and operating a new framework of international justice between the Court and national courts, including both courts in territorial states and courts in other states, and possible future regional criminal courts. Indeed, the success of the Court will be measured not only in the number of crimes the prosecutor investigates and prosecutes but also in its catalytic effect on other criminal justice systems, which are more likely to be able to investigate and prosecute much larger numbers of cases and at a much lower cost.

To ensure that this essential aspect of the Court's mission is successful, the prosecutor should have both global and situational anti-impunity complementarity strategies designed to encourage efforts to bring all persons responsible for crimes under international law to justice. What I would hope occurs is that over the course of its first decade the Court would not simply be seen as a passive court of last resort but also be considered as an integral part of an increasingly global framework of justice that will be playing a driving role in shaping and implementing that system.

17.1.6.1. A Global Anti-Impunity Complementarity Strategy

At the global level, the prosecutor should be urging states, whether states parties to the ICC Statute or not, to have effective legislation in place to permit their courts to try persons for crimes under international law, both on the basis of territorial and universal jurisdiction, and to implement it. In addition, the prosecutor should press all states to have effective means to co-operate with the Court and other jurisdictions in the investigation and prosecution of these crimes. These particular points are discussed further in section 17.2. under the relationship between the prosecutor and

states. In order to ensure that an effective global strategy by international, regional and national jurisdictions can be developed and implemented effectively, the prosecutor could encourage non-governmental organisations to produce an annual global impunity survey to identify the gaps, both in terms of preventative measures, such as ratifications, legislation and security force training programmes and regulations, and in terms of the crimes that are not being investigated and prosecuted by international, regional and national jurisdictions.

17.1.6.2. Situational Anti-Impunity Complementarity Strategies

At the situational level, the prosecutor should always have in mind the total impunity problem in each situation. Currently, a great deal of thought is going into development of the guidelines for selecting cases for preliminary examination, investigation and prosecution, but it appears that insufficient thought has been devoted in many quarters to determining what should be done about the crimes that will not be investigated or prosecuted in the Court in a particular situation. If none of those crimes is investigated or prosecuted by other jurisdictions, the Court's initial successes will be undermined. There is a serious risk that it will be begin to be portrayed by revisionists as a political court picking on leaders and perceived as ineffective by the press and general public because of the huge resources being devoted to a relatively small number of individuals.

It would be advisable if the prosecutor, as part of his or her investigation and prosecution strategy for a particular situation, were to mirror the global impunity survey suggested above by beginning with an assessment in each situation of the total crime problem and the number of potential perpetrators. After determining or at the same time as determining in the application of the examination, investigation and prosecution strategy which crimes the prosecutor will address, he or she would work with national authorities and civil society to devise effective criminal justice solutions for the remainder of the crimes that would be developed and implemented in co-operation between the prosecutor and the other jurisdictions. Of course, I am not suggesting that the prosecutor get entangled in such solutions or that the prosecutor provide substantial resources to develop and implement the situational anti-impunity work of the other jurisdictions. These resources must come from both the international community, since the crimes are against the international community, and the territorial states, to the extent possible. Instead, what is being suggested is

that the prosecutor should be a catalyst for such solutions and, to the every possible extent, that the prosecutor and other jurisdictions should not work at cross-purposes. The Office of the Prosecutor of the ICTY has provided the expertise of its staff on a temporary basis to other jurisdictions, including East Timor and Sierra Leone, to assist them in setting up institutions to investigate and prosecute crimes under international law.

Options in situational strategies. In developing situational anti-impunity complementarity strategies a range of options could be explored, including:

- *Rebuilding the criminal justice system in the territorial state.* Even in states where the entire system has collapsed and armed conflict still rages, certain steps can be taken to lay the foundations for rebuilding effective and fair criminal justice systems. The sooner that these steps are undertaken, the better. Given that the crimes have no statute of limitations, the crimes can still be investigated and prosecuted as long as the perpetrators are still alive. As long as the criminal justice system in the territorial state remains incapable of affording prompt and fair trials for crimes under international law, the chances of lasting peace and reconciliation will remain elusive. Such rebuilding efforts should have a realistic schedule for substantial completion, which could be as long as a decade. Had the international community and Rwanda been able to agree on such a judicial reconstruction programme with such a timetable, the cases of all or almost all of the more than 130,000 suspects detained in the past decade would have been completed by now.
- *Exercising universal jurisdiction in countries where suspects are found.* Although universal jurisdiction based on *aut dedere aut judicare* is a useful tool, it will be of limited value since not all states have universal jurisdiction legislation, such legislation varies in effectiveness, only a small percentage of perpetrators travel and it is often difficult to act quickly enough when they are discovered. Moreover, as soon as a state is perceived to have effective legislation that will be implemented, perpetrators will begin avoiding the state.
- Exercising universal jurisdiction by seeking the extradition of persons accused of crimes committed abroad when other states fail to investigate or prosecute. Although two states, Belgium and Spain,

have used this technique, other states have not done so, even when their legislation does not preclude it. In addition, this technique has proved unpopular in both of these states. The Spanish Supreme Court declared – contrary to all the evidence – that international law prohibited such jurisdiction and Belgian appellate courts held that national law did not permit such jurisdiction, although those decisions were overturned by a panel of the Cour de cassation.

- Exercising universal jurisdiction by seeking the extradition of persons accused of crimes committed abroad when other states fail to investigate or prosecute on a shared expense basis or by setting up a regional criminal court. The model of the Europol and Eurojust with respect to multistate investigation, the European prosecutor with respect to financial crime and the Caribbean Community ('CARICOM') Caribbean Court of Justice, with respect to criminal appeals from national courts, all suggest that regional criminal justice systems of co-operation, including the establishment of regional criminal courts, are feasible. This approach appears to be the most promising politically and in terms of effectiveness and one that my organisation has advocated, most recently in the context of the situation in the Côte d'Ivoire.⁵
- *Strengthening regional and international extradition and mutual legal assistance regimes.* One of the main barriers today to effective national anti-impunity efforts is the absence of effective bilateral and multilateral extradition and mutual legal assistance arrangements. For example, despite all the efforts to build new international criminal justice systems in East Timor and Sierra Leone, the failure or inability to negotiate effective extradition and mutual legal assistance arrangements with other states means that arrest warrants and requests for mutual legal assistance cannot be implemented in most countries.

17.1.7. Guidelines for Determining Which Individuals to Prosecute

In determining which individuals the prosecutor intends to prosecute, as opposed to the questions of which crimes should be the subject of a preliminary examination or an investigation, national prosecutorial guide-

⁵ Amnesty International, "Côte d'Ivoire: A Succession of Unpunished Primes", AI Index: IOR 31/007/2003, February 2003.

lines, whether those of civil or common law jurisdictions, will be of limited assistance. As a general rule, national prosecutorial guidelines simply address questions of whether to prosecute particular individuals or not, what charges would be appropriate and what sentences should be sought. Exceptions to this general rule include guidelines applicable to federal prosecutors in deciding whether to assert concurrent jurisdiction over conduct that is criminal both under federal law and under the state, province or territory, or guidelines applicable to military prosecutors in deciding whether to assert concurrent jurisdiction over conduct that is also criminal under civilian law. In contrast, prosecution guidelines for international criminal courts and tribunals will look also at the separate, complementarity question whether the person suspected of the crime should be prosecuted by the prosecutor or by national prosecutors. Thus, when deciding not to prosecute a person suspected of the crime, the prosecutor will have to determine whether that decision means that the person should not be prosecuted by anyone for the crime or simply that the person should be prosecuted by another jurisdiction.

The ICC Statute also provides limited guidance in making these determinations. Article 53(2), which probably applies to all cases, regardless of the trigger for the investigation, although it only mentions investigations based on state or Security Council referrals, provides:

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

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17; or
- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reason for the conclusion.

To ensure that determinations whether a suspect should be prosecuted at all or, if not prosecuted by the prosecutor, prosecuted in another jurisdiction, are made in a fair manner, the prosecutor will have to devel-

op prosecution guidelines that build upon the ICC Statute and draw from national prosecutorial guidelines. The elements of such prosecutorial guidelines could take into account the following illustrative priorities, requirements and exceptions or “interests of justice”:

Priorities:

- The suspect was a commander or superior responsible on the basis of command or superior responsibility.
- The suspect was a principal rather than responsible on an accessory principle of criminal responsibility or the intellectual author of the crime or the instigator of the crime, such as someone who directly and publicly incited genocide.
- The suspect was responsible for a large number of deaths, enforced disappearances, cases of torture, rapes and other crimes of sexual violence or other grave crimes causing severe physical or mental suffering.
- The particular crimes for which the suspect was responsible were widespread or systematic (in a non-technical sense), thus particularly threatening to the international community and the social fabric of the society where they took place. For example, the suspect was the commander of a chain of detention camps where torture or extermination took place.
- If several crimes fit the third or fourth priority, the victims in one or more of the crimes were members of particularly vulnerable groups, such as children and mentally or physically handicapped, but this consideration should be used cautiously since all victims are equally entitled to justice.
- A successful prosecution in the Court would be likely to inspire national authorities in the territorial state or elsewhere to investigate and prosecute others.
- There is no realistic possibility in the foreseeable future that national authorities would prosecute the suspect.

Requirements:

- There is sufficient reliable and admissible evidence available so that there is a realistic chance of securing a conviction. This particular requirement is based on the evidential test in the United Kingdom’s Code for Crown Prosecutors.

- The legal basis for criminal responsibility is reasonably clear, although the prosecutor should not be reluctant to address difficult legal issues.
- It is unlikely that there is a sufficient defence to the charges. (The second and third requirements could also be seen as part of the realistic chance of conviction requirement.)

Exceptions or “interest of justice”:

- The suspect is so old that he or she is unlikely to live to the end of the trial and final judgment, although this situation is likely to be rare and should be considered in the light of the recent successful prosecutions in the Sawaniuk, Touvier, Papon and Preibke cases.
- The suspect is so infirm as to be unfit to stand trial, although this ground must be invoked only when all alternatives, including limits on the hours of the trial, have been considered and rejected.
- In applying the exceptions to prosecutions by anyone listed in Article 53(2)(c), it will be important to bear in mind the Preamble to the ICC Statute. The basic presumption should be that it is always in the interests of justice to prosecute, absent a compelling justification. The two exceptions mentioned, restrictively read, are about the only legitimate ones for crimes in the ICC Statute. National amnesties, pardons and similar measures of impunity that prevent judicial determinations of guilt or innocence, the emergence of the truth and full reparations to victims are contrary to international law and it would not be in the interests of justice for the prosecutor to decline to prosecute on the ground that the suspect had benefited from one of these measures. Traditional interests of justice grounds in national prosecution guidelines for not prosecuting suspects, such as those listed in the United Kingdom’s Code for Crown Prosecutors, are not helpful when considering crimes in the ICC Statute, although none of the public interest factors against prosecution listed would apply to genocide, crimes against humanity or war crimes.

17.1.8. Some General Policy Issues and Other Matters concerning the Conduct of Investigation and Prosecution

There are a huge number of general policy issues concerning the conduct of investigations and prosecutions that could fill a handbook for prosecu-

tors. I simply note here a few miscellaneous points that could be further explored and developed.

17.1.8.1. Challenges to Admissibility and Jurisdiction

The prosecutor should develop an aggressive plan of action to deal with challenges to admissibility and jurisdiction under Articles 18 and 19 of the ICC Statute to prevent the Court from being undermined by deliberate delaying tactics or inefficiency and should urge the Court to take energetic steps to meet this danger. Given that under Article 53(1)(b) the prosecutor will, after a preliminary examination have determined that the case is admissible before opening an investigation, as will have the Court when the prosecutor is acting under Article 15, the presumption in an Article 18(2) challenge must be that the case is admissible. The prosecutor should, therefore, always apply to the Pre-Trial Chamber to authorise an investigation in the face of such a challenge, absent compelling evidence presented by the state making the challenge that it is now investigating or prosecuting the case genuinely. If the Pre-Trial Chamber rules against the prosecutor, and the prosecutor determines that the ruling is improper, the prosecutor should always request an expedited appeal under Article 18(4), unless the prosecutor needs time to gather additional information that could be considered on appeal. When the prosecutor has deferred an investigation, he or she should ask for regular, frequent and detailed reports, perhaps every month, in accordance addressing specific items requested by the prosecutor about the investigation and prosecution, such as evidence gathered, witnesses interviewed, motions by parties and court rulings. The prosecutor should seek to give the concept of “exceptional” in Article 18(6) a broad reading in the interests of justice. The prosecutor should urge the Court to make every effort to consolidate challenges by several states so that successive challenges cannot be used to delay proceedings and to consider on a summary basis subsequent challenges by the same or different states that do not present compelling new evidence.

The prosecutor should also urge the Pre-Trial Chamber to apply the Rules of Procedure and Evidence governing proceedings pursuant to Articles 18 and 19 in a way that will ensure speedy determinations of challenges and a broad reading of the steps that can be taken to preserve evidence under both articles. Prosecution strategy should seek to have as many investigative steps under way as possible so that Article 19(8) can be used to protect the inquiry pending the outcome of any admissibility or

jurisdictional challenges. In certain cases, where the prosecutor is fully confident that the Court has jurisdiction and the case is admissible, he or she might invoke Article 19(1) at an early stage to obtain favourable rulings on these questions that would make it more difficult for a state to challenge jurisdiction and admissibility at a later date.

17.1.8.2. Powers and Duties

The scope of the prosecutor's powers and duties under Article 54 deserve a book and has been extensively covered in commentaries. I will simply note here that it will be essential for the Code of Conduct and practice directives to instil a basic respect among all staff for the right to fair trial, taking into account not only the express provisions of the ICC Statute but also other international law and standards, as well as jurisprudence and interpretation by relevant treaty bodies and United Nations Special Procedures. A similar effort, discussed below, should be undertaken to ensure due respect for the interests and rights of victims.

17.1.9. Sentencing Guidelines

It will be important to develop and articulate prosecutor's guidelines for seeking sentences that the prosecutor wishes the Trial Chamber to adopt as Trial Chamber sentencing guidelines and the Appeals Chamber to uphold. Neither Articles 77(1) nor 78 of the ICC Statute nor the detailed Rule 145 of the Rules of Procedure and Evidence provide sufficient guidance to the prosecutor, the defence or the Trial Chamber to predict with any certainty the number of years of a sentence for particular crimes.

17.1.10. Guidelines for Appeals

No attempt will be made here to try to articulate detailed guidelines for determining whether to appeal an interlocutory order, a conviction or a sentence. Nevertheless, I will suggest a few straightforward principles that might be incorporated in any guidelines for such determinations and discuss a few policy issues.

17.1.10.1. Some General Points about Deciding Whether to Appeal

There is a natural impulse among prosecutors to appeal every adverse ruling on every legal issue. As representatives of the public, they have a responsibility to defend its interests vigorously and will sometimes feel that if

they fail to appeal everything, particularly in the first cases, they will be criticised as betraying the public trust. Such feelings will only be accentuated at the Court, which acts on behalf of the entire international community.

Nevertheless, it may well better serve the public interest to take a somewhat selective, strategic approach over the long run. The Appeals Chamber will welcome such an approach and, if it is not taken, it may well develop techniques, such as summary disposition of certain appeals or other types of sanctions to deal with the workload. It may also pay not to exasperate the Appeals Chamber by failing to focus on key issues. If every conceivable adverse ruling is challenged, energy will be expended on marginal issues to the detriment of the most important ones. Sometimes the positions that are advocated by the prosecutor may simply be incorrect or unwise. In the early years, it may make sense to appeal more issues when so much is new, but over the long run, selectivity is probably a better policy likely to give the prosecutor greater credibility with the Appeals Chamber. Second, it may be better to forgo an appeal in one case of an issue where it is better presented in another case. Judges are human beings and rulings on legal issues may well be influenced – consciously or unconsciously – by the particular facts of the case or even by a desire not to rule always in the prosecution’s favour. Although the bad precedent will stand for the Pre-Trial Chamber or Trial Chamber concerned if it is not appealed, the Appeals Chamber will not yet have ruled and as the number of Pre-Trial and Trial Chambers increase, there will be chances to get better rulings at this level before going to the Appeals Chamber.

17.1.10.2. Appeals of Acquittals

First, Amnesty International strongly opposed giving the prosecutor the right to appeal an acquittal as opposed to the right to appeal the legal rulings in a judgment of acquittal without adverse effects on the acquitted person. Permitting such an appeal of an acquittal is inconsistent with the prohibition of *ne bis in idem* and that the interest of the international community in justice could be adequately addressed by permitting an appeal on a point of law only, as is the practice in certain countries, such as the United Kingdom. If the prosecutor avails himself or herself of Article 81(1)(a) to challenge an acquittal, he or she will limit the relief sought to a ruling that the Trial Chamber referred as a matter of law and should not make such rulings in the future. Such a request is fully consistent with the ICC Statute since Article 83(2) and Rule 158(1) of the Rules of Procedure

and Evidence give the Appeals Chamber a range of options if it finds that the decision appealed from was materially affected by error of fact or law or procedural error. It is not required to order a new trial under Article 83(2)(b), but it may simply amend the decision under Article 83(2)(a).

To the extent that the prosecutor seeks to overturn acquittals, the public is likely to perceive the process as unfair and one in which the prosecutor could endlessly try an individual again and again in the hope of securing a conviction, even if the resource implications and the burden on victims and witnesses would minimise or preclude this danger. Assuming that prosecutor declines to follow this advice, it will still be necessary to develop guidelines for appealing an acquittal and for countering this public perception of unfairness. Such guidelines could be similar to the factors listed in Article 84(1)(b) concerning revision and could include the introduction of forged evidence or perjured testimony that was crucial to the acquittal and improper conduct by a judge, all of which undermined the integrity of the proceedings so much that they no longer deserved to be considered a real trial.

Second, although I have personal reservations based on the same considerations as those that underlie the *ne bis in idem* prohibition about the ability of the prosecutor to appeal a sentence that is seen to be disproportionate to the crime, this view is not widely shared. However, it will be important to develop and articulate prosecutor's guidelines for seeking sentences that the prosecutor wishes the Trial Chamber to adopt as Trial Chamber sentencing guidelines and the Appeals Chamber to uphold. As noted above, neither Articles 77(1) and 78 of the ICC Statute, nor the detailed Rule 145 of the Rules of Procedure and Evidence, provide sufficient guidance to the prosecutor, the defence or the Trial Chamber to predict with any certainty the number of years of a sentence for particular crimes. Assuming that Trial Chamber sentencing guidelines are developed, the prosecutor will have to establish internal guidelines for appealing sentences, since a minor deviation would probably not merit an appeal of the sentence.

17.1.11. The Approach to Revision of Conviction or Sentence

The grounds for seeking revision of a conviction or sentence identified in Article 84 of the ICC Statute are relatively straightforward. However, it will be important for the prosecutor to instil a culture in the Office of the Prosecutor in the Code of Conduct and in practice that not only ensures

prompt and impartial responses to requests for revision in line with the prosecutor's powers under paragraph 1 of that article and the prosecutor's duties under Article 54(1)(a), but also ensures that all staff of the Office of the Prosecutor remain alert to any information that comes to their attention at any time that could conceivably form the grounds for revision of a conviction or a sentence. The prosecutor should ensure that any such information is brought promptly to the attention of the convicted person, his or her counsel and the Appeals Chamber. Instituting and enforcing such a policy will not only ensure that justice is done but be seen to be done. The approach suggested will also strengthen the credibility of the Office of the Prosecutor as a fair and an impartial body.

17.1.12. Compensation to an Arrested or Convicted Person

The Prosecutor should develop internal guidelines supplementing Rules 173 to 175 of the Rules of Procedure and Evidence to define the exceptional circumstances when the Court should award compensation when there has been a grave and manifest miscarriage of justice. There should be a presumption that compensation would be awarded in all cases, absent some extraordinary factors, such as the sole responsibility of the arrested or convicted person for his or her plight (of course, this would not include a false confession made as the result of torture or ill treatment). Although the decision whether to award compensation will be that of the Chamber designated by the Presidency, the prosecutor should propose compensation guidelines to the Presidency and the other judges long before any such situation arises so that the prosecutor's approach to this question when it arises will be seen as entirely neutral.

Such compensation guidelines should address the question of grave and manifest miscarriages of justice that were the result of conduct of state authorities. Whether it is within the power of the Court to require states to award compensation is not entirely clear, but it would certainly be desirable if the Court had such power. Otherwise the person might be without any redress.

17.1.13. Other Issues

1. Policy with respect to seeking a Security Council or state referral of a situation. This question is discussed below in section 17.2.5.2.

2. Policy with respect to requests by the Security Council for a deferral of investigations or prosecutions. This question is discussed below in section 17.2.5.2.
3. Policy with respect to ratification and implementation of the Rome Statute and the Agreement on Privileges and Immunities of the International Criminal Court. This question is discussed below in section 17.2.4.2 and 7.

17.2. External Relations of the Office of the Prosecutor

The Office of the Prosecutor will face challenges and opportunities in external relations with the other organs of the Court; the Assembly of States Parties and its Committee of Budget and Finance; the Trust Fund for Victims; states, including the host state, other states parties, states that have made a declaration pursuant to Article 12(3), states that have signed the ICC Statute, states that are formally co-operating with the Court and other states; the United Nations, in particular, the Security Council; other inter-governmental organisations; defence counsel and the International Criminal Bar; and civil society, including victims and their families, lawyers for victims, witnesses and their lawyers (if they are represented); international and national non-governmental organisations; independent experts and academic institutions; the press; and the general public. The following overview looks both at some of these interlocutors and at particular issues, such as Security Council resolution 1422 and impunity agreements being signed with the United States.

17.2.1. Other Organs and Components of the Court

17.2.1.1. Presidency and President

There are many issues facing the prosecutor in which Presidency and the president will also play an important role. However, it will be essential for the prosecutor, on the one side, and the Presidency and the president, on the other, to respect each other's independence and to ensure that there is no appearance of improper contacts.

Although the Presidency is responsible under Article 38(3)(a) of the ICC Statute for “[t]he proper administration of the Court, with the exception of the Office of the Prosecutor”, Article 38(4) provides that “in discharging its responsibility under paragraph 3(a), the Presidency shall co-

ordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern”. In addition to the administration of the Court, the Presidency has a number of other functions under the Statute that will necessarily be of interest to the prosecutor and it will be desirable to consult with the Presidency. These include proposing an increase in the number of Court judges (Article 36(2)(a)); proposing a reduction in that number (Article 36(2)(c)(ii)); concurring with the prosecutor and registrar with regard to proposal of staff regulations; setting up of Trial Chambers (Article 61(11)); and determining whether it is necessary to nominate alternative judges (Article 74(1)).

There are also a number of responsibilities of the president under the Statute and supplementary instruments where consultation with the prosecutor would be useful. These include addressing the Security Council pursuant to Article 4(2) of the Relationship Agreement.

17.2.1.2. Other Judges

Although there are a number of responsibilities assigned to the president or to the Presidency under the ICC Statute and supplementary instruments, it is unlikely that either will take particularly important decisions without close consultation with the other judges. There are also numerous activities of interest to the prosecutor, where all the judges are likely to be involved, such as the drafting pursuant to Article 51(1)(b) of the ICC Statute of proposed amendments to the Rules of Procedure and Evidence (other than proposals by the prosecutor under paragraph 1(c) of Article 51); the drafting of the Regulations of the Court pursuant to Article 52, which requires consultation with the prosecutor; the drafting of the Headquarters Agreement; the drafting of certain supplementary agreements to the Relationship Agreement; preparation of the draft budget; and the selection of the permanent site for the seat of the Court and the design of the buildings. Therefore, the prosecutor will need to develop a forum for regular dialogue with the judges with regard to such matters that are also of concern to the prosecutor that fully respects both the formal role of the president and the Presidency and the independence of all concerned.

There are also numerous places in the Statute and in supplementary instruments where the term “Court” is used where it is not clear which organ of the Court is meant or whether the concurrence of all the organs is required, for example, with regard to reporting to the Security Council pursuant to Article 6 of the Relationship Agreement. In order to minimise

confusion and potential tensions with the rest of the Court, it would be useful to discuss these provisions first with the judges (and the registrar) to seek to clarify these questions ahead of time.

17.2.1.3. Registry

There are several areas in the relationship between the prosecutor and the Registry that will be of particular importance, including: common administration matters, preparation of the budget, victims, defence counsel, court management, the detention unit and the library. Here, I simply discuss a number of points relevant to the first three.

Common administration. Although the Registry will play a significantly more reduced role in the work of the prosecutor than the Registries of the ICTY and ICTR do with the prosecutor of those two tribunals, the Registry will still perform certain common administrative functions for reasons of economies of scale and convenience, to be determined in consultation with the prosecutor. It will be important to reach agreement on these common administrative tasks, even if only on a temporary basis, at the earliest possible stage. It will also be important to build a good working relationship with the Registrar from the very start to avoid some of the problems that have existed in the ICTY and ICTR. It will be important, however, to recognise that the Registry will be significantly different from the Registries of the two tribunals and to build long-standing institutional relationships that will not depend unduly on the individuals holding posts in the Office of the Prosecutor and the Registry.

Preparation of the budgets. Some of the most important contacts with the Registry will be with respect to the preparation of the programme budget, prepared by the Registrar under Regulation 3 and Rule 103(2) of the Financial Regulations and Rules in consultation with other organs of the Court, as well as in preparation of supplementary budgets pursuant to Regulation 3(6) and maintaining regular contact over unexpected increases in expenditures and shortfalls in paid assessments. Although the current process of drafting a budget reflecting the probable concerns of the future Office of the Prosecutor by the Division of Common Services appears to be working well, the procedure envisaged in Regulation 3 and Rule 103(2) is not satisfactory on paper, even though Regulation 1(4) seeks to provide an appropriate balance between the registrar and the prosecutor. It remains to be seen whether it will work smoothly when both the prosecutor and the registrar are in post and steps have been taken pursuant to Rule

101(1)(b) to establish appropriate institutional arrangements between the registrar and the Office of the Prosecutor.

Victims. Many of the contacts with the Registry will be with regard to issues related to victims and witnesses, primarily with the Victims and Witnesses Unit and the Victims Participation and Reparations Unit. Some of the issues regarding victims are mentioned below in section 17.2.8.1., but most of these issues are covered in more detail in the paper produced by the Victims' Rights Working Group after its December 2002 meeting at Amnesty International's International Secretariat in London, so there is no point repeating all of them in this chapter. The most important point is that the prosecutor should have one or more persons in the Office of the Prosecutor with the overall responsibility to deal with the full range of victims' issues. Some of the other suggestions with regard to the role of the prosecutor with regard to victims include the following:

- *Establishing a respectful and compassionate attitude towards victims.* In nearly all cases, investigators from the Office of the Prosecutor will be the first Court representatives to meet directly with victims and their families. From that point on, the Office of the Prosecutor will have contact with victims in a variety of roles – as victims of horrific crimes, as relatives of victims, as witnesses and as persons seeking reparations. The Office of the Prosecutor will also have contact with legal and other representatives of victims in relation to specific cases. To a large extent, the Office of the Prosecutor will be dependent on victims to conduct effective investigations and prosecutions. Therefore, from the outset, it will be essential for the Office of the Prosecutor to present itself as respectful and compassionate to victims. This approach should be addressed both in the Code of Conduct and practice directives to staff.
- *Establishing an effective training program.* One of the first priorities for the prosecutor will be to establish an effective training programme for all Office of the Prosecutor staff on dealing with victims as well as specific and focused training for designated staff, such as investigators. Since the budget for the first financial period does not expressly include funding for training, the prosecutor should seek voluntary external and internal experts to organise initial training. In particular, the prosecutor should work with the Victims and Witnesses Unit, which is mandated under Rule 17(1)(a)(iv) of the Rules of Procedure and Evidence to provide

training to all Court staff in issues of trauma, sexual violence, security and confidentiality. The prosecutor should include sufficient funding for expanded training on working with victims for all Office of the Prosecutor staff in the budget for the second financial period.

- *Appointment of special advisers.* It is also essential, as provided in Article 42(9) of the ICC Statute and anticipated in paragraph 50 of the budget for the first financial period, that the prosecutor appoint advisers with legal and practical expertise on particular issues, including, but not limited to, sexual and gender violence and violence against children. The immediate appointment of such advisers is justified as they will have an important role to play in advising and training members of the Office of the Prosecutor and in developing prosecution strategy regarding these issues. They may also be needed to accompany investigation teams to provide them with field assistance and supervision in the first preliminary examinations and investigations, as well as to work with the trial preparation teams.
- *Role of investigators in first contacts with victims.* As investigators are likely to have the first contacts with victims, the prosecutor should consider what should be the role of those investigators in addition to traditional investigation. In particular, the prosecutor, in consultation with the registrar, the Victims and Witnesses Unit and the Victims Participation and Reparations Unit, should consider mandating investigators to provide victims with information in their own language about the Court, security arrangements and the role of the victims in the Court. Materials are being developed by the Court for reparations applications and other materials are likely to be prepared in the near future. While providing such materials to the victims is not directly the role of the Office of the Prosecutor, it is a relatively simple task that will facilitate the work of the Office of the Prosecutor by encouraging victims and their families to cooperate.
- *Security for victims that have been in contact with Office of the Prosecutor staff.* The prosecutor, together with the Victims and Witnesses Unit, before any preliminary examination in the field or investigation should conduct a security analysis and establish procedures for each situation to ensure effective protection for victims, their families, witnesses and others who are in contact with the Of-

office of the Prosecutor and may face threats based on contact with investigators. Each situation will require a somewhat different approach, which may need to be regularly readjusted in the light of circumstances, including the level of co-operation and effectiveness of protection that can be provided by national authorities.

- *Measures to avoid retraumatisation or further traumatisation of victims.* The prosecutor should make every effort to ensure against the retraumatisation of victims at all stages of the proceedings. For victims appearing before the Court, the prosecutor will obviously obtain substantial assistance from the Victims and Witnesses Unit. However, it is not yet clear what support this unit will be able to provide to the Office of the Prosecutor away from the seat of the Court. As well as training mentioned above, effective practices need to be developed to address this problem.
- *Measures to avoid traumatisation of Office of the Prosecutor staff.* Office of the Prosecutor staff, in particular those who take part in investigations, are at some risk of traumatisation from their work. Procedures, including monitoring of staff and counselling, must be set up within the Office of the Prosecutor to minimise this risk and to provide effective and continuing treatment, where necessary, to staff.

17.2.2. The Assembly of States Parties, Its Bureau and the Committee on the Budget and Finance

The prosecutor or representatives of the prosecutor under Rule 34 of the Rules of Procedure of the Assembly of States Parties “may participate, as appropriate, in meetings of the Assembly and the Bureau in accordance with the provisions of these Rules and may make oral or written statements and provide information on any question under consideration”. Needless to say, the prosecutor should take full advantage of this right to ensure that the Assembly has a thorough understanding of the issues from the point of view of the prosecutor, as well as a clear idea of the prosecutor’s long-term policy and prosecution strategy. The outline of such policy and prosecution strategy will need to be conveyed to the second session of the Assembly of States Parties in September 2003.

17.2.3. The Trust Fund for Victims

Although the prosecutor does not have a formal link to the Trust Fund for Victims, it will be useful for the prosecutor to be in regular contact with the Trust Fund from the earliest stages of establishment of the fund.

The scope of the work of the Trust Fund for Victims and its degree of independence from the Court remain to be decided by the Assembly of States Parties. However, the prosecutor should consider the impact of an effective Trust Fund for Victims on the Court. For example, a Trust Fund for Victims with sufficient resources that could meet the shortfall of Court reparations orders will increase the perception of the Court as an effective institution and the willingness of victims and their families to co-operate with the prosecutor. Furthermore, if mandated to do so, the Trust Fund for Victims may provide assistance to those victims of crimes committed in a situation that has been investigated by the prosecutor where the person suspected of those particular crimes is not prosecuted. These considerations should be taken into account by the prosecutor when deciding whether to support applications by victims or their families or to make his or her own application for co-operation and protective measures for the purpose of forfeiture under Rule 99(1) of the Rules of Procedure and Evidence.

17.2.4. States

The prosecutor is likely to have contact with all or almost all states at one time or another. The nature of that contact will vary, depending on such factors as whether that state is the host state, another state that has ratified the ICC Statute, a state that has made a declaration under Article 12(3), a signatory of the ICC Statute, a state that is co-operating the Court pursuant to Article 87(5), a state that has not yet ratified the Agreement on Privileges and Immunities, a state that is not a party to the ICC Statute or a state that has signed an impunity agreement with the United States. The following discussion focuses on the content of any contacts, but the prosecutor will have to devise a variety of effective ways of raising these issues, depending on the issues and the states concerned, in meetings with embassy officials in The Hague, meetings with government officials when travelling, phone calls, correspondence and public documents.

17.2.4.1. The Host State

The Court will have to face a number of issues with regard to the host state, many of which will be of concern to the prosecutor, including arrangements for the current headquarters and detention facilities, the design and location of the permanent headquarters building if the Court stays in The Hague and drafting the Headquarters Agreement. Many of these issues have been or are being addressed in papers issued by the Coalition for the International Criminal Court Secretariat in detail, so I will not repeat the points made elsewhere.

Dealing with the host state will require close co-operation with the other organs of the Court and, on certain issues, such as the text of the Headquarters Agreement and the location of the permanent seat of the Court, the Assembly of States Parties. Consultation with non-governmental organisations will also be advisable to ensure that these valuable sources of information and advice will be able to operate effectively in the host state.

17.2.4.2. Other States That Have Ratified the ICC Statute

This is a particularly broad topic, but I will simply note here that it is essential for the Office of the Prosecutor to maintain and strengthen the work now being done in the Division of Common Services on compiling and monitoring the drafting and enactment of legislation to implement the ICC Statute. Regardless where in the Court this work is conducted after the prosecutor takes office, the prosecutor should take a leading role in addressing the question of implementation of the ICC Statute.

An active role for the prosecutor on implementation. In particular, the prosecutor will need to urge states that have not yet enacted comprehensive implementing legislation to fulfil their complementarity and co-operation responsibilities to do so as soon as possible. The prosecutor should work to develop temporary agreements on co-operation pending enactment of implementing legislation and supplementary agreements to address gaps or ambiguities in implementing legislation. In pressing for implementing legislation, the prosecutor should work closely with other organs of the Court, the Assembly of States Parties and non-governmental organisations to maximise impact and minimise duplication of effort. It will also be crucial for the prosecutor to identify problems that are emerg-

ing in draft and enacted legislation regarding both complementarity and co-operation obligations.

Co-operation with Amnesty International and other members of the Coalition for the International Criminal Court. Amnesty International has made enactment and implementation of effective implementing legislation a priority since Rome and its International Justice Project has published a paper in a number of languages (including English, Arabic, French, Spanish and Portuguese) outlining obligations of states parties under the ICC Statute and other international law, as well as suggesting other steps to make the Court effective.⁶ It has sent copies of this paper to government officials in all states and it has distributed it widely among other non-governmental organisations to use in lobbying. The organisation has embarked upon an ambitious programme of commenting on draft and enacted implementing legislation and provides information about this effort on a regular basis to the Division of Common Services. It has been urging states to contact the Director of Common Services for advice in drafting legislation and non-governmental organisations to invite representatives of the International Criminal Court to conferences on implementation. Other non-governmental organisations in the Coalition for the International Criminal Court have been involved in similar efforts. It will be particularly important for the prosecutor to be in close contact with non-governmental organisations that are involved in lobbying states to enact effective implementing legislation and to participate in conferences on this subject. The International Justice Project will look forward to coordinating efforts by Amnesty International with the Office of the Prosecutor in ensuring that states enact the most effective implementing legislation possible.

17.2.4.3. States That Have Made a Declaration under Article 12(3)

States that have made a declaration under Article 12(3) accepting the exercise by the Court of jurisdiction over crimes will be in a similar situation as state parties. Like them, states making such a declaration will need to enact implementing legislation or enter into agreements to co-operate without any delay or exception in accordance with Part 9 of the ICC Statute. These agreements would need to be made in accordance with Article

⁶ Amnesty International, “International Criminal Court: Checklist for Effective Implementation”, AI Index: IOR 40/15/00, July 2000.

87(5) and entail all the consequences provided for in that provision. The prosecutor will almost certainly wish to be consulted in the drafting of such agreements and may wish to develop model agreements in advance (see discussion below in section 17.2.4.6.). It will be important to emphasise to those states the need for implementing legislation since agreements may well be insufficient in national law to permit full police and judicial co-operation.

17.2.4.4. States That Have Signed the ICC Statute

As of 25 March 2003, there were 40 states that had signed the ICC Statute, but not ratified it. Although 38 of these states are bound under international law not to do anything to defeat the object and purpose of the Statute pending a decision whether to ratify it, implementing legislation will be needed when they ratify the Statute. The prosecutor will wish to urge those states to speed up ratification of the Statute and to offer advice with regard to drafting implementing legislation so that work on such legislation can begin before ratification. The special situation of the two signatory states that have since repudiated their signatures is discussed below in section 17.2.4.5.).

17.2.4.5. States That Have Repudiated Their Signatures of the ICC Statute

Two states, the United States and Israel, have repudiated their signatures of the ICC Statute. Although the United States has campaigned to prevent the Court from exercising jurisdiction over its nationals through bilateral impunity agreements and for the Security Council to adopt resolution 1422, it would be a mistake to think that even under the current US administration some co-operation would be impossible.

First, the American Service-Members' Protection Act expressly permits co-operation with the Court when it is investigating and prosecuting non-US nationals. Second, there may well be a range of situations not involving US nationals as potential accused persons where the United States would not veto a referral to the Court sought by one or more other permanent members of the Security Council. Indeed, as the recent statement by Marc Grossman suggests, the United States may even support the use of the Court to investigate and prosecute persons from certain states. There may well be situations involving governments perceived as hostile

to the United States where elements of the American electorate on the right might call for the Court to act. It should always be borne in mind that despite the lukewarm support of the previous administration and the hostility of the current administration to the Court, polls demonstrate that there is fairly strong support for the Court among the American public. Although the impact of recent events remains to be seen, it would be unwise for the prosecutor and the Court to assume that there are no possibilities for co-operation with the United States in the coming decade or in future decades.

Nevertheless, the US role in pressing states to sign impunity agreements and its likely attempt to persuade the Security Council to renew the request in resolution 1422 will pose serious problems for the Court. Although there is little that the prosecutor can do in the short term to convince the current administration to desist from these efforts, over the long term, the prosecutor's policy, prosecution strategy and reputation for professionalism, independence and impartiality will begin to have an impact on the American public and reduce the irrational fears of the prosecutor and the Court. It would be better to focus the prosecutor's efforts to counter these threats on other states. To the extent that the prosecutor does decide to engage the current administration in a dialogue on these issues, it will be extremely important not to fall into the trap of doing so on its terms. For example, instead of saying, as some defenders of the Court now do, that no US national will ever come before the Court, it would be better to emphasise the prosecutor's prosecution strategy, so that the general public will quickly draw its own conclusions that unless the United States plans to commit genocide, crimes against humanity or war crimes on a considerable scale, US nationals are likely to be investigated and prosecuted for such crimes only in national courts.

Second, instead of saying that US courts now can conduct fair trials, so there will be no possibility that the Court would ever find a case involving a US national admissible, it would be better to say that if the United States provides that crimes in the ICC Statute are defined as crimes in US law, with principles of criminal responsibility and defences that are consistent with international law, and it conducts prompt, thorough, independent and impartial investigations and trials of persons suspected of these crimes that are consistent with international law and standards, there is no chance that the prosecutor would consider investigating or prosecuting crimes committed by US nationals. By doing so, the

prosecutor will not give up the important catalytic role of pressing states to enact effective legislation and to investigate and prosecute such crimes. It would be wise not to go beyond generalities such as that the prosecutor has every confidence that should any US national be suspected of such crimes that it would investigate and, if there is sufficient admissible evidence, prosecute. This course is advisable since the United States does not have the necessary legislation in place, its record of investigating such crimes by its own nationals is uneven and its procedures for investigating and prosecuting some of these crimes, such as by military commission, do not satisfy contemporary international law and standards for fair trial.

17.2.4.6. States That Are Co-operating with the Court under Article 87(5)

As far as I am aware, no state has yet entered into an Article 87(5) agreement with the Court. The prosecutor will almost certainly wish to be consulted in the drafting of such agreements and may wish to develop model agreements in advance. It will be important to emphasise to those states the need for implementing legislation since agreements may well be insufficient in national law to permit full police and judicial co-operation.

17.2.4.7. States That Have Not yet Ratified the Agreement on Privileges and Immunities

As of 25 March 2003, only two states had ratified the Agreement on Privileges and Immunities of the Court of the 25 states that had signed it. I need not emphasise how important it will be to make signature, ratification and implementation of the Agreement a priority to ensure that the Office of the Prosecutor can operate effectively outside the host state. I would just make the following points.

First, it is important to press for prompt ratification to ensure that the Agreement enters into force as soon as possible. Second, officials and staff of the Court will have to operate or travel through most states at some point and will require the protection provided by the Agreement in certain states immediately.

Third, since ratification of the Agreement is likely to take some time, the prosecutor and the rest of the Court should seek to obtain as many signatures as possible as rapidly as possible. A large number of signatures is important for at least two reasons. It demonstrates broad com-

mitment to making the Court an effective institution. It also obliges states that have signed the Agreement not to take any steps that would defeat the object and purpose of the Agreement pending a decision on ratification. Since most serious infringements of the Agreement, such as arresting investigators or seizing correspondence or evidence, would defeat the object and purpose of the Agreement, signatures would give the Office of the Prosecutor at least some protection pending ratification.

Fourth, it is important to press for the prompt enactment of effective implementing legislation for states that ratify the Agreement. The prosecutor should review any non-governmental organisation checklists and guides to determine if they will provide appropriate guidance to states in drafting implementing legislation.

Fifth, given the lengthy time for ratification, interim solutions need to be developed, such as memoranda of understanding with states. As with implementation legislation for the ICC Statute, such memoranda of understanding could address gaps and problems in the Agreement, such as provisions concerning telecommunications.

17.2.4.8. States That Have Signed US Impunity Agreements

As of 25 March 2003, 24 states were known to have signed impunity agreements with the United States under which they agree not to surrender US nationals and certain other persons to the Court. For the reasons explained in detail in Amnesty International's papers, "International Criminal Court: U.S. Efforts to Obtain Impunity for Genocide, Crimes against Humanity and War Crimes"⁷ and "International Criminal Court: The Need for the European Union to Take More Effective Steps to Prevent Members from Signing US Impunity Agreements",⁸ such agreements are contrary to the ICC Statute. Not a single one of these agreements has been ratified by a parliament. However, in a number of states, ratification of international agreements by parliament is not necessary, although it may be possible in some states for parliament to negate such agreements by subsequent legislation. It is to be hoped that the prosecutor will make

⁷ Amnesty International, "International Criminal Court: U.S. Efforts to Obtain Impunity for Genocide, Crimes against Humanity and War Crimes", AI Index: IOR 40/025/2002, September 2002.

⁸ Amnesty International, "International Criminal Court: The Need for the European Union to Take More Effective Steps to Prevent Members from Signing US Impunity Agreements", AI Index: IOR 40/030/2002, October 2002.

clear that such agreements are contrary to the ICC Statute and that the prosecutor will still seek the surrender of an accused even if that person happened to be covered by an impunity agreement, leaving the legal status of the agreement to the appropriate Chambers to decide.

17.2.4.9. All, or Nearly All, States

There are a number of issues that the prosecutor may wish to raise with all, or nearly all, states, including US impunity agreements (where the state has not signed one), renewal of the request in Security Council resolution 1422 (discussed below in section 17.2.2.2.) and the acceptance of sentenced persons. Under Article 103 of the ICC Statute, any state may be designated as a state willing to accept persons sentenced by the Court. The number of states that have agreed to accept persons sentenced by the ICTY and ICTR has been disappointingly small, despite major efforts by those two tribunals to persuade states to do so. Similarly, only a limited number of states parties so far have indicated a willingness to accept sentenced persons. It will be important for the Court to have persons serving sentences in a variety of regions in the world to demonstrate its global nature, but it will also be important to try to ensure that persons serve their sentences, where possible, in places that are accessible to their families. It will be important for the prosecutor to work together with the Presidency, the registrar and the Assembly of States Parties to devise an effective strategy to encourage a large number of states to accept sentenced persons.

17.2.5. The United Nations

The prosecutor is likely to have contact, directly or indirectly, with a number of United Nations organs and subsidiary bodies, including the secretary-general, the Security Council, the General Assembly, the High Commissioner for Human Rights, the Commission on Human Rights and its Special Procedures and treaty bodies for which the United Nations acts as secretariat. In addition, peacekeepers in United Nations operations may well have contact with the Court as witnesses or accused. Many of the contacts between the United Nations and the Court will be governed by the Relationship Agreement between the Court and the United Nations. It may be useful to have one or more persons in the Office of the Prosecutor assume responsibility for oversight of the overall relations with the United Nations to ensure that there is a degree of consistency in approach and

that common problems can be addressed in an appropriate and timely manner.

17.2.5.1. The Secretary-General

The secretary-general will play two important roles with respect to the Court, both of which will be of interest to the prosecutor. First, the secretary-general can be an effective supporter of the Court. Second, the secretary-general has a number of responsibilities under the Relationship Agreement.

Supporting role. The current secretary-general has been a strong supporter of the International Criminal Court since he first took office. He has encouraged the work of the Preparatory Committee, the Diplomatic Conference, the Preparatory Commission and the Assembly of States Parties. He was present in Rome at the close of the Diplomatic Conference, spoke on the occasion of the sixtieth ratification and the entry into force of the ICC Statute, defended the Court against threats to its independence on 3 July 2002, and attended the inauguration of the first 18 judges. It would be a wise move for the prosecutor, as well as for the president of the Court, to keep the current secretary-general, as well as his successors, regularly informed, publicly or privately, of developments and potential threats to the Court's independence. Indeed, it would be useful for the prosecutor to ensure that all persons who are likely to be in the running to succeed the current secretary-general are informed of the work of the Office of the Prosecutor to assist them in understanding the importance of that work for the United Nations. Some of those likely to put themselves forward for this position do not have the same enthusiasm for or understanding of the Court or its importance and do not have the same eloquence.

Role under the Relationship Agreement. Under the ICC Statute and the Relationship Agreement, the secretary-general will play an important role in a number of respects with the Court, some of which will be directly relevant to the prosecutor, although in most instances they will not be nearly as important as the role of the secretary-general as supporter and defender of the Court and the role of the United Nations Secretariat, in particular, the Office of Legal Affairs. In a number of cases, the role is simply a ministerial one of transmitting or receiving information or decisions by others, with little or no discretion. The following overview of relations between the secretary-general, the Secretariat and other components of the United Nations, on the one hand, and the prosecutor, on the

other, is based on the somewhat artificial divisions of the Relationship Agreement and entails some duplication with other parts of this paper. Despite efforts of non-governmental organisations, certain states and members of the ICTY and ICTR, the Relationship Agreement contains a number of potential roadblocks to co-operation between the United Nations and the Court, in particular the prosecutor, that should be identified and efforts made to address them in negotiations with the United Nations in advance of problems arising in specific cases.

Exchange of information. Article 5 sets out a number of mutual obligations on the United Nations, in particular the secretary-general, and the Court with regard to the exchange of information, some of which are of special interest to the prosecutor. Article 5(1) establishes the general rule that “[w]ithout prejudice to other provisions of the present Agreement concerning the submission of documents and information concerning particular cases before the Court, the United Nations and the Court shall, to the fullest extent possible and practicable, arrange for the exchange of information and documents of mutual interest”. This general obligation is supplemented by the obligation in Article 5(2) to avoid duplication in the field of information. Article 5(1)(a)(i) requires the secretary-general to “[t]ransmit to the Court information on developments related to the Statute which are relevant to the work of the Court”, which will be a useful principle to invoke in many situations, even if the specific examples cited are of a public nature. Although there is a general obligation in Article 5(1)(b)(i) on the registrar to keep the United Nations informed on its request about proceedings, there is a more general obligation on the Court, presumably including the prosecutor, to keep the United Nations informed about proceedings in which the United Nations is involved. Which organ will be responsible for fulfilling this obligation will need to be sorted out.

Article 15 contains a number of crucial provisions regarding co-operation between the United Nations and the Court that establish a general rule, but subject to conditions, the scope of which may cause problems. Paragraph 1 of that article, which is mandatory, provides that

[w]ith due regard to its responsibilities and competence under the Charter and subject to its rules, the United Nations undertakes to cooperate with the Court and to provide to the court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Statute.

It will be a priority for the Prosecutor to identify potential roadblocks with regard to fulfilment by the United Nations of this co-operation obligation and to try to negotiate solutions before they cause problems. Paragraph 2, which is discretionary, has fewer limitations:

The United Nations or its programmes, funds and offices concerned may agree to provide to the Court other forms of cooperation and assistance compatible with the provisions of the Charter and the Statute.

The Court and the prosecutor should encourage these bodies to give this provision the broadest possible reading.

Under Article 16(2) of the Relationship Agreement, “[t]he Secretary-General may be authorised by the Court to appoint a representative of the United Nations to assist any official of the United Nations who appears as a witness before the Court”. Under Article 17(1) of the Relationship Agreement, once the Security Council has decided to refer a situation to the prosecutor pursuant to Article 13(b) of the ICC Statute, the secretary-general “shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council”, and “[i]nformation provided by the Court to the Security Council in accordance with the Statute and the Rules of Procedure and Evidence shall be transmitted through the Security Council”. Under Article 17(2), when the Security Council decides to request a deferral of an investigation or a prosecution, “this request shall immediately be transmitted by the Secretary-General to the President and the Prosecutor”. Although the prosecutor is not directly involved in the transmission to and from the Security Council through the secretary-general of information concerning the failure of states to co-operate under Article 87(5) and (7), this particular tool will be one of great importance to the prosecutor (see discussion below concerning the Security Council). Requests by the prosecutor for information pursuant to Article 15(2) from the United Nations shall be addressed “to the Secretary-General who shall convey it to the presiding officer or other appropriate officer of the organ concerned”.

Laissez-passer. Under Article 12, the prosecutor, deputy prosecutor and staff of the Office of the Prosecutor are entitled, in accordance with special arrangements as may be concluded between the secretary-general and the Court, to use the laissez-passer of the United Nations as a valid travel document where such use is recognised by states. The prosecutor

will have to ensure that any special arrangements provide for prompt issuance of such travel documents in accordance with simple procedures and on an equal basis with others entitled to this travel document.

Supplementary arrangements with the Court. Although the secretary-general has no express role in negotiating the terms of the Relationship Agreement, Article 21 provides for such a role with regard to supplementary arrangements to implement the Relationship Agreement. It provides: “The Secretary-General and the Court may, for the purpose of implementing the present Agreement, make such supplementary arrangements as may be found appropriate”. The prosecutor should begin reviewing the Relationship Agreement, in co-operation with other organs of the Court, with a view to deciding what supplementary arrangements, independent of the co-operation arrangements or agreements with the prosecutor expressly provided for in Article 18(1) (discussed below), are likely to be needed to implement the Agreement. It is likely that there will be a need for many such arrangements covering a wide range of activities, including co-operation arrangements with various peacekeeping operations.

Co-operation arrangements or agreements with the prosecutor. The role of the United Nations Secretariat in co-operation with the Court, in particular with the prosecutor, is too broad a topic to go into any detail here, but it is worth noting the following areas of co-operation which will have an impact on the work of the prosecutor and where it will be important to develop policies and practices, as well as supplementary arrangements, to ensure that such co-operation is as effective as possible. Article 18(1) provides for the United Nations to enter into such co-operation arrangements or agreements with the prosecutor, subject to a number of conditions:

With due regard to its responsibilities and competence under the Charter of the United Nations and subject to its rules, the United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under Article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with that article.

This provision will be particularly important given that in many situations there will be United Nations operations present. However, the prosecutor

will need to be particularly vigilant to ensure that the references to Charter responsibilities and competence and United Nations rules do not restrict essential co-operation. The prosecutor should urge the United Nations to view full co-operation with the Court as completely consistent with such responsibilities and competence and to amend any United Nations rules that would restrict such co-operation. A review of practice of co-operation by the rest of the United Nations with the ICTY and ICTR to identify possible problems and solutions would be advisable.

The United Nations as trigger for preliminary examinations. As noted above, given the likely presence of United Nations operations, including peace-keeping and humanitarian operations, in many of the situations where the prosecutor is likely to be operating, the United Nations will be an important source of information under Article 15(1), (2) and (6) of the ICC Statute. Article 18(2) of the Relationship Agreement provides, subject to conditions, that the United Nations undertakes to cooperate with the prosecutor in providing such information:

Subject to the rules of the organ concerned, the United Nations undertakes to cooperate in relation to requests from the Prosecutor in providing such additional information as he or she may seek, in accordance with article 15, paragraph 2, of the Statute, from organs of the United Nations in connection with investigations initiated *proprio motu* by the Prosecutor pursuant to that article. The Prosecutor shall address a request for such information to the Secretary-General who shall convey it to the presiding officer or other appropriate officer of the organ concerned.

The same concerns as mentioned above concerning the limits on co-operation, subject to United Nations rules, in Article 18(1) of the Relationship Agreement exist with respect to Article 18(2). In addition, it will be advisable for the prosecutor to seek to enter into supplementary arrangements or agreements with the United Nations as soon as possible, either pursuant to Article 18(1) or (4) (see below) to avoid delays in obtaining information from United Nations staff that are certain to occur if all requests for such information have to go through the secretary-general. In addition, the prosecutor will wish to interview United Nations staff in full confidence in certain sensitive investigations and, in some situations, such staff will not wish that others in their office are aware that they are providing information to the prosecutor.

Provision of information on a confidential basis. The provision for agreements in Article 18(3) of the Relationship Agreement for the United Nations to provide information to the prosecutor on a completely confidential basis could pose a number of problems, particularly if it were to become the norm for co-operation. That paragraph states:

The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.

First, as with the provision of national security information pursuant to Article 72 on a confidential basis, there is a risk that information that is exculpatory or relevant to mitigation will be unavailable to the relevant Chamber. The prosecutor will have to devise effective internal mechanisms to ensure that such information is identified as soon as possible (in some cases this aspect of the information may only be known at a late date in the proceedings or, in a few situations, after proceedings have terminated, for example, when the information concerns an investigation into matters different from the case that has closed). There must be effective procedures in place so that once the exculpatory or mitigating nature of the confidential information is known steps are taken to deal effectively with the problem.

The easiest situation is when the nature of the information is discovered before an investigation begins, charges are confirmed or a trial commenced. However, if the nature of the information is learned at a later stage in the proceedings, the prosecutor will be in the awkward situation of having to return to the United Nations and ask for the confidentiality restriction to be removed. It is not clear what steps would be open to the prosecutor should permission be refused, as it will be difficult to obtain revision without disclosing the information. To avoid this problem, in the – one would hope rare – situation where the only way to obtain such information from the United Nations was through such a confidentiality agreement, the prosecutor should insist on a provision in the agreement that the United Nations will waive the confidentiality restriction whenever the prosecutor determines that such information is exculpatory or mitigating. However, such a provision might not be seen as a completely satis-

factory one from an objective point of view, since it leaves the prosecutor as the sole judge of whether the information should be disclosed. Another possibility would be, in the rare instances when the United Nations provides information on a confidential basis, for the information to be made available to the relevant Chamber in camera to decide what should be done.

The prosecutor will wish to take advantage of Article 18(4) of the Relationship Agreement, which authorises the United Nations, its programs, funds and offices to enter into co-operation agreements with the prosecutor. It provides:

The Prosecutor and the United Nations or its programmes, funds and offices concerned may enter into such arrangements as may be necessary to facilitate their cooperation for the implementation of this article, in particular to ensure the confidentiality of information, the protection of any person, including former or current United Nations personnel, and the security or proper conduct of any operation or activity of the United Nations.

Although this paragraph provides for implementation of Article 18, it may provide some flexibility to avoid some of the problems identified above with respect to the other paragraphs of this article.

Asserting jurisdiction over United Nations officials. Article 19 makes it clear that if any person alleged to be responsible for a crime within the Court's jurisdiction who enjoys privileges and immunities under international law with respect to his or her work for the United Nations, "the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities". This means that the United Nations will assist the Court in making that person available in all cases, even if that person is a senior United Nations official. The drafting of Article 19 proved extremely difficult and states wished to avoid any suggestion that there were any privileges or immunities applicable to crimes within the Court's jurisdiction. The final text ensures that the United Nations will waive any privileges and immunities that it believes exist, and therefore permit the individual's surrender to the Court, but it is carefully worded so that it does not acknowledge that any such privileges and immunities do exist with regard to these crimes.

Confidentiality of information provided to the United Nations. Article 20, which permits non-states parties and intergovernmental organisations to provide information to the United Nations that can be concealed from the Court, should be a matter of concern to the prosecutor. Although that article was justified by its proponents as necessary in the light of existing confidentiality agreements with the United Nations, that justification cannot apply to agreements entered into or renewed since 1 July 2002. Article 20 states:

If the United Nations is requested by the Court to provide information or documentation in its custody, possession or control which was disclosed to it in confidence by a State or an intergovernmental organization or international organization, the United Nations shall seek the consent of the originator to disclose that information or documentation. If the originator is a State Party to the Statute and the United Nations fails to obtain its consent to disclosure within a reasonable period of time, the United Nations shall inform the Court accordingly, and the issue of disclosure shall be resolved between the State Party concerned and the Court in accordance with the Statute. If the originator is not a State Party to the Statute and refuses to consent to disclosure, the United Nations shall inform the Court that it is unable to provide the requested information or documentation because of a pre-existing obligation of confidentiality to the originator.

The prosecutor should urge the United Nations not to enter into any future agreements with states that permit the donor of information or documentation to prevent the prosecutor or the Court from having full access to that information when it is necessary to do justice and to seek to renegotiate any existing agreements that contain this restriction.

17.2.5.2. The Security Council

There are a number of different ways in which the prosecutor will be involved with the Security Council, most of which I am sure are covered in great detail by your other correspondents, and co-operation and exchange of information between the prosecutor and the Security Council pursuant to Article 17 have already been mentioned above. I will just mention here a number of opportunities for the prosecutor that could be explored, even if it is decided not to exploit them in the early years of the Court. These

include encouraging referrals of situation, discouraging requests and renewals of requests under Article 16, challenging the legality of Security Council resolution 1422 or any renewal of that resolution, minimising the obstruction of justice caused by Article 16 requests and invoking the assistance of the Security Council to enforce orders of the Court and to compel states to provide information that the Court had decided is necessary after following the procedure outlined in Article 72. Of course, given the sensitive nature of the relationship between the Court and the Security Council, the pros and cons of the suggestions made below will have to be weighed very carefully before deciding to implement any of them. However, in the light of recent events, many previous conclusions about the likelihood or improbability of the Security Council taking particular actions regarding the Court will have to be reassessed.

Encouraging referrals of situations. The prosecutor could use the opportunity provided in Article 4(2) of the Relationship Agreement between the International Criminal Court and the United Nations to address the Security Council to make available information that would assist the Council in deciding whether to refer a situation to the Court under Article 13(b) of the ICC Statute. Article 4(2) of the Relationship Agreement provides:

Whenever the Security Council considers matters related to the activities of the Court, the President of the Court or the Prosecutor may address the Council, at its invitation, in order to give assistance with regard to matters within the jurisdiction of the Court.

Although this provision is somewhat narrowly drawn, and may reflect the intent of some of the drafters to prevent the prosecutor from taking the initiative to request a Security Council referral, there is some room for effective interpretation. For example, if the prosecutor is conducting a preliminary examination or investigating crimes committed in a situation that is being considered by the Security Council under Chapter VII (a not infrequent occurrence), simply informing the Council in writing about the scope of the crimes committed could encourage the Council to refer the situation to the Court, thus giving the prosecutor greater powers to obtain co-operation from the territorial state and other states. The prosecutor could use Article 6 of the Relationship Agreement to inform the Security Council indirectly about these matters by informing the United Nations generally through the secretary-general. That article provides that “[t]he

Court may, if it deems appropriate, submit reports on its activities to the United Nations through the Secretary-General". In addition, the Court may propose agenda items to the United Nations under Article 7 of the Relationship Agreement. That article provides:

The Court may propose agenda items for consideration by the United Nations. In such cases, the Court shall notify the Secretary-General of its proposal and provide any relevant information. The Secretary-General shall submit the proposed item to the General Assembly or the Security Council, and also to any other United Nations body, as appropriate.

Both provisions could prove cumbersome and might require the concurrence of all the organs of the Court before submission of a report or a request for an agenda item. It would be useful, however, to explore how the possibilities of these two articles could be developed. Reports could be made on a relatively frequent basis to the Security Council and to other United Nations bodies and the Court could agree that each organ could submit separate reports or that organ's part of the Court report separately. The Court could also propose that the Security Council and other United Nations bodies include a standing agenda item on the International Criminal Court to encourage frequent contributions by the prosecutor and other organs of the Court to their work.

In any event, seeking an invitation to address the Security Council could have even greater impact than any written report. The prosecutor could during such a presentation, in response to a question by an interested member of the Security Council, outline the advantages such a referral would have in conducting investigations and in obtaining surrenders of accused. Of course, this technique would have to be carefully used to ensure that the prosecutor does not become involved in political determinations.

Discouraging the making of requests or renewals of requests under Article 16. The prosecutor could take advantage of the ability under Article 4(2), if invited, to address the Security Council whenever it is considering the possibility of invoking Article 16 of the ICC Statute in a particular case. In these circumstances, the prosecutor should consider seeking such an invitation as a way of trying to prevent obstruction of an investigation or a prosecution and to minimise the damage to international justice caused by such requests. Of course, it would be almost inconceivable for the Security Council not to respond favourably to a request by the prosecutor or the president to provide it with all necessary information

relevant to a decision to request a deferral of a prosecution or investigation of crimes within the jurisdiction of the International Criminal Court. It is to be hoped that once the president and prosecutor have been elected, they will make a standing request to the Security Council to be invited to address the Council well before it makes any request citing Article 16 or a renewal of such a request. Indeed, one of the first requests by the prosecutor and the president to address the Security Council could be when the Security Council begins considering a proposal to renew the request made in resolution 1422 in May or June 2003 so that the prosecutor can explain why a renewal of the request would be in excess of the Council's powers and inconsistent with Article 16 and the president can note that the decision on its lawfulness is one that the Court alone can make. Admittedly, the issue of a renewed request could pose a major test for the prosecutor and the Court that would best be avoided as long as possible until it is presented in an actual case where the Court has asked for the surrender of a person covered by the request. Whether it can be completely avoided in June 2003 is another matter. One possible way to avoid a premature confrontation would be for the prosecutor and the president to make it clear that this is an issue that can only be addressed by the Court in a concrete case before it.

Security Council resolution 1422 (2002) was adopted without the benefit of input from the prosecutor or the president. Had either official been in post in July 2002, they would have been able to explain with great authority that Article 16 was intended to be used only in exceptional circumstances on a case-by-case basis when the Security Council had determined that an investigation or a prosecution could impede its efforts to maintain international peace and security and then to be used only for a limited period of time. They could also have explained the consequences for international justice if the Court were to grant such a request. Faced with such explanations, the Security Council might have decided not to adopt the resolution.⁹ Similarly, an explanation by the prosecutor of the consequences for international justice if certain states were to seek at some future date to have the Security Council invoke Article 16 in a particular case under investigation or prosecution, as well as presentation of some of the evidence concerning the nature of the crimes committed and their impact on the victims, could convince the Council not to make re-

⁹ Amnesty International, "Article 16 of the Rome Statute of the International Criminal Court", AI Index: IOR 40/006/2003, May 2003.

quest under that article, particularly if that information were also made available to the general public around the world. The prosecutor could follow the same approach with regard to an attempt to renew a request.

Limiting the damage caused by an Article 16 request. Of course, one hopes that the Security Council will never again seek to invoke Article 16. However, there are a number of damage limitation exercises that the prosecutor could consider if he or she thinks that the Council might invoke Article 16 to preserve the ability of the prosecutor or a national prosecutor at a future date to investigate or prosecute crimes within the jurisdiction of the Court, including prolonging and expanding the scope of the preliminary examination and taking other steps after the Court grants the request or renewed request or asking states if they were able or willing to investigate and prosecute the crimes. The following discussion suggests a number of possible steps that could be explored.

Extending the scope of an Article 15 preliminary examination. The prosecutor could extend the scope of an Article 15 examination as one way to preserve crucial evidence and open lines of inquiry for a future investigation by the prosecutor after a lawful request has expired. A lawful request under Article 16 has no application whatsoever to any preliminary inquiry by the prosecutor under Article 15(2) of the ICC Statute, which permits the prosecutor to analyse information received pursuant to Article 15(1), to seek information concerning crimes within the jurisdiction of the International Criminal Court and to receive oral and written testimony at the seat of the Court concerning such crimes.¹⁰ That provision states:

¹⁰ Luigi Condorelli and Santiago Villalpando, “The Rome Statute of the International Criminal Court”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 650, noting that, “since Article 16 refers only to investigations and prosecutions, nothing prevents the Prosecutor from continuing to gather information that would prove useful in future proceedings, after the period of deferral”. Assuming that the Security Council has made a lawful request for a deferral under Article 16,

[t]he Prosecutor should then be entitled to conduct those examinations following an authorization by a Pre-Trial Chamber: he or she could, in particular, gather information and take all the appropriate steps to analyse its seriousness. Moreover, the administrative duties of the Court linked with the deferred cases should be completed. It could be asked whether some exceptional judicial activities can still be pursued after the deferral. That should certainly be the case for those measures considered appropriate by the Court for the protection of witnesses and

The Prosecutor shall analyse the seriousness of the information received [pursuant to Article 15(1)]. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

The clear distinction between steps that may be taken by the prosecutor during a preliminary examination and during an investigation is analogous to the clear distinction between steps that the prosecutor can take pursuant to Article 18(6) during a deferral of an investigation during a challenge to admissibility, pursuant to Article 19(8) and (11) during a challenge to jurisdiction or admissibility or the representations that victims may make pursuant to Article 19(3) during such a challenge.¹¹ Presumably, if a deferral of an investigation pursuant to these provisions had occurred – at least if the deferral occurred before a proper deferral under Article 16 – the prosecutor may continue to take such steps.

Representations by victims to the Pre-Trial Chamber pursuant to Article 15(3). The prosecutor could suggest to victims and their representatives that they could make representations before the Pre-Trial Chamber in the form of testimony and presentation of material and documentary evidence. Of course, such representations and presentations should be carefully prepared so as not to undermine an effective prosecution by the prosecutor after the term of a lawful request and any renewal expires. A proper request by the Security Council to defer an investigation or prosecution cannot prevent victims from making representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence, pursuant to Article 15(3) of the ICC Statute. That provision states:

victims, since it would be unacceptable for their safety and well-being to be affected by the deferral of the Security Council.

Ibid., p. 652 (footnote omitted).

¹¹ Similarly, under Article 15 (6) even if the prosecutor decides after a preliminary inquiry that an investigation is not warranted, the prosecutor can consider further information in the light of new facts or evidence:

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

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

Requesting a Pre-Trial Chamber hearing under Article 15(4). The prosecutor could request the Pre-Trial Chamber to hold hearings pursuant to Article 15(4). The Security Council cannot prevent the Pre-Trial Chamber from holding such hearings to determine whether an investigation should be opened. That paragraph states:

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

It is only when the Pre-Trial Chamber has reached a decision to authorise an investigation that a proper request by the Security Council pursuant to Article 16 can be granted by the Court. Presumably, the Pre-Trial Chamber and Appeals Chamber could consider challenges to jurisdiction and admissibility during the pendency of a proper request for a deferral pursuant to Article 16 as a way of ensuring that valuable time is not lost during a deferral.

Requesting the Pre-Trial Chamber to take steps under Article 57. The prosecutor could request the Pre-Trial Chamber to take a number of steps before an investigation is opened that could continue in effect after a lawful request under Article 16 was granted by the Court. The Pre-Trial Chamber may take a number of steps to preserve evidence and to protect victims and witnesses under Article 57 of the ICC Statute even before an investigation has begun.¹² It was certainly not intended by the drafters of

¹² Article 57 (Functions and powers of the Pre-Trial Chamber) provides that the Pre-Trial Chamber make take a number of steps at the pre-trial stage – including before a formal investigation has begun – such as the preservation of evidence. These powers are in addition to the Pre-Trial Chamber’s other statutory powers and, therefore, are not limited in scope to the period of investigation or by other express provisions authorising it to act after an investigation has begun (except where clearly limited to the period of an investigation, as in Article 57(3)(a)). In particular, paragraph 3(c) of that article provides that:

the ICC Statute that measures commenced before an investigation, such as preservation of evidence and protection of victims and witnesses and their families, would come to an end whenever the Security Council made a lawful request under Article 16 to defer temporarily an investigation or a prosecution. If such a perverse interpretation were to be accepted, the prosecutor could be faced the inability to conduct a successful investigation or prosecution once the deferral came to an end. Evidence would have been lost, damaged or destroyed and witnesses identified, threatened or killed.

Thus, the International Criminal Court can take a broad range of preliminary steps before a proper request by the Security Council pursuant to Article 16 can interfere with the pursuit of justice. This conclusion is confirmed by the leading commentary on that article:

It may not be concluded, however, that by referring to both “investigation” and “prosecution”, article 16 extends the Security Council’s deferral power to the totality of activities of the Prosecutor. The Statute clearly states that steps taken by the Prosecutor prior to the Pre-Trial Chamber’s authorization of an investigation only constitute a “preliminary examination”, not the beginning of an investigation. Indeed, the purpose of the authorization is to enable the Prosecutor to start an investigation. Among the steps which the Prosecutor can take before an investigation starts are seeking “information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate”, receiving “written or oral testimony at the seat of the Court”, as well as analysing the information received. The Security Council cannot prevent the Prosecutor from taking these steps on the basis of article 16.¹³

The scope of an Article 16 request is limited to suspending temporarily the ability of the Court alone to investigate or prosecute crimes.

In addition to its other functions under this Statute, the Pre-Trial Chamber may: [...]

- (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information[.]

¹³ Morten Bergsmo and Jelena Pejić, “Article 16: Deferral of Investigation or Prosecution”, in Otto Triffterer (ed.), *The Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos, Baden-Baden, 1999, p. 376.

Therefore, if it became apparent that the Security Council was planning to make endless, successive requests, contrary to the intent of the drafters, and that the Court was likely to grant these requests, the prosecutor could inform states of the situation and ask if the initial determination that states were unable or unwilling to investigate or prosecute genuinely the crimes was still correct. If not, and a state was able and willing to investigate and prosecute the crimes, the prosecutor could then cooperate, with that state, within the constraints of the ICC Statute and its Rules of Procedure and Evidence, to avoid a situation in which persons responsible for the worst possible crimes would obtain impunity.

Requesting assistance of the Security Council pursuant to Article 87(5) and (7). There are at least two instances when the prosecutor will wish to seek the assistance of the Security Council when states fail to cooperate with the Court. Although it is not entirely clear from the ICC Statute which organ of the Court can contact the Council in this situation, it appears that one of the Chambers was intended. Under Article 87(5)(b) of the ICC Statute:

Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform [...], where the Security Council referred the matter to the Court, the Security Council.

Similarly, under Article 87(7):

Where a State fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter [...], where the Security Council referred the matter to the Court, to the Security Council.

It remains to be seen how effective these provisions will prove in practice. Requests by the prosecutor of the ICTY and ICTR to the Security Council to take action when states failed to co-operate with orders or requests for assistance have not met with the most effective response.

17.2.5.3. The General Assembly

Although the role of the General Assembly in work of the Court of direct interest to the prosecutor is likely to be limited, it may play a role in a

number of areas that would warrant further study. The prosecutor should ensure that Court reports to the United Nations under Article 6 of the Relationship Agreement include information of interest to the General Assembly, and should propose pursuant to Article 7 of that agreement that the General Assembly have a regular agenda item on the Court to facilitate consideration of issues of common concern. Article 4(1) of the Relationship Agreement provides that the Court may participate as an observer in the work of the General Assembly and, upon invitation, to attend meetings and conferences convened under the auspices of the United Nations where observers are allowed and matters of interest to the Court are under discussion.

Article 115(b) provides that part of the expenses of the Court shall be provided by “[f]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council”. Although opposition by non-states parties may limit or preclude funding by the United Nations of Court activities not involving a Security Council referral, in the long run the General Assembly will almost certainly fund such activities and it will have to approve the budget covering Security Council referrals.

17.2.5.4. Human Rights Bodies

The prosecutor will wish to be in regular and, occasionally, frequent contact with the various human rights bodies of the United Nations, including the high commissioner for human rights, the Commission on Human Rights and its special procedures and treaty bodies serviced by the Office of the High Commissioner for Human Rights.

The second high commissioner for human rights was, like the current secretary-general, a strong supporter of the Court. It will be important for the prosecutor, together with other organs of the Court, to urge the current high commissioner, who is considered by some to be a potential successor to the current secretary-general, to take a similarly bold and energetic role, both publicly and in meetings with senior government officials. The Commission on Human Rights can adopt useful resolutions in support of the work of the Court. Several of its special procedures, including the special rapporteur on torture and the special rapporteur on the independence of judges and lawyers have been strong supporters of the Court. These two special procedures, as well as others, such as the special rapporteur on violence against women, the special rapporteur on extra-

legal, summary or arbitrary executions and the Working Group on enforced or involuntary disappearances, address matters of direct concern to the prosecutor and could be valuable sources of information, either pursuant to Article 15(1), (2) and (6) or at a later stage of proceedings. They will also be cited by the Court, defence counsel and representatives of victims for authoritative interpretations of international law and standards of direct concern to the prosecutor, including issues related to fair trial and reparations.

It will also be important for the prosecutor to monitor developments in treaty bodies of serviced by the Office of the High Commissioner for Human Rights, such as the Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child, and the Committee on the Elimination of All Forms of Discrimination against Women, concerning a wide range of issues, including the right to fair trial, definitions of torture, children in armed conflict and violence against women, since their interpretation on these matters is almost certain to have a strong impact on the views of the Chambers of the Court.

Although regular contact with these bodies probably would not be necessary, it might be useful to ask them to invite the views of the prosecutor when issues related to the scope of the duty of states to investigate and prosecute crimes, the content of the right to fair trial or the definitions of crimes or defences under international law arise. Although it would not be cost-effective for the prosecutor to express his or her views on such issues in more than a handful of cases being considered under optional protocols or other complaint mechanisms, in certain exceptional cases it might be a useful strategy for the prosecutor to do so, both with a view to influencing the Chambers in a future case and, as part of a broader complementarity strategy, to develop the law applicable in national courts. For example, such treaty bodies have interpreted the scope of obligations of states to investigate crimes, the relevant factors in determining whether a trial is prompt and definitions of crimes under international law, such as torture and “disappearances”.

17.2.6. Other Intergovernmental Organisations

In addition to the United Nations, the prosecutor will have to develop relationships with a number of other intergovernmental organisations. With some of these organisations, these relations will involve regular day-to-day contact, and with others the contact will be relatively infrequent. Re-

lations with such organisations will be important both as sources of information pursuant to Article 15(1), (2) and (6) and in the context of cooperation. Article 87(6) provides:

The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

The most important relationships will be with criminal justice organisations (Interpol, Europol, Eurojust). It would be useful for the prosecutor to maintain contact with subsidiary bodies of other intergovernmental organisations that deal with criminal justice issues, such as the Council of Europe Steering Committee on Crime Problems, which monitors implementation of the ICC Statute by member states. Such bodies could provide a forum for conveying concerns about emerging problems about implementing legislation. It will be important for the prosecutor to monitor developments in treaty bodies of regional human rights organisations, such as the European Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights and the future African Court of Human and Peoples' Rights, concerning the right to fair trial since their interpretation of this right are almost certain to have a strong impact on the views of the Chambers of the Court.

Although regular contact with these bodies probably would not be necessary, it might be useful to ask them to invite the views of the prosecutor when issues related to the scope of the duty of states to investigate and prosecute crimes, the content of the right to fair trial or the definitions of crimes or defences under international law arise. Although it would not be cost-effective for the prosecutor to express his or her views on such issues in more than a handful of cases, in certain exceptional cases it might be a useful strategy for the prosecutor to do so, both with a view to influencing the Chambers in a future case and, as part of a broader complementarity strategy, to develop the law applicable in national courts. For example, such regional courts have spelled out in their jurisprudence the duty of states in conducting investigations of crimes, the relevant factors in determining whether a trial is prompt and definitions of crimes under international law, such as torture and “disappearances”.

17.2.7. Defence Counsel and the International Criminal Bar

The procedures in the ICC Statute and the Rules of Procedure and Evidence are designed to ensure a more co-operative and constructive relationship between the Office of the Prosecutor of the Court and defence counsel than the relationship that has existed between the Office of the Prosecutor of the ICTY and ICTR. Whether that will expectation will be realised is another matter. One way to increase the chances of that happening will be for the prosecutor to meet regularly with defence counsel outside the context of pending proceedings to discuss issues of common concern, such as how to implement disclosure provisions of the ICC Statute and the Rules of Procedure and Evidence, how to protect witnesses and how to make the unique investigative opportunity procedure of the Pre-Trial Chamber operate smoothly. The International Criminal Bar may provide one forum for such regular meetings, but it may not be the only one or even the best one. The organisation of the International Criminal Bar is still underway and it is not yet clear whether a number of important issues remain unresolved following the Berlin organisational meeting, including the role of lawyers who represent other clients, including victims and their families, witnesses, states making admissibility or jurisdictional challenges and lawyers representing persons involved in disciplinary proceedings before the Court.

However, regardless which venue or venues prove to be the most effective, the main point is that the prosecutor should at the earliest possible stage begin meeting with counsel who have represented accused persons before the ICTY and ICTR, counsel who have indicated an interest in doing so before the Court and representatives of the International Criminal Bar to identify issues of common concern with a view to developing solutions in advance of the first cases, as well as establishing a long-term constructive relationship.

17.2.8. Civil Society Generally

Far more than any national prosecutor and probably more than the prosecutor of the ICTY and ICTR, the prosecutor will need to develop effective relationships with many sectors of civil society. These include: victims, their families and lawyers for victims and their families; witnesses and their lawyers (if they are represented); international and national non-

governmental organisations; independent experts and academic institutions; press; and the general public.

17.2.8.1. Victims, Their Families and Lawyers for Victims and Their Families

The prosecutor will be involved with victims, their families and lawyers for victims and their families in a wide variety of ways at all stages of the proceedings, and it will be crucial to an effective prosecution strategy to move early to develop an effective relationship with regard to participation and submission of information. I would identify the following as some of the most important aspects of that relationship: developing effective practices concerning the participation of victims in pre-trial, trial, reparations, appellate and revision proceedings; clarification of the division of responsibility between the prosecutor and victims with regard to reparations; working with victims and the Victims and Witnesses Unit; ensuring that issues that are not expressly assigned to this unit are addressed elsewhere in the Court; and developing guidelines for submitting information to the prosecutor pursuant to Article 15 of the ICC Statute (the latter issues are discussed below with issues applicable to relations with non-governmental organisations generally).

The provisions of the ICC Statute and the Rules of Procedure and Evidence providing for participation of victims in the proceedings are a landmark in international criminal procedure and my organisation worked hard to ensure that they were included. However, insufficient thought has gone into the question of how these provisions will work in practice, particularly from the point of view of the prosecutor, who will have a particular interest in ensuring that the proceedings are prompt and efficient, and defence counsel, who will face two opposing parties which may not take consistent positions with each other. The prosecutor should seek to address this question as a matter of priority, both to ensure a speedy and effective prosecution that fully respects the rights of the accused and to ensure that the relationship with victims is a harmonious one. It will be important to develop a prosecutorial position in time to affect decisions by the Pre-Trial Chambers and Trial Chambers are made on these matters.

As soon as the prosecutor has been appointed, it would be advisable to follow up the excellent work of the Division of Common Services, which took the initiative to meet members of the Victims' Rights Working Group of the Coalition for the International Criminal Court on a regu-

lar basis to identify issues of common concern related to victims and to devise solutions. One way to do this would be to consult, individually and in groups, a range of persons with experience in *partie civile* proceedings, including judges, prosecutors, defence lawyers, lawyers for victims and victims and their families to identify problems and possible solutions. It could seriously undermine the credibility of the Court if the first trial adopted the same approach as in the *Touvier* and *Papon* trials. Devising appropriate procedures will require the greatest possible sensitivity to the needs and rights of victims.

17.2.8.2. Witnesses and Their Lawyers (If They Are Represented)

In some legal systems, it is unethical for a lawyer to have direct contact with a witness of an opposing party outside of the civil or criminal proceedings. The prosecutor will need to determine what rules or guidelines he or she wishes the Court to adopt in regard to contact outside court proceedings with witnesses being called by the accused, by victims or by the Court. These rules and guidelines would be in addition to protective measures for witnesses under threat.

17.2.8.3. International and National Non-Governmental Organisations

Some of the most important external relations of the prosecutor and the Office of the Prosecutor will be with non-governmental organisations. Certain issues for the prosecutor specific to non-governmental organisations dealing with the role of the defence, such as the International Criminal Bar, and victims' security, participation and reparations, such as the Victims' Rights Working Group, have been mentioned above. Some of the issues applicable to relations of the prosecutor with non-governmental organisations generally include: guidelines for compiling and submitting information to the prosecutor pursuant to Article 15(1), (2) and (6); identifying issues of interpretation of the ICC Statute and its supplementary instruments where it would be helpful to have non-governmental organisations or independent experts submit *amicus curiae* briefs, and informally soliciting such submissions from particular organisations and experts; identifying other problems that could be usefully addressed by non-governmental organisations, such as flaws in national implementing legislation or lack of co-operation by states; clarifying the prosecutor's posi-

tion concerning confidential sources; and contractual relations with non-governmental organisations.

The Coalition for the International Criminal Court and its secretariat. It is useful to mention first the umbrella organisation, the Coalition for the International Criminal Court, which has well over one thousand members around the world and is both a founding member and a member of its Steering Committee. Since the first discussions in November 1994 to plan the formation of the Coalition, it has played an increasingly important role in the establishment of the Court, particularly its widely admired secretariat, which has produced a wide range of analytical documents on the Court and, in particular, on the supplementary instruments to the ICC Statute and on steps needed to make the Court operational. It plays the major role in identifying issues that its members need to address and in mobilising them on issues of common concern. Almost all non-governmental organisations working on issues related to the Court are members of the Coalition. Its members have also organised into regional networks and thematic groups, including the Women's Caucus for Gender Justice, the Faith Based Caucus, the Victims' Rights Working Group and the Universal Jurisdiction Caucus.

There a variety of ways in which the prosecutor can relate to non-governmental organisations. On certain matters common to all such organisations, the main point of contact would be with secretariat of the Coalition, but in most instances such contacts would not be exclusive of contacts with individual organisations. The secretariat will be an excellent place to start in seeking technical analysis of matters, such as the interpretation of supplementary instruments or comments on draft instruments. Draft regulations of the Office of the Prosecutor, including a Code of Conduct, are examples. The Coalition secretariat will often help to coordinate non-governmental organisation lobbying on topical issues, such as on Security Council resolution 1422 and the US impunity agreements. It plays an important role in co-ordinating the work of non-governmental organisations on ratification and implementation of the ICC Statute and the Agreement on Privileges and Immunities (see below). Staff of the Office of the Prosecutor will want to participate in many of the conferences on the Court being organised by non-governmental organisations around the world on a regional or national basis and to suggest topics for such conferences, as well as places where they are needed.

The possible advantages of a liaison officer. The staff of the Office of the Prosecutor will be inundated with requests by representatives of non-governmental organisations in the first year to meet, and it will be important to devise procedures that ensure that the representatives feel that their concerns are being considered seriously, but avoid swamping the staff with marginal or even frivolous matters that will detract staff from essential work. It would be useful to work with the secretariat of the Coalition to develop such procedures, together with guidelines on relations with the Office of the Prosecutor. It might be useful to have a liaison officer that deals with requests for meetings by non-governmental organisations. In some instances, particularly initial meetings, the liaison officer might be the only contact. In others, the liaison officer would simply arrange for meetings with relevant staff, at their convenience. In some instances, the non-governmental organisation would have built up a long-standing relationship with one or more staff members that would allow direct contact for certain issues without going through the liaison officer or, in particularly sensitive matters, without informing the liaison officer.

Guidelines for compiling and submitting information to the prosecutor pursuant to Article 15(1), (2) and (6). As a review of the submissions made to the Court so far will quickly demonstrate, there is an urgent need to clarify for non-governmental organisations, as well as individuals, basic guidelines about what information should be submitted to the prosecutor under Article 15(1), (2) and (6), as well as clarification about the scope of the Court's jurisdiction. Some of these guidelines will be relatively straightforward. However, one particular problem that appears to be emerging is that some non-governmental organisations are trying to prepare extremely large, extensively documented submissions that may duplicate and, possibly, undermine the work of investigators if the prosecutor decides to undertake a preliminary examination, investigation and prosecution. In addition, such efforts could, if not carefully done, endanger victims and witnesses and their families, as well as their legal representatives, and could also lead to destruction of evidence. It will be a matter of priority to address this issue and to review the experience in the ICTY and ICTR with respect to the compilation of information by non-governmental organisations, both done independently and under the supervision of the two tribunals, such as the collection of statements by non-governmental organisations about crimes committed in Kosovo and the use of forensic experts in exhumations of graves.

Soliciting submissions on legal and practical issues. One particular area where non-governmental organisations can assist the prosecutor is in making formal submissions to the Court, in particular *amicus curiae* briefs pursuant to Rule 103 of the Rules of Procedure and Evidence. It would be in the interest of the prosecutor to identify issues of interpretation of the ICC Statute and its supplementary instruments where it would be helpful to have non-governmental organisations or independent experts submit *amicus curiae* briefs, and then to solicit them from particular organisations and experts. Of course, the prosecutor would need to respect the independence of those organisations and be careful to avoid any misunderstandings that the organisations were being expected to draft briefs that had to be vetted by the prosecutor (even if many organisations would show drafts informally to the prosecutor to benefit from the prosecutor's experience). Indeed, not all such briefs, even those informally solicited by the prosecutor, will be in accordance with the views of the prosecutor, who has the right to reply to them under paragraph 2 of that rule. However, in many cases, such submissions can provide useful commentaries on issues of substantive or procedural law. Such submissions played an important role in the *Blaškić* case in the ICTY.

Submissions can play an important role in the development of international criminal law and procedure in the fight against impunity and it has already identified a number of issues that it is considering addressing in *amicus curiae* briefs and it will actively seek leave to make such submissions when relevant to a case. In addition, my organisation intends to press for an amendment of the rule to permit submission of such briefs on issues not directly related to a particular proceeding or for a regulation of the Court that would permit submissions analogous to *amicus curiae* briefs to Chambers that were not directly related to a particular proceeding.

Co-operating with non-governmental organisations on areas of common concern. In addition to the issues related to defence counsel and to victims mentioned above, there are many areas where informal co-operation with non-governmental organisations would be invaluable. The prosecutor should consider identifying other problems that could be usefully addressed by non-governmental organisations, such as flaws in national implementing legislation for the ICC Statute and the Agreement on Privileges and Immunities or lack of co-operation by states. The area of implementation is one where non-governmental organisations have been extremely active, but so far without being able to draw upon the experi-

ence and views of the prosecutor. Given the numerous conferences and extensive lobbying organised by non-governmental organisations on this issue and the varying approaches to this question in the materials produced by non-governmental organisations, from minimalist recommendations by some to recommendations that states do more than required by the Statute by others, such as my organisation, it will be important for the prosecutor to be in close contact with non-governmental organisations on matters related to implementation. The prosecutor is likely to be concerned about the emerging problems with such legislation and will wish to convey those concerns to non-governmental organisations so that they can raise such matters with governments.

Contractual relations with non-governmental organisations. Although most relations with non-governmental organisations will be at arm's length, there is at least one exception that should be noted which involves completely different considerations from those outlined above. In a number of instances, non-governmental organisations will enter into contracts with the Office of the Prosecutor to perform specific tasks, such as to conduct forensic examinations. In those instances, both the prosecutor and the non-governmental organisation will be in a somewhat awkward situation, since the organisation will often have a range of organisational concerns that will be different from those arising from the contractual relationship. For example, a non-governmental organisation that furnished a team of forensic experts under a contract with the Office of the Prosecutor to conduct exhumations of graves and forensic examinations might have a different perspective from the Office of the Prosecutor on how such examinations should be conducted with respect to the families of victims. It will be important to draw from the experience of the ICTY and ICTR in such contractual relations with non-governmental organisations to minimise potential problems.

Clarifying the prosecutor's position concerning confidential sources. Another matter of vital importance to non-governmental organisations will be protecting their ability to investigate and documenting crimes freely and impartially including protecting their confidential sources. Although these sources would appear to be fully protected by Rule 73 of the Rules of Procedure and Evidence, it will be up to the judges to interpret the scope of the protection of confidential sources and they will be particularly interested in the views of the prosecutor on this question. Given the different positions of each of the three prosecutors of the

International Criminal Tribunals on the question of confidential sources of non-governmental organisations, the International Committee of the Red Cross and the press, and the ambiguities in the balancing test adopted by the Appeals Chamber of the ICTY in the Jonathan Randall matter, non-governmental organisations will face considerable uncertainty in investigating and documenting crimes within the jurisdiction of the Court.

The prosecutor should clarify his or her policy with regard to this question at the earliest possible date to ensure a harmonious relationship with non-governmental organisations, whose public reports will be a major source of information about crimes committed and the response of the criminal justice systems to those crimes, particularly when deciding whether to conduct a preliminary examination or an investigation. It is to be hoped that the prosecutor will adopt a policy of not seeking to compel the disclosure of the identity or the testimony of persons who provided information to non-governmental organisations on a confidential basis about crimes within the jurisdiction of the Court and will argue that Rule 73 should be interpreted to protect such sources.

17.2.9. Press

Of course, there is no need to emphasise the importance of effective relations between the prosecutor (in addition to the other organs of the Court) and the press and I am sure that this will be a priority for the prosecutor. Although a harmonious relationship of mutual respect would be desirable, it is inevitable that the press, if it is doing its job properly, will be critical of many aspects of the work of the prosecutor. The primary aim of a good press policy would be to encourage accurate and fair reporting by the press of the facts and the law, regardless of the criticism of the prosecutor or the Court. Success should be measured by the accuracy and fairness of reporting, not the number of stories that appear in the press. I would just emphasise a few cautionary notes.

First, the quality of reporting of the work of the two International Criminal Tribunals has been uneven at best and sometimes is appallingly bad. Some of the press reporting on the work of the two International Criminal Tribunals and on the establishment of the International Criminal Court simply do not understand – or quickly forget – basic facts and law. For example, reporters working in the former Yugoslavia and their editors routinely talk about national constitutional bars to “extradition” of nationals to the ICTY. Other problems are conceptual. For example, the pro-

gress of the ICTY in investigating and prosecuting crimes is rarely compared to the lack of progress in doing so at the national level, whether based on territorial or extraterritorial jurisdiction. Similarly, both the ICTY and ICTR are portrayed as expensive without setting them in the broader context of the cost of investigating crime worldwide, including crimes under international law, other crimes of international concern (such as “terrorism”) and ordinary crimes.

It will be important for the prosecutor to develop effective training manuals and training programmes, in co-operation with the Registry wherever possible, for the press, including both reporters and editors. In addition, the press office of the prosecutor should take the initiative and be assertive in seeking as a routine matter to inform reporters and their editors of erroneous or misleading press reports, such as the continued confusion between extradition and surrender, and to enter into a dialogue that could encourage a more accurate understanding of the work of the Office of the Prosecutor and the rest of the Court. Any attempts to correct press reporting should be done in a very sensitive manner so as to avoid any suggestion of a threat to reporters.

A second cautionary note is that the prosecutor should ensure that press officers, as well as all staff of the Office of the Prosecutor, fully respect the right of suspects and accused persons to be presumed innocent until proven guilty beyond a reasonable doubt in a fair trial. The prosecutor should not indicate publicly that a particular individual is likely to be indicted and care should be taken when announcing indictments to make it clear that the accused person is presumed innocent. Announcements of indictments should be made in a forum that reflects the dignity and independence of the Court. It will be important for the prosecutor not only to set an excellent example but also to ensure through appropriate regulations and directives that press officers fully respect the rights of suspects and accused to the presumption of innocence. As stated above, the Code of Conduct should be consistent with the UN Guidelines on the role of prosecutors. Those Guidelines require prosecutors to “[c]arry out their functions impartially” and to “act with objectivity”. In implementing press policy, it will help if the prosecutor tries to convey a lower-key image of a prosecutor working seriously and impartially as a prosecutor than some prosecutors and investigating judges at the international and national level have done in the past.

A third matter of vital importance to the press will be protecting its ability to investigate and report freely and impartially, including protecting its confidential sources. Although these sources would appear to be fully protected by Rule 73 of the Rules of Procedure and Evidence, it will be up to the judges to interpret the scope of the protection of confidential sources and they will be particularly interested in the views of the prosecutor on this question. Given the different positions of each of the three prosecutors of the International Criminal Tribunals to the question of confidential sources of non-governmental organisations, the International Committee of the Red Cross and the press, and the ambiguities in the balancing test adopted by the Appeals Chamber of the ICTY in the Jonathan Randall matter, the press will face considerable uncertainty in investigating and reporting crimes within the jurisdiction of the Court. The prosecutor should clarify his or her policy with regard to this matter at the earliest possible date to ensure a harmonious relationship with the press, whose reports will be a major source of information about crimes committed, particularly during the preliminary examination. It is to be hoped that the prosecutor will adopt a policy of not seeking to compel the disclosure of the identity or the testimony of persons who provided information to the press on a confidential basis about crimes within the jurisdiction of the Court and will argue that Rule 73 should be interpreted to protect such sources.

17.2.10. The General Public

One of the major failings of the two International Criminal Tribunals was the failure to establish effective outreach programmes in the former Yugoslavia and Rwanda at the outset. It is certainly to be welcomed that the Division of Common Services has begun work on developing outreach programmes to reach the general public around the world. I would simply emphasise how important it is for the prosecutor to be closely involved in developing such programmes to ensure that they accurately reflect the law, deflate the unrealistic expectations noted above and, although this will have to be done with great sensitivity, encourage effective pressure on national authorities to fulfil their obligations under the ICC Statute and international law.

It is important to note that the understanding by the general public of the jurisdiction of the Court and how it works is still minimal almost five years after Rome. Every few days there are reports in the press of

persons in all walks of life, including lawyers, who think that the Court can exercise its jurisdiction over crimes committed in the territories of non-states parties by their nationals in the absence of a Security Council referral or declaration under Article 12(3) and that it can exercise jurisdiction over crimes committed before 1 July 2002.

Challenges in a Nutshell

Lars Oftedal Broch*

Aside from the vital question of principles for selecting the ‘right’ cases, the key issue in all very large cases is how to shorten the time that a case takes in court. At the start of a new system, which in this case is the Office of the Prosecutor at the International Criminal Court, a proper selection of judges from the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda may be invited for a seminar, where they can share their views based on their experiences of how to concentrate on procedure, including of course any criticisms they may have on how the prosecution has developed, as well as their tactics over the years. The *ad hoc* tribunal judges are well placed, and suggestions for altering procedural rules coming from such a quarter may also appeal to those who must pass the necessary regulations.

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Interacting with Academic Institutions

William A. Schabas*

No single individual has more responsibility for the survival and success of the International Criminal Court ('ICC') than its prosecutor. Exercise of poor judgment, essentially in choosing cases with which to proceed, will probably discourage ratification and may even provoke denunciation of the Statute. And it will comfort the Court's most vitriolic opponent, the government of the United States, which has challenged the creation of the independent *proprio motu* prosecutor as one of the ICC Statute's fatal flaws.

19.1. Choosing the First Cases

Many practical issues will influence the initial choice of targets by the prosecutor, and it is impossible here to even begin speculating about them. But there is an essentially political choice of great significance, namely, whether to give priority to states that are "unwilling" to prosecute or those that are "unable" to prosecute. For the sake of discussion, Colombia might be an example of the former, while the Democratic Republic of the Congo might be an example of the latter.

In targeting the unable, the prosecutor will be exposed to criticism that the Court is merely an additional institution by which the North lectures the South on how to do the right thing. The Court will be attacked as being neo-colonialist in orientation, and this may impact negatively upon the pace of ratification in many parts of the world. The alternative, of pur-

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suing the much harder and more challenging cases of the unwilling, which may throw important resources into resisting the intervention of the Court, may lead to frustration and a lack of genuine productivity. I do not have a firm position about which way the prosecutor should go, and believe that reasonable people can disagree about such matters. But I would like to suggest a scenario that justifies focusing upon the unable.

The term ‘complementarity’ has always seemed to be a bit of a misnomer, because what is really contemplated seems to be more of an antagonistic relationship between Court and national justice system. This is certainly the case with the unwilling. But as for the unable, can we not imagine an approach to the work of the Court that is less aggressive and more benign? In this way, prosecution of a handful of ‘big fish’ (the preamble, Article 1 and the various jurisdictional thresholds in Articles 6–8 suggest this focus, not to mention the power of the Court pursuant to Article 17(1)(d) to dismiss insignificant cases) would actually complement the work of domestic accountability initiatives.

There are many examples of attempts at transitional justice in states that appear to fit the unable paradigm: Cambodia, Rwanda, East Timor and Sierra Leone. In all of them, there have been efforts to marry international involvement with home-grown accountability mechanisms. Most of the literature has painted this as a relationship of conflict, with the Court proceeding to challenge measures judged insufficient, like truth commissions. But is there not another way to approach this? Accordingly, projects like a truth commission or the Rwandan *gacaca* courts would be viewed as one piece of the transitional justice package. The ICC would complete the national efforts by ensuring fully fledged trial of “those who bear the greatest responsibility”, to borrow the language of the Special Court for Sierra Leone.

Many observers will contrast the efforts of a country like Rwanda, which was uncompromising in its attempt to prosecute the *génocidaires*, and Sierra Leone, which offered amnesty, although it was sugar-coated with a truth commission. While the two are at opposite poles in some respects, on a practical level they have ultimately evolved towards the same type of solution: national mechanisms that fall short of criminal trials (as they are meant by Article 14 of the International Covenant on Civil and Political Rights), but crowned by a prestigious, international trial.

These cases of ‘internationalised’ trials are now being governed by a variety of hybrid approaches. The United States, in its efforts to sabo-

tage the Court, seems particularly keen on initiatives like the Special Court for Sierra Leone, which it can offer as an alternative. But can we not imagine a role for the prosecutor of the ICC in such cases. Rather than leave the initiative to the United States, or to the UN Office of Legal Affairs, the ICC prosecutor might seek out situations of transitional justice and attempt to find ‘complementary’ solutions that are not viewed as threatening or aggressive by the unable states. It might even take the form of prosecutorial initiatives targeted at states that are not yet parties, with a view to provoking Article 12(3) declarations or, ideally, ratification or accession.

Take the example of Burundi, not yet a state party. The Agreement for Peace and Reconciliation in Burundi, reached in Arusha on 28 August 2000, obliges the transitional government to call upon the Security Council to establish a commission of inquiry into genocide, war crimes and crimes against humanity. This is to be followed up, again according to the Agreement and on the rather safe assumption that the commission will find evidence of such crimes, by a further request from the government of Burundi that the Security Council establish an *ad hoc* international criminal tribunal.¹ This result is unlikely, given the costs involved in an *ad hoc* tribunal. But could the prosecutor not contact the authorities in Burundi and explore the possibility of some recognition of the Court’s jurisdiction by Burundi that would be seen as co-operative and ‘complementary’ rather than as a threat?

I concede that this type of approach was not really imagined in Rome. But recent experiments at transitional justice in poor, developing countries like Rwanda and Sierra Leone suggest a fundamentally common approach by which national options are combined with international justice. A prosecutor who was friendly to such solutions might define such a Court – not one that nobody has yet imagined, but one whose contribution to accountability and the fight against impunity seems self-evident. Such a prosecutorial approach might well encourage ratification and accession in developing countries, and effectively challenge stereotypes about judicial imperialism.

Here too, then, Burundi’s efforts at accountability and transitional justice are conditional upon international involvement and support.

¹ Accord d’Arusha pour la paix et la réconciliation au Burundi, 28 August 1999, Article 7(10)-(11).

19.2. Relationships with Academic Institutions

There have been various efforts from universities, I think mainly in the United States, directed at providing research assistance to the Office of the Prosecutor. In practice, most of the work was done by law students. Presumably much of this work was fundamentally positive and helpful, but it drew upon researchers with little experience or background and this was no doubt reflected in the overall quality of the output. The prosecutor of the Special Court for Sierra Leone has apparently attempted to take this a step further, creating what he calls an “academic consortium” of law faculties that provide opinions and research as requested.

Without in any way challenging the validity of such efforts, may I suggest another approach to the academic community, and one that would engage not only with undergraduate law students but also with academics at the highest levels? The Office of the Prosecutor has an interest in seeing itself as part of the academic community. In this respect, it is quite unlike national prosecution services, which are focused essentially on the quotidian. Many of the professionals within the Office of the Prosecutor are themselves people with one foot in the academic community. They publish articles, attend conferences and so on; many of them are either coming from academic careers or going to them.

The Office of the Prosecutor should encourage such networking with academics, both informally but also formally. A budget should be set aside to facilitate participation by professionals at the Office of the Prosecutor in academic conferences (only a few weeks ago, a colleague at the Office of the Prosecutor of the ICTY informed me he could not participate in an important academic conference I am organising because no funding was available), and to encourage publication by them in journals, books and so on. The Office of the Prosecutor might also consider joining as a co-sponsor in conferences or training events, like the young penalists course at Siracusa or the summer course on the ICC in Galway. The relevant academic institutions would welcome this, and would probably recognise the value of even a modest contribution to the event in the form of travel expenses for one of the Office of the Prosecutor lawyers as adequate participation. Being able to list the Office of the Prosecutor as a co-sponsor would give their own events greater credibility. The Office of the Prosecutor could also encourage its own professional staff to take up temporary teaching positions, as guest lecturers, in the growing number of

courses in international criminal law being offered around the world. This already occurs to a limited extent, of course, but it is essentially a matter for individual initiative at present. It would be preferable if the Office of the Prosecutor took a proactive approach to such relationships.

The Office of the Prosecutor might create a position such as a visiting scholar or research fellow that would be reserved for an academic on leave. It too need not be a remunerated position. Many academics likely to be interested in such a position would have no serious difficulty obtaining funding for such leave. Of course, the position would need to be sufficiently important within the Office of the Prosecutor as to be truly attractive, providing such a visitor with the chance to work on cases, attend strategy and planning meetings at the highest level and even, in appropriate cases, to actually participate in courtroom work. Such a position would be prestigious for both the academic in question and for the Office of the Prosecutor. It would enhance the reputation of the Office of the Prosecutor *vis-à-vis* the judges and it would also contribute to the building of long-term relationships between the Office of the Prosecutor and academic institutions.

Finally, could the Office of the Prosecutor not organise a one or two-day academic seminar in The Hague to which recognised academics in the field would be invited? Those concerned would not at all be troubled at the suggestion that they were responsible for their own costs; this would seem to be quite normal (although the Office of the Prosecutor might throw in the coffee breaks and perhaps a reception). But the whole thing could be run on a very small budget, and quite informally. The sessions would consist of briefings from senior professionals in the Office of the Prosecutor about their work, ongoing files and so on. It would also provide academics with a chance for some quality time with the prosecutor himself.

In order to facilitate this type of contact and involvement, the Office of the Prosecutor should designate an individual with a title such as academic institution co-ordinator or something similar. The International Committee of the Red Cross has such a position, currently occupied by Antoine Bouvier. It need not be a full-time job, and might simply be a title of one of the lawyers with a particular interest in this area who would then become a focal point for this. This type of meaningful and profound involvement with academic life would, in the long run, provide the Office of the Prosecutor with imaginative intellectual input of a very different

nature than what it is likely to get from law students conducting research projects (whose contribution, I repeat, is not to be gainsaid, but it is of a different order).

Case Selection

James Hamilton*

The most difficult problem facing the prosecutor at the International Criminal Court ('ICC') will arguably be the selection and prioritisation of the cases in which he or she proposes to seek an authorisation from the Pre-Trial Chambers for an investigation. Clearly the ICC is under a duty to act in relation to grave violations in cases falling within its jurisdiction. However, a serious problem would arise if the ICC were to attempt to take on too heavy a caseload, with the result that there would be an unreasonable delay in cases being heard. The ICC will have credibility only if cases can be brought to trial expeditiously.

It is important, therefore, that the ICC ought to be selective at the start and accept jurisdiction only in cases where there has been a particularly grave violation (of which, unfortunately, in the current state of the world there is no shortage) and where there is, or is likely to be, clear evidence. If the ICC is to avoid being overwhelmed from the start, the chief prosecutor will need to adopt a somewhat cautious and conservative approach to the initiation of investigations.

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The most obvious source of relevant experience is the *ad hoc* tribunals and a familiarity with their experience will undoubtedly be beneficial to the chief prosecutor. The experience of the *ad hoc* tribunals would indicate that in cases of very serious crimes, trials are likely to be very lengthy, some of them lasting for longer than a year. In these circumstances a Trial Division consisting of six judges will be able to handle only a limited caseload.

Additionally, the chief prosecutor will have the complex task of running an office staffed by people of different national backgrounds, with varying linguistic competence and from different legal systems. The multinational nature of the organisation makes it imperative at the outset to establish clear procedures and clear standards for the operation of the Office of the Prosecution.

Preparation of Draft Indictments and Effective Indictment Review

Mark B. Harmon*

21.1. The Indictment

The single most important legal document prepared by the Office of the Prosecutor will be the indictment of the accused. If it is prepared thoughtfully and patiently, after careful consideration of the evidentiary basis supporting each of the charges contained in it and after sound legal analysis, both as to its form and to the charges contained in it, the rigours and consequences of the litigation that will flow from it will be manageable. Anything less will court failure.

21.2. Investigation

It is axiomatic that a sound indictment can only result from a careful investigation. Given that an indictment is the most critical document in the litigation, the investigation leading up to its creation should be directed, but not necessarily managed, by a prosecutor who is an experienced trial lawyer and one who will later participate in the prosecution of the case. I make this suggestion because the investigation must be focused on obtaining evidence that will be admissible in trial and will be sufficient to prove each of the required elements of the criminal charges contained in the indictment. Without such guidance, whatever limited investigative resources that are at disposal could be squandered pursuing matters that are

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irrelevant to the potential criminal charges being investigated. It is my firm opinion that the quality of the indictment and the soundness of the analysis of the evidence underlying the proposed counts will be qualitatively improved if the person directing the investigation has a role in the future trial of the case.

Before leaving the subject of the pre-indictment investigations, I would like to offer the following observation. The investigative team should be comprised of more than experienced police investigators. The team should be multidisciplinary and should, depending on the nature of the case include or have access to, *inter alia*, military experts, political experts, forensic experts and, when required, outside specialists including but not limited to experts in the fields of ballistics, pathology, questioned documents, anthropology and the like. The views of such experts should be incorporated into the pre-indictment decision-making process before the proposed indictment is drafted and submitted for review (see below section 21.5.).

21.3. Scope of the Indictment

Turning to the indictment itself, one of the common issues that will confront a prosecutor in every case is the issue of the scope of the indictment – should it include every possible charge revealed by the investigation or should it be a leaner instrument that focuses on fewer counts? I personally favour the latter and do so for pragmatic reasons. On one hand, the mandate of the Office of the Prosecutor is to investigate and prosecute persons responsible for the most serious crimes of concern to the international community, and on the other hand, the resources at the prosecutor’s disposal to do so will likely be limited. Between the imperative of accomplishing the lofty mandate and the likelihood of limited investigative resources being available, pragmatism must win out.

In some instances under the Statute of the International Criminal Tribunal for the former Yugoslavia (‘ICTY Statute’), similar criminal conduct can be prosecuted under different provisions of the Statute. For example, “extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly” is a violation of Article 2(d) of the ICTY Statute (Grave breaches of the Geneva Conventions of 1949), and “wanton destruction of cities, towns, or villages or devastation not justified by military necessity” is a violation of Article 3(b) of the ICTY Statute (Violations of the laws or customs of war). Criminal con-

duct of this type can be prosecuted under either or both articles of the ICTY Statute. However, by charging a violation of Article 2 for the aforementioned conduct, the prosecutor is required to prove the additional element that the offence occurred within the context of an international armed conflict. Proving this additional element, in my experience, has been complex (a “trial within a trial”), burdensome and unnecessary in many cases, particularly since a conviction under Article 2(d) and Article 3(d) for the same conduct will not result in a greater sentence being imposed on the accused. Indeed, what may ensue from unnecessarily broad charging decisions are protracted trials, inefficient and wasteful use of limited prosecutorial and judicial resources, and delayed justice.

21.4. Evidentiary Standard for Indictment

Another critical consideration in the preparation of the indictment is the standard of the evidence supporting the indictment. Should the evidence supporting the charges in the indictment merely establish a *prima facie* case or should the evidence supporting the indictment be of a considerably higher standard (a trial ready standard or close thereto), meaning hypothetically that the case would be ready for trial or close thereto at the time of the initial appearance of the accused?

My view, from hard experience in the international criminal arena, ineluctably leads me to favour the latter concept. Again, this is for pragmatic reasons. Because the prosecutor will be based in The Hague and the locations where the crimes that he or she will be investigating are likely to be geographically distant, the investigations will take longer to complete than normal domestic investigations. Indeed, in terms of the differences of time it takes to complete an investigation, there is no comparison between the two. The reasons international criminal investigations take longer than domestic ones are manifold, and may include such formidable issues as the lack of access to or the inability to locate crime scenes, witnesses, and documents; limitations relating to language differences (interpretation issues such as interpreter availability and the time consuming translation of large volumes of documentary evidence); logistical issues (passports, air and ground travel, accommodation); and security issues (such as demining scenes of crimes and ensuring field security for staff).

In the context of international criminal justice and in the face of such investigative variables, it is imprudent to rely on an indictment that is merely supported by *prima facie* evidence. Should an accused person

be apprehended shortly after the indictment has been confirmed, such an indictment will require additional investigation in order for the charges (or some of them) to be provable at trial. Once an accused has been arrested, the prosecutor does not want to find himself or herself in a desperate race attempting to elevate the quality of *prima facie* evidence that supports the indictment to the standard of proof necessary to secure a conviction at trial (proof beyond a reasonable doubt), particularly when an accused has a right to be tried ‘without undue delay’. Under those circumstances, the prosecutor might actually lose the race and have to suffer the consequences.

21.5. Indictment Review Process

Having made these general observations, let me suggest a process designed to ensure the factual and legal soundness of the indictment itself. It is a process of testing the viability of the indictment before it is issued and it is a process that requires discipline and intellectual rigour. It requires two steps: the preparation of a draft indictment and supporting memorandum and a peer review process or indictment review.

The underlying rationale for conducting an indictment review process is simple: it is better that the indictment is first tested vigorously by one’s peers, thus exposing its flaws and weaknesses, than tested for the first time in the courtroom. The review process creates an opportunity to identify and cure evidentiary and legal problems with the proposed indictment whereas proceeding to trial with an untested instrument may create stress and uncertainty and could lead to failure.

The process begins when the prosecutor who has directed the investigation believes the evidence is sufficiently developed to indict an accused for a crime or crimes within the ICC Statute. At that point, he or she should prepare a draft indictment and simultaneously prepare a prosecution memorandum in support of the proposed indictment.

The prosecution memorandum is a critical document in the indictment review process because it focuses the mind of the prosecutor proposing the indictment on the available evidence and on the legal issues relating to the proposed indictment. Second, it serves the persons reviewing the proposed indictment with an analytical tool by which to commence a proper assessment of the indictment and the evidence supporting it.

An effective prosecution memorandum should include the following parts:

1. *Summary of the case*: This section provides a brief descriptive overview of the case.
2. *Description of the evidence*: Included in this section is a complete description of the evidence that supports each of the counts of the proposed indictment (meaning summaries of the testimony of each proposed witness, description of the documentary evidence, summaries of the expert evidence).
3. *Legal analysis*: This section includes a thorough legal analysis of the indictment, both as to its form and as to the nature of the substantive charges contained in it.
4. *Anticipated defences*: This section identifies and discusses the possible defences to each of the counts. By addressing anticipated defences at this early stage of the process, the prosecutor will be better prepared to deal with them at trial.
5. *Special problems*: This section identifies any special problems associated with the evidence or the law. For example, this section may identify and discuss witness protection issues for selected witnesses or document authentication issues in respect of specific items of evidence. It may also address such concerns as drafting issues or potential legal issues relating to specific charges in the indictment. The purpose of this section is to alert the reviewers to any problems that may impinge on the quality or availability of evidence or the viability of the charges contained in the proposed indictment.
6. *Recommendation*: The memorandum concludes with the recommendation of the prosecutor submitting the indictment for review.

To maximise the effectiveness of the indictment review process, the prosecution memorandum and the draft indictment should be circulated to the reviewers a reasonable time in advance of the actual indictment review in order for the reviewers to absorb its contents and prepare thoroughly for the indictment review.

It is imperative that the indictment review panel is composed of experienced trial attorneys and international legal experts and that the review process is presided over by a disinterested party (one who has not participated in either the investigation or the preparation of the proposed

indictment). If possible the chief prosecutor should attend and participate in the review.

The indictment review process requires the vigorous and honest review of the evidence that supports each of the counts in the proposed indictment. The term ‘evidence’ in this context is synonymous with the definition of what is admissible at trial under prevailing ICC standards. Therefore, evidence should include summaries of the proposed testimonies of persons who have indicated a willingness to testify (as opposed to summarising the evidence of witnesses who will not testify) and descriptions of documents that are at hand and that are legally admissible before the ICC. Using any lesser standard will corrupt the indictment review process and ill serve the prosecutor at a later trial.

The second component of the review process should include a vigorous review of the law that relates to the form of the indictment and to the legal charges themselves. For example, indictments at the ICTY are frequently challenged on the basis that they are allegedly deficient because they fail to state the material facts necessary to provide the accused with sufficient notice of the charges he faces. If properly addressed at the indictment review, such challenges may be later minimised or eliminated altogether.

Once the indictment review process has been completed, the conclusions of the reviewers in respect of the factual and legal sufficiency of each count of the indictment should be prepared by the person who led the review in its deliberations. If the indictment is found to be factually and legally sufficient, either in whole or in part, and a decision is taken to submit it to the chief prosecutor, the conclusions of the review panel and a final draft indictment should be forwarded to the chief prosecutor for his or her consideration and approval.

Should additional investigation be required before an indictment is submitted to the chief prosecutor, it should be pursued. Once this investigation has been completed, the indictment review panel should be reconvened to consider the new evidence. Assuming the results of this review are positive, the indictment should be finalised and forwarded for approval to the chief prosecutor, along with the conclusions of the review panel.

Substantive and Organisational Issues

Minna Schrag*

22.1. Introduction

The International Criminal Tribunal for the former Yugoslavia ('ICTY') is and should be considered a success, conducting credible trials and developing in concrete contexts the application of international law. But much could have been done to make the Tribunal even more effective. What follows are reflections, based on my own experience as a senior trial attorney in the Office of the Prosecutor in 1994 and 1995 during the Tribunal's early formative period. These reflections have been enhanced by my continuing conversations with former colleagues and my observations during occasional visits to The Hague in connection with my consulting activities since 1997. They are also informed by my participation in the Rome conference and meetings of the International Criminal Court ('ICC') Preparatory Commission as a member of the United States delegation, where my responsibilities concerned procedural issues.

At the beginning of the Tribunal's work, there was very little informed discussion about lessons learned from Nuremberg and Tokyo. The only references usually heard about Nuremberg were general comments that we had to be better and that we wanted to be viewed as less political

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and not engaged in victor's justice. I believe that mistakes could have been avoided if Nuremberg had been studied more closely. I therefore urge that the Office of the Prosecutor of the ICC take some time at the outset to consider and discuss fundamental principles as well as operating policies, and to profit from the ICTY (and International Criminal Tribunal for Rwanda) experience.

22.2. Goals of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Court

A long list of purposes is often ascribed to the ICTY and the ICC, and high expectations are attached to each one. Among those on the usual list are:

- to bring sense of justice to a war-torn place;
- to provide a sound foundation for lasting peace;
- to bring repose to victims;
- to provide a safe forum for victims to tell their stories;
- to enforce international law, end impunity for violations, especially for senior political and military leaders;
- to re-establish the rule of law;
- to demonstrate fairness and the highest standards of due process;
- to provide exemplary procedures to serve as a model for rebuilding a legal system devastated by war crimes and human rights violations;
- to create an accurate historical record, to forestall those who might later try to deny that the widespread violations of international law occurred;
- public education in general;
- in a didactic mode, to illuminate explanations about what caused the violations, and illustrate particular patterns of violations;
- to develop and expand the application and interpretation of international law and norms;
- to function with maximum transparency and public scrutiny;
- to provide a forum for considering restitution and reparations.

I believe that there is inherent tension among some of these goals, and that it is important that the senior staff in the Office of the Prosecutor spend some time considering what the priority should be among them.¹ Even notions of what constitutes appropriate ‘justice’ may vary widely. Whether or not a consensus emerges, the discussion itself will illuminate a variety of perspectives, and assist the prosecutor in setting fundamental approaches. My own view is that the prosecutor should emphasise in particular the didactic function and the perception in the affected region that justice is being done.

22.3. Political Context

Throughout the ICTY’s life some important prosecutorial choices were made with insufficient appreciation of political issues and perceptions. Sources of support and assistance may have been overlooked or unnecessarily offended, because senior officials took the position, familiar in domestic contexts, that prosecutorial decisions must be immune from political influence and considerations. While I emphatically support prosecutorial independence, I believe that a nuanced appreciation of political realities and sensitive public statements would be helpful.

For example, at the ICTY opportunities to win early public support, particularly in Bosnia, were lost because the best-known senior perpetrators, like Milošević, Ražnatović (‘Arkan’) and Šešelj, were not targeted for investigation. Even the indictment of Karadžić and Mladić, more than a year after the Office of the Prosecutor began its work, had less impact

¹ For example, there may be a tension between providing utmost fairness to the accused and special protections for victims. Similarly, there has been a mostly unexamined assumption that all victims of sexual assault will testify in closed session and need special protection, an assumption not necessarily based on real need and contrary to the goal of transparency and maximum public exposure. On the other hand, some witnesses, not necessarily only those who are victims, genuinely do require a wide array of special protective measures. Similarly, in conceiving trial strategy, it appears that the ICTY may have paid insufficient attention to its goals. There has been little concern for public education and the importance of keeping press attention; in some cases, more evidence was presented than necessary; the flexibility available under the rules to provide some of the uncontroversial background and contextual information in written form has been sparingly used. On the other hand, there has at times been insufficient attention to courtroom drama. For example, the very first trial, of Duško Tadić, began with the important but undramatic testimony of an expert witness regarding historical and political background, thereby losing the opportunity to capture the attention of the press who drifted away as the testimony continued over several days.

than it might have because it followed several indictments of relatively unknown persons.

Intense expectations that the Office of the Prosecutor immediately present indictments and cases to try led to the early decision by the Office to focus investigations on the Prijedor region where the Commission of Experts had done some detailed research. This decision kept everybody busy, but led to rapidly prepared early indictments. Time was never taken to conceive of a thorough prosecution strategy.

Moreover, because armed conflict continued for a year and a half after the Office of the Prosecutor began work, much criticism was received from those who considered the Tribunal's prosecutions inconsistent with peace. Greatly to his credit, Richard J. Goldstone immediately understood that he had to devote his personal energy to countering that criticism and generally to obtaining support for the Tribunal from political leaders, the press and influential organisations. The ICC prosecutor may have to attend to similar issues.

The political context in the former Yugoslavia required more attention than it received. We should have addressed more forcefully at the outset the perception that the ICTY was anti-Serb. Instead, we relied on claims of professional prosecutorial impartiality, familiar in a domestic context, which were not persuasive to those who were already convinced that the Tribunal was biased. More sensitivity to the political effects of Tribunal's work might have produced greater public understanding.

Managing budget approval through the General Assembly process required a different kind of political skill. There was little understanding, especially at first, at the United Nations about how expensive investigations and prosecutions are, especially in the midst of an ongoing armed conflict. Even though the budget grew quickly, the Office of the Prosecutor has been chronically underfunded. Similar skill will be required for the ICC. In my view, it is essential that the prosecutor participate actively with the registrar in creating the budget and in advocating for it at the Assembly of States Parties.

22.4. Office of the Prosecutor: Substantive Issues

22.4.1. Selection of Persons to Prosecute

Once a particular event, or place, has been selected for investigation, I suggest that the focus be on preparing prosecutions of the important perpetrators. Too much focus on the events themselves may be conducive to producing a history of a particular place, rather than on creating a strategy to pursue the most senior persons responsible for the crimes.

At the ICTY many low- and middle-level perpetrators were indicted because the evidence against them was readily available. This used up resources and clogged the system, so that many accused persons have waited several years for trial, undermining perceptions of fairness. While there may be good reasons to prosecute at least some low- and middle-level perpetrators, not enough attention was paid to limiting the number of them.

Moreover, there was insufficient overall co-ordination of investigations, and a belief held by some, not founded in any legal requirement, that if evidence was acquired that demonstrated a person's culpability, there was an obligation to indict that person. Since most evidence at first was collected from people who had been in detention camps, most evidence related to low-level prison guards.

A decision was made not to pursue theme cases, or in other ways not to give priority to the didactic purposes of prosecution. The only theme case so far, about sexual assault in Foča, has received more press attention than any case other than the Milošević trial. Reflecting a misapprehension about Nuremberg, the antipathy to theme cases was usually explained as not wanting to be perceived as "political" or to present "show trials". In my view, if cases are based on solid evidence, they cannot correctly be described as for show purposes.

But there were significant problems with the *Foča* case, too. The people who were prosecuted were middle-level officials who directly participated in sexual assaults, not more senior officials who directed the policy of using sexual assault as a weapon. More importantly, the focus of much prosecution energy in the case was to expand the prohibition against slavery to include sexual slavery, even though the facts of the case do not conform to popular notions of what constitutes slavery. Whether or not one believes that expanding and modernising the reach of international

law is a primary goal of the Tribunal, the priority in the case seemed to be on legal theory rather than on the more immediate purpose of illustrating and showing how, and explaining why, sexual assault is used as a weapon of terror.

One reason for the particular emphasis on law expansion may be that those who see the Tribunal as a vehicle and a rare opportunity to advance international law are paying closer attention than any other audience, and through their advocacy they may have disproportionate influence over prosecutorial strategy. For example, arguments from outside legal advocates may have led one trial team, without broader discussion within the Office of the Prosecutor, to seek and obtain from the judges authorisation to present an anonymous witness at trial, a decision that caused widespread criticism and diverted at a very early stage much needed attention and support. A strong senior level co-ordination of prosecution policy and practices might serve to minimise such disproportionate influences and encourage thorough internal discussion of decisions, especially of those likely to provoke controversy.

22.4.2. Creating an International Prosecutor's Office

It will be a great challenge for the ICC Office of the Prosecutor, as it was at the ICTY, to mold the staff into a cohesive body with a common approach to substantive and procedural issues. No task before the prosecutor will be more important or more immediate. No matter how detailed the rules of procedure will be, for example, it is inevitable that lawyers and investigators alike will tend to rely on their habitual approaches and instincts that they used in their domestic experience. For instance, staff members may bring with them dramatically different notions about how a witness statement should be written, or what constitutes exculpatory material, or whether and how a witness should be prepared for cross-examination. Failure to resolve at the outset the countless issues like these that inevitably will arise may create staff tension, inconsistency and significant misunderstandings, internal and external.²

² For example, at the ICTY several indictments were sealed upon confirmation. The use of sealed indictments is unremarkable to many common law prosecutors, but in some civil law systems, where the issuance and confirmation of the indictment is invariably a public proceeding that is in many ways almost as important as the trial itself, sealed indictments are viewed with suspicion. From this perspective, the denouncement by otherwise support-

I suggest that the senior staff of the Office of the Prosecutor meet regularly to discuss these issues, and that consideration be given to creating an office manual, setting forth the practices and procedures that will be followed.

22.5. Office of the Prosecutor: Organisation and Practices

From my experience at the ICTY I offer the following observations regarding the organisation of the prosecutor's office and its practices:

1. On the assumption that ordinary domestic practices would be applicable, the police, rather than the lawyers, were given responsibility over investigations and strategy at the ICTY. This was, I believe, a great mistake that in recent years has been somewhat corrected. The nature of the investigations and prosecutions at the ICC will require legal direction and co-ordination from the beginning. The investigators should report to the lawyers who will be presenting the cases at trial and confirmation.
2. An early priority should be choosing software so that a database can be created that will be easily searchable. For example, potentially exculpatory material must be identified and accessible; confidential material must be maintained as such; material collected by one investigative team should be available to other teams.
3. It will be important to have on staff persons with capacity to analyse data and in particular to have analysts with military expertise.
4. Investigative and trial teams should be closely co-ordinated and supervised at a senior level. Failure to do this at the ICTY produced at times intra-office conflict, a failure to recognise and pursue leads, and a failure to recognise exculpatory material.
5. Investigations should be completed before indictments are presented for confirmation. At the ICTY failure to do this was understandable in light of the circumstances, but the subsequent need to amend indictments created an impression of carelessness and perhaps unfairness.

ive Serb legal professionals of the Tribunal's procedures as illegal is understandable, and might have been better addressed.

6. The investigative staff should receive special training in dealing with trauma victims. Trauma counsellors should be available to staff as well.
7. A senior staff member should have responsibility for co-ordinating communications with victim representatives and positions the prosecutor may take regarding victim participation in particular cases. That staff member may also be responsible for ensuring that victims and other witnesses are kept informed of significant developments in the cases.
8. Similarly, a senior staff member should be responsible to act as liaison with governments and other providers of confidential information, to ensure that agreed upon procedures for obtaining and maintaining that information are followed and to manage novel issues that inevitably will arise. That function was filled with great skill at the ICTY.
9. Because the ICC Rules of Procedure leave the conduct of the trials largely to the discretion of the Trial Chambers, it will be important to have a senior staff member responsible for formulating and co-ordinating the prosecutor's position on questions of trial practice. Different trial teams should be prevented from taking inconsistent positions.
10. There should be a unit responsible for co-ordinating responses to legal questions and for pursuing legal questions on appeal. In general, that unit might function as the intellectual centre of the prosecutor's office. It should be available to advise the investigative and trial teams and should participate in high-level policy decisions.
11. There should be a senior staff person responsible for supervising and co-ordinating the work of the prosecutors. For example, that person might receive a copy of all outgoing correspondence; when different cases are competing for the live testimony of a witness, decide which case should have priority; convene discussions to ensure that common goals will be pursued; and encourage development of an indictment form used consistently with the office that is readily intelligible and tells a story.
12. There should be staff members within the Office of the Prosecutor with particular responsibility for relations with the press, non-

governmental organisations and the Victims and Witness Unit within the Registry.

Prosecutor-Directed Investigations

Hildegard Uertz-Retzlaff*

23.1. Prosecution versus Investigation

From an organisational chart of the Office of the Prosecutor of the International Criminal Court ('ICC'), I have noticed that the separation of investigation and prosecution departments is planned. That follows the system practised in the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia ('ICTY'). I personally observed over the years that this structure has disadvantages that are hard to overcome and result in huge pressure on trial teams.

In the Investigation Department in the Office of the Prosecutor, the superior body is the police structure with the legal advisers, as the name indicates, in an advisory position. This may suffice in a legal environment with clearly defined criminal charges. It is less practical when the charges are very complex and complicated such as in the ICTY and ICC. Without being disrespectful to the work of the police structures, my experience shows that, in the course of police-driven investigations, difficult legal elements were not paid sufficient attention to. Only in the much later prosecution stage were those matters realised, which led to the fact that in many cases an extensive investigation had to be conducted during the trial stage. As a consequence, most of the investigative resources were drawn into cases on trial while new investigations had to be put on hold.

Carla del Ponte, the prosecutor of the ICTY, recognised this problem and reorganised her office. Since then, the senior trial attorneys have directed the investigations. However, the role of the investigation com-

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manders became somewhat superfluous and perhaps uncomfortable. My proposal, therefore, is to give up the artificial division between the investigation and prosecution departments. The senior trial attorneys in the ICC should direct the investigations. The investigative team leaders should have a legal background and report to the senior trial attorneys. This organisational structure has proven practical also in my home jurisdiction, Germany. There prosecutors are in charge of the investigation and lead the police and expert personnel assigned to the investigation. This is particularly crucial in complicated offences.

For the organisation of the Office of the Prosecutor of the ICC this means that there should to be sufficient senior legal staff and fewer senior police staff as proposed in the organisational chart.

23.2. Prosecution Targets

Another problem that became apparent in the Office of the Prosecutor of the ICTY was the question who to prosecute. From the very start of my work in the Office of the Prosecutor, discussions were held about whether to prosecute the so-called small fish. Although it was decided early on that the Office of the Prosecutor would concentrate on the higher-level perpetrators, this was not practised consistently for good reasons.

First, if all forms of serious criminal conduct that became apparent during the conflict in the former Yugoslavia should be publicly recognised, the Office of the Prosecutor had to prosecute notorious lower-level perpetrators as well. Had the Office of the Prosecutor not done so, no Trial Chamber of the ICTY would have had to deal with crimes committed in rape camps or prison camps. This level of prosecution contributed to reconciliation as envisioned for the ICTY, and also helped to define legal elements of charges. However, the question remains whether so many lower-level perpetrators should have been indicted.

In addition, the investigations directed against lower-level perpetrators should have been accompanied by a complex strategy to tie them into the investigation against the top-level perpetrators. This aspect was not given the necessary attention. Many investigative resources were spent on lower-level perpetrators without paying attention to the broader context. As a result, the resources left for the highest-level perpetrators were not sufficient. This resulted in the investigations against the top political and military leadership in the republics and at the federal level in the former

Yugoslavia being put on hold for too long. This is one of the reasons why the Office of the Prosecutor is now preparing many indictments against the highest leaders, and why middle-level perpetrators will not be indicted at all in the remaining time of the ICTY.

My suggestion for the management of the Office of the Prosecutor of the ICC, therefore, is to decide at the very beginning on a long-term strategy for the investigations relative to a conflict encompassing all levels of perpetrators and conduct, starting from the top level down and not the other way round.

23.3. Dossiers versus Open Files

One key problem in the Office of the Prosecutor of the ICTY from the beginning was disclosure, in particular Rule 68. Due to the huge amount of information that flooded the Office of the Prosecutor from the beginning, document collection is very difficult. Most of the materials, however, are not of special evidentiary value but have to be searched for Rule 68 searches. Had the evidentiary value of incoming material been properly assessed immediately upon its arrival at the Office of the Prosecutor, the problems would not have been so serious. A control mechanism needs to be established for all incoming materials, so that materials of lesser or no evidentiary value or materials already known to the Office of the Prosecutor can be separated and kept out of the system.

In addition, all documentation relating to an investigation should be filed in a case file in chronological order, with special binders for particular issues, that could then be handed to the confirming judge and disclosed to the defence.

On Charging Criteria and Other Policy Concerns

Clint Williamson*

24.1. Introduction and Background

In this chapter, I offer a number of observations and recommendations that I believe might be of benefit to the prosecutor of the International Criminal Court ('ICC') and his or her immediate staff. I base these opinions on my experience as a legal adviser/trial attorney in the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia ('ICTY') from 1994 to 2001, and as the director of the Department of Justice in United Nations-administered Kosovo in 2001 and 2002. In the latter role, among other responsibilities, I supervised international judges and prosecutors working in the province and managed the overall judicial policy of the mission/government. In light of Kosovo's post-conflict situation, there was a heavy emphasis on issues relating to international hu-

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manitarian law during my tenure and a surprising number of parallels with my former work at the ICTY.

24.2. Structure

It is extremely important that there be control from the top of the investigative and charging process and, to a lesser extent, of ensuing prosecutions. Decisions on the cases that will be pursued, the investigative targets, and which charges will be brought (or not brought) should be coordinated by the prosecutor and his or her immediate office. Although the ICC Statute provides a formal process for determining whether an investigation will be opened (through a review by the Pre-Trial Chamber of the Court), the prosecutor should not take a hands-off approach after that decision is made. While it is important that the prosecutor not micromanage every investigation, he or she and his or her immediate staff must remain engaged in the investigative process and ensure that the investigative strategy being pursued is sound. This is vital if there is going to be a consistent approach to investigations and prosecutions – something that is crucial to establishing the credibility of the organisation.

In the case of the ICTY, investigative teams were effectively given a free hand in choosing which cases they would pursue and the strategy by which they would pursue them. Since many of the persons making these decisions were ill-informed about the conflict as a whole, or even the specific regions on which they were focusing, they were easily influenced by a few reports or the testimonies of a limited number of witnesses. Too many investigators and lawyers at the ICTY who did not make an effort to learn about the broader conflict tended to form their opinions about the conflict as a whole, and the relation of their respective investigation within that broader context, based on what they were told by a small number of witnesses in a single village. Also, coming from domestic environments, many (understandably) were horrified by the scale of the crimes in the specific area of their respective investigation. While no one would argue that the mass murder of 15 people is not criminal, such events unfortunately were commonplace in the former Yugoslavia and it would have been impossible to prosecute every case of that size. Since most investigators had never seen crimes on this scale, though, they tended to overestimate the importance of the cases they were investigating. This skewed perspective led to huge discrepancies in the types of cases that were brought and in the relative guilt of those charged. This contrib-

uted to the perception that the ICTY was extremely political because persons knowledgeable about the conflict (especially those in the former Yugoslavia itself) could not understand why tremendous resources were being dedicated to low-level perpetrators who were relatively insignificant in the overall scheme of things.

While the ICTY prosecutor, deputy prosecutor and chief of investigations exercised some oversight of investigations and prosecutions, it was largely of an administrative nature. They did not play a meaningful role in the selection of cases or in the substantive manner in which investigations were pursued. As a result, investigative teams were largely left to their own devices as to how they did things, and the quality of cases produced was entirely dependent on the quality of those working on the investigation. Additionally, since there was little effective co-ordination from the top, resources were allocated in a haphazard fashion with little regard for the relative importance of cases (for example, the investigation of Srebrenica where more than 8,000 Muslim men and boys were killed was handled for months by only two persons). At the point that an investigation was completed and an indictment submitted, the prosecutor and deputy prosecutor became more involved substantively. By then, though, the focus was really only on the legal and factual sufficiency of the indictment. Since resources had been poured into the case for months at that point, rarely were questions raised as to the soundness of the decision to undertake that particular investigation in the first place. Thus, too many cases were indicted simply because no one in management had exercised substantive oversight until it was too late and, by then, the momentum of the investigation simply carried the cases through to indictment.

Management also tended to look at each case in isolation. As a result, indictments that were brought often had contradictory allegations in them. For example, one indictment against Serbian perpetrators might allege that the Bosnian Muslims primarily had been the victims in a certain region of Bosnia, while an indictment brought by another team against Bosnian Muslim perpetrators might say that the Serbs had been the primary victims. In some cases, the conclusions drawn from the facts were simply incorrect and, in others, teams simply refused to work with other teams or to accept their input. Again, these problems largely arose because teams worked in an uncoordinated fashion, often had little knowledge of the broader conflict and were not provided any strategic guidance from above.

Another problem arising from this lack of managerial engagement was the absence of true accountability in the Office of the Prosecutor, particularly in the Investigations Section. Teams were required to make presentations to management approximately every six months. For many, however, these presentations became a well-rehearsed drill of saying what was required to justify a six-month continuance of an otherwise ill-conceived investigation (for example, “we’ve just located a key witness”, “we have to follow-up on this new lead” and so on). Since those in management (or their support staff) either did not have substantive knowledge of the material being discussed or practical operational experience, they were not able to challenge investigators and lawyers on their claims or to know whether the points they were making were legitimate. Some teams thus investigated one case for three or four years without producing any meaningful results. During this time, expenses related to their activities would total hundreds of thousands of dollars or in excess of a million dollars, yet they were rarely challenged to explain themselves aside from the periodic briefings to management. In short, management should have been much more involved, should have monitored teams’ activities more closely and in a more informed manner, and should have constantly assessed the investigations to determine whether their continued approach was worth pursuing or whether it would have been better to follow other alternatives.

All of the points I have just raised relate in one way or another to the general issues of organisation and structure. As a new institution, the ICC is being created from the ground up, and initial decisions as to how it should be structured will be based on projections of the type and amount of work it will be required to do rather than actual experience. Over time, some of these projections may prove to be incorrect as new challenges arise and expectations change. It was certainly the case at the ICTY that many of the initial projections proved to be incorrect as the work of the office developed. Unfortunately, management was unwilling – until very late in the day – to make organisational changes that reflected the actual work of the Office of the Prosecutor and the demands that were made on it.

When I arrived in Kosovo, I found that much the same situation existed with the Department of Justice. It had been set up over the preceding two years in an *ad hoc* fashion (that is, whenever a need arose a new office was created) with little thought for creating a coherent organisation. In some cases, offices that had been set up a year before to serve a certain

purpose were no longer even necessary. Other offices, which had extremely high work demands on them, were understaffed or otherwise under-resourced. As in any international organisation or government, though, bureaucratic structures tend to take on a life of their own and are extremely resistant to change. Thus, it is often easier to maintain the *status quo* than to fight battles with personnel over restructuring.

With the Department of Justice in Kosovo, there was widespread dissatisfaction with the department's performance, and I therefore was given a broad mandate to make needed changes when I arrived. Nevertheless, I encountered stiff resistance from certain quarters when I sought to restructure the department along the lines of a functioning ministry of justice, which necessarily was required given the role the department was expected to play. I was able to accomplish this over time, but it required a strong commitment of personal time and energy. In short, structural changes are often opposed to such an extent that the only way they will be implemented is by having top management stay very engaged in the process. This may sound obvious, but too often (as was the case with the ICTY) needed changes are introduced, but they are not implemented fully because others down the chain of command do not want to see them succeed.

As the ICC is established, it is important for the prosecutor to adopt a very flexible approach and be willing to make structural and organisational changes as necessary. If his or her middle-level managers and staff know this, it goes a long way toward overcoming the resistance to change when change is needed. In Kosovo, I headed a department of 1,500 persons working in specialised units (organised crime/terrorism unit, international affairs unit and so on), the courts, the prosecutors' offices, the prisons, and the missing persons/forensics programme. Some of these sections were in place when I arrived, and I established others to address issues that were not being adequately handled. With such a varied mandate and with professionals from so many fields involved, though, I found that it was helpful to establish goals and objectives for each unit and for the department as a whole. Some of these were very general and some were performance-related but, by constantly assessing progress on these objectives, it was relatively easy to identify which offices were working well and which were not. Every three months, I met with my core staff to thoroughly review the objectives and to determine if each had been accomplished, partially performed or not addressed at all. Where objectives had not been met, we sought to determine what was needed to get them done.

On several occasions, this required structural changes in the department and, at other times, shifts of personnel or an increase in resources. Although I found that this worked well in Kosovo, it does not necessarily mean that exactly the same approach is appropriate for the ICC as an institution or for the prosecutor as an individual. Nevertheless, it is important to set up some system for assessing effectiveness, to make sure that everyone knows this is going to be done, and that everyone understands changes will be made if necessary.

In relation to the aforementioned points, I would offer the following suggestions:

- The prosecutor should create a core group that oversees all investigations and prosecutions, and the make-up of this group should remain constant so as to ensure a consistent approach. Included in this group should be the deputy prosecutor, a senior legal adviser and a senior political adviser, and their combined expertise should reflect a comprehensive body of knowledge and experience. All such persons should be politically astute and sensitive to broader issues beyond purely evidentiary and legal concerns.
- The deputy prosecutor should have a solid operational background and should be capable of effectively overseeing both the prosecutorial and investigative aspects of the office. Thus, extensive first-hand experience in both areas is preferable and experience working in a field environment also is helpful. Since the diplomatic and public relations demands on the prosecutor are so great, the deputy prosecutor will often be the one running the office; management experience therefore is crucial.
- The senior legal adviser should have substantial experience in international humanitarian law and preferably some field experience. The Prosecutor needs someone who can provide well-reasoned advice on legal matters, but advice that is well-grounded in terms of operational realities.
- The senior political adviser should co-ordinate the area experts in the office and should be able to draw upon outside expertise as well to provide input on the political context of issues considered and the possible political ramifications of Office of the Prosecutor actions.
- The chief of prosecutions and the chief of investigations should know both the investigative and prosecutorial processes. Since the

two are so intertwined in war crimes investigations, it will be unhelpful to have persons in these positions whose knowledge and experience are limited to only one of the two aspects. People with mixed backgrounds as prosecutors and investigative magistrates could be well-suited for these posts.

- The prosecutor and his or her core staff should remain engaged in the investigative process even after the decision to open an investigation is approved by the Pre-Trial Chamber. They should receive regular (and realistic) reports on progress, should hold investigative teams accountable for their work, and should assess the viability of the case on an ongoing basis.
- The prosecutor should be very engaged in the indictment review process and should not see it as a *pro forma* procedure focusing solely on sufficiency of evidence and legal form.
- Although extensive oversight is required during the investigative process, less supervision should be needed during trials provided, however, that the trial attorneys are capable. While trial attorneys need to have latitude to handle cases in court as they see fit, the prosecutor must be able to intervene in any case where action is warranted.
- In setting up the office, the prosecutor should try to anticipate various work requirements and needs of the Office of the Prosecutor and create structures accordingly. A mechanism should be established for regularly assessing the effectiveness and continuing need for all component parts of the Office of the Prosecutor, and there should be no reluctance to make structural changes when deemed necessary.

24.3. Charging Criteria

Critics of the ICTY frequently alleged that it was biased against one ethnic group or another, based on the fact that a number of perpetrators from one group had been indicted and none or only a few from another group had been so indicted. Too often management at the ICTY succumbed to these arguments and pushed for indictments of someone from the other group in order to prove that the Tribunal was even-handed. I think this was a major mistake that exposed the ICTY to even more criticism for being politically driven.

For example, in relation to the Kosovo conflict, Slobodan Milošević and four of his top officials were indicted for a number of crimes in May 1999. Almost immediately, there were calls for indictments of Kosovar Albanians because they, too, had committed crimes. Clearly a number of Albanians had committed criminal acts but, generally speaking, the crimes committed by Albanian perpetrators were on a relatively small scale (at least during the period of recognised armed conflict, that is, prior to the North Atlantic Treaty Organisation's July 1999 deployment in the province) compared to crimes that could be linked to the top Serbian leadership. Milošević and his co-defendants were charged with overseeing forced deportations of almost a million people and with the deaths of several thousand. On the other hand, very few Albanian perpetrators could be linked to more than a single-digit number of deaths during the armed conflict. In an attempt to show its even-handedness, however, the ICTY aggressively sought to come up with an indictment against an Albanian with little regard for the relative scale of the crime.

In almost every conflict, some crimes can be attributed to all sides. Rarely, though, is guilt equal to every side. Rather than creating this impression by trying to balance indictments in equal numbers between all sides, it is better to be honest and forthright and say openly that the evidence shows that more crimes can be linked to one side or another, and to proceed based on the scale of the crimes rather than the ethnicity of the perpetrator. In short, this means adopting a threshold level of criminality that should be used as the guiding principle for issuance of indictments rather than ethnicity. With either approach, one group or another will find fault. However, by using the nature and scale of the crime as the determining factor, rather than mere ethnic, tribal or national affiliation of the alleged perpetrator(s), the rationale for investigations and indictments can be defended by a largely objective methodology. While this approach may open the institution to more criticism in the heat of the moment (particularly from parties to the conflict), it will reflect much better on the organisation from a long-term historical perspective.

In regard to this issue, I would recommend the following:

- Investigate all sides in an even-handed fashion, but do not succumb to the pressure to issue indictments evenly against all sides unless the evidence supports such indictments.

- The prosecutor should establish a threshold level of crime for each conflict situation in which the ICC undertakes an investigation. (Since each conflict is different, though, it will be necessary to select criteria appropriate to each specific situation.)
- While exceptions may need to be made – for particularly heinous crimes (that is, ‘notorious offenders’) – established threshold levels should be the guiding principle for prosecutions.

In the long run, this approach – using objective criteria – is more even-handed, is easier to defend and is less vulnerable to attack for politicisation of the process.

24.4. Investigations

Valuable lessons can be learned from the ICTY and the mistakes that were made in terms of its approach to investigations. In this regard, I refer to the overly prominent role which was exercised by police investigators. When the ICTY was established, the deputy prosecutor placed all responsibility for the conduct of investigations in the hands of investigators. This approach effectively called for investigators to make all decisions about investigative targets, to create investigative strategies, and then to handle all witness interviews and evidence collection – tasks for which the ICTY investigators were woefully unprepared. At the conclusion of this process, it was envisaged that the investigators would hand a “completed case” to the legal adviser (playing the role of solicitor), who would then draft the indictment, and the case would then go to the senior trial attorney (playing the role of the barrister) who would try the case in court.

This was a deeply flawed approach for several reasons. First, while this process might work in the investigation of a relatively straightforward street crime (for example, where A shoots B), it was inappropriate for the investigation of complex war crimes cases. Apart from direct perpetrators of war crimes, these cases are much more akin to organised crime cases where the person ultimately responsible for the commission of the crime is insulated from the act itself by several layers of trusted subordinates. Thus, the prosecutions tend to be much more complicated and often rely on circumstantial evidence. It is vital, therefore, that the prosecutors be actively involved in the investigation and oversee the manner in which evidence is developed and collected.

Second, the nature of war crimes cases is such that political, military and intelligence factors often play as much of a role in determining culpability as does physical evidence of the crime. As such, experts in these fields are vital to the investigative process. The tendency at the ICTY to rely exclusively on police skills at the expense of everything else often led to flawed investigative findings.

Third, while there is a role for police investigators to play, the ICTY generally hired the wrong type of people to be investigators. Early on, the Office of the Prosecutor sought out only detectives with years of experience conducting domestic street crime investigations. Other qualifications normally required for professional-level employment in the United Nations (for example, university degrees) were waived, since this was seen as the only truly relevant qualifier. While policemen trained in street crime investigations may be quite proficient in gathering crime base evidence (for example, witnesses who can say “I saw A shoot B”), most do not have the experience or background for developing evidence of command structures above the trigger-pullers. This was certainly the case at the ICTY, where too many resources were applied to investigations of low-level perpetrators such as camp guards. Because investigators were most comfortable handling these types of cases, investigations of leadership targets suffered.

Finally, the bifurcated investigative/prosecutorial approach used at the ICTY gave all power to investigators, but basically left prosecutors with all of the responsibility. In other words, even if a prosecutor knew that an investigative approach being followed would result in problems in the courtroom, it was still the final call of the police investigator as to how things would be done. Thus, prosecutors often found themselves in court defending investigative practices with which they may have disagreed but had no power to change.

Accordingly, I would recommend the following:

- Create integrated investigative teams with prosecutors/legal officers in the lead but including area experts (possessing detailed knowledge of the region involved in the specific case), translators, military and intelligence analysts, and police investigators.
- When investigative teams brief the prosecutor (and his or her core staff) on the progress of their work, provide an opportunity for the specialists on the team in each field (lawyers, political analysts, mil-

itary analysts and so on) to express their views on how the investigation is proceeding. In other words, use these briefings as a mechanism for ensuring that no one aspect of the investigation is dominating everything else.

- Set stringent criteria for prosecutors and investigators who will go into the field, ensuring that they have experience relevant to conducting complex war crimes investigations (for example, organised crime, terrorism and so on).
- Require that prosecutors leading investigations have experience both in investigating crimes and in prosecuting them in court.
- Since it will be impossible to maintain a large staff of experts on every country or region, a list of demonstrably qualified area experts should be developed who can be called upon in the event of issues arising in their respective regions of knowledge. These experts should represent the needed range of perspectives on the region in question (that is, not just the perspective of one side in a conflict).
- If individuals with police backgrounds are used as investigators, they should have suitable educational levels (that is, university degrees), backgrounds in complex criminal investigations (for example, organised crime or terrorism), and/or particularly useful knowledge of the region on which they are focused (for example, language skills or knowledge of the culture).

24.5. Hiring

Although I touched on this issue to some extent in the preceding paragraphs, I would like to highlight one point relating to the ICC's ability to hire personnel who have the highest qualifications possible for positions in the Office of the Prosecutor. Like the ICTY, the ICC will be a very desirable place to work and it will attract applications from thousands of persons for relatively few posts. For this reason, the ICC can afford to be very selective in who it hires. It need not settle for individuals who have questionable qualifications, nor should it revise qualification requirements downward simply to employ people quickly.

Especially at the outset, the prosecutor should be very involved in the hiring process and should ensure that the staff created for him or her is capable and that their qualifications are consistent with what he or she

wishes to accomplish. Thereafter, the prosecutor or the deputy prosecutor should still participate in the hiring of anyone who will perform key functions. Ultimately, the success of the organisation will be determined by the quality of its staff, and it is always easier to screen people at the hiring stage than it is to dismiss those already hired people who are not performing adequately. While the prosecutor or his/her deputy may understandably be inclined to delegate hiring decisions to other subordinates, they must remain informed of hiring practices and choices – particularly in the early days. In Kosovo, for example, I sat on the interview panels of everyone who would be performing key functions or supervisory duties (division heads, international judges and so on) or working directly with me in the department's front office (special assistants, lawyers in the Legal Policy Unit). As to every other professional staff member hired, I retained the final decision and only signed off on a hire after reviewing their *curriculum vitae* and the notes of the interview panel.

The involvement of the prosecutor and the deputy prosecutor is also important to guard against practices or even the perception of cronyism (that is, the hiring of friends or cronies). If one nationality, or a small set of nationalities, comes to have an overly prominent role in the organisation, this will inevitably lead to questions about the fairness of the hiring process. Particularly if these individuals have been friends in the past or have previously worked together, questions will arise. This is not to suggest that anyone who has previously worked with a current staff member should be barred from employment; quite the contrary. If a trusted staff member has personal knowledge of an applicant's abilities or work habits, this should clearly be taken into account and their recommendations should be considered. Where such prior relationships exist, though, every effort should be made to distance the current staff member from the hiring process for that applicant (for example, not participating in the interview panel), and that applicant's hiring or promotion should be able to withstand objective scrutiny. If staff members lose confidence in the fairness of the hiring and promotion processes, this will quickly translate into a loss of confidence in management as a whole.

My recommendations regarding hiring would then be as follows:

- The prosecutor should be actively involved in the hiring of persons for all key posts in the Office of the Prosecutor, especially those assuming supervisory positions or working in the front office of the

prosecutor. This involvement should include participation in the interview process.

- The prosecutor should make the final decision on all professional hires, even if substantial parts of the process have been delegated to subordinates.
- The prosecutor should closely monitor personnel decisions within the Office of the Prosecutor to ensure that a truly objective and transparent process is used in hiring (that is, transparent not only on paper but in practice as well) and that nothing occurs which creates the perception that cronyism is a factor.

24.6. Scope of Prosecutions

A court such as the ICC cannot be seen as the forum for prosecuting every perpetrator from a given conflict. As a practical matter, resource limitations will preclude this. Beyond the practicalities, though, there is a philosophical basis for the court which argues for a different approach. I would suggest that the ultimate mission of the ICC (as was envisaged for the ICTY as well) is to assist in ensuring accountability but also in creating a climate of peace and reconciliation in the aftermath of a conflict. This will be accomplished by prosecuting individuals who bear overall responsibility for large-scale violations of international humanitarian law and/or those who engaged in especially egregious acts (that is, ‘notorious offenders’). Although there will usually be many individuals with blood on their hands in any given conflict, there are relatively few whose prosecutions will be consistent with the broad mission objectives of the ICC noted above. Thus, the prosecutor should always guard against efforts by outside commentators or even by others in the ICC to pressure the Office of the Prosecutor into pursuing low-level perpetrators who are more appropriately prosecuted in a national domestic court.

In this regard, I would offer the following recommendations:

- Avoid the tendency to bring prosecutions against low-level, insignificant players simply because they are easy cases to put together and because the targets are easier to get into custody. In other words, be patient and wait for the ‘big fish’.
- Always be mindful of the historical ramifications that will flow from ICC prosecutions; misguided prosecutions that present a

skewed view of what transpired in a given conflict will only give rise to lingering resentment and feelings of injustice.

Section 3: Management, Staffing, Functioning

The Exercise of the Powers of the Prosecutor

Nicholas Cowdery*

The prosecutor will have the advantage that many of the requirements for the exercise of his or her powers have been set out in the relevant statutes and formal documents relating to the International Criminal Court; but a number of principles may be emphasised.

The first and most important is professional independence in prosecutorial decision-making. Decisions must be able to be made (and in fact be made) free from inappropriate influences by governments, politicians, international organisations, the media, individuals or sections in society, special interest groups or judges. Mechanisms must be established to facilitate that. Clear administrative independence of the Office of the Prosecutor will assist, as will an appropriate level of funding to enable the Office to be adequately resourced for its tasks.

There will need to be established an internal division between the conduct of the investigatory and prosecuting functions of the Office. It is just as important that prosecutorial decisions be made independently from the views of investigators (while, of course, relying upon the product of their investigations).

The prosecutor will need to delegate a number of functions to appropriate levels within the Office. It is essential that appropriate checks and balances be installed to minimise the risk of corruption of processes and decisions. At the same time, an atmosphere of mutual respect and trust needs to be fostered at all levels and between all levels of officers. Ultimately, the prosecutor needs to be able to have confidence in the op-

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erations of the Office as a whole and the nature of the ‘product’ it produces. Only then can it begin to have the confidence of the international community, which is essential to its acceptance and effective operation.

Consequently, clear written guidelines will have to be developed and promulgated for the guidance of staff. They should include (in due course and in the light of experience) factors relevant to the making of prosecutorial decisions in general.

Above all, it is important to avoid reinventing the wheel. Despite the unique character of the Office of the Prosecutor, there are models available for that line of work (in the Tribunals at The Hague) and lessons to be learnt from the establishments and operations of prosecutors’ offices around the world.

In my view, this is a very important initiative that deserves to be supported in all possible ways.

Issues Regarding Article 42

Hector Olásolo*

Summary of Contents

This chapter addresses a number of issues relating to the administrative and managerial functions of the prosecutor that, in my view, need to be dealt with at this early stage of the establishment of the Office of the Prosecutor of the International Criminal Court ('ICC'). First, as a result of having directed the performance of the Office of the Prosecutor functions by the principles of political discretion and indirect dependence on the states parties, the legal position of the Office of the Prosecutor has been weakened *vis-à-vis* the states parties and other external powers. This chapter proposes a number of measures within the powers of the Office of the Prosecutor directed to strengthen such a position.

Second, unlike the Statutes of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR'), the ICC Statute establishes three different types of procedures, each one with its own subject, parties and proceedings, which are respectively called: the triggering procedure, the criminal procedure and the civil procedure. However, the organisation of the Office of the

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Prosecutor provided for in the budget for the first financial period of the Court has been mainly designed on the basis of the functions entrusted to the Office of the Prosecutor in the criminal procedure, and thus it does not adequately reflect the key functions that the Office of the Prosecutor has been entrusted with in the triggering and civil procedures. This chapter proposes some organisational adjustments to better enable the Office of the Prosecutor to carry out such key functions.

In order to enable the Office of the Prosecutor to perform properly its role as primary custodian of the complementarity regime of the ICC, to deal adequately with victims' issues, and to comply with its duties derived from the two types of right of access to the Court provided for in Articles 13, 14, 15 and 53 of the ICC Statute, this chapter proposes some additional managerial and organisational adjustments of the Office of the Prosecutor.

Finally, given the experience of the ICTY Office of the Prosecutor internship programme and the key functions entrusted with the Office of the Prosecutor as the primary custodian of the complementarity regime, an internship programme should be established as soon as practicable, whose regulations could be along the lines of the draft regulations contained in the last part of this chapter.

26.1. Introduction

Having provided in Article 34 of the ICC Statute that the Office of the Prosecutor is one of the organs of the Court, Article 42(1) establishes that the Office "shall act independently as a separate organ of the Court". The shaping of the Office of the Prosecutor as a separate organ of the Court is further developed in Article 42(2) that grants "full authority over the management and administration of the Office, including the staff, facilities and other resources thereof", to the head of the Office of the Prosecutor, the ICC prosecutor. These administrative and managerial powers are restated in Articles 43(1) and 44 when regulating the functions of the Registry and personnel matters.

As a result, unlike the ICTY and ICTR Statutes, Articles 42(2), 43(1) and 44 of the ICC Statute grant to the prosecutor sweeping administrative powers that require that he or she has his or her own administration and administrative staff. On this basis, the budget for the first financial period of the Court provides for an Administrative Unit attached to the immediate Office of the Prosecutor whose main functions are to help the

prosecutor recruit personnel and to exercise his or her statutory authority to administer and manage the Office of the Prosecutor.

These separate administrative arrangements are intended to guarantee that the use of personnel and other Office of the Prosecutor resources will not be restricted by the Registry in any way that could interfere with investigations and prosecutions. In addition, such separate administrative arrangements stem from the understanding that it would be inappropriate for the registrar, head of the Registry and elected by the majority of the ICC judges, to provide administrative services to a separate organ of the Court as the Office of the Prosecutor.

Articles 42(2), 43(1) and 44 of the ICC Statute entrust the Office of the Prosecutor with a wide range of administrative and managerial functions, including *inter alia*:

- organisation of the Office of the Prosecutor;
- recruitment of the Prosecutor and use of staff of the Prosecutor and of the Prosecutor *gratis* personnel;
- use of Office of the Prosecutor equipment and material resources;
- receipt and storage of Security Council and states parties' referrals of situations of crisis and Article 15(1) "complaints";¹
- retention and security of information and physical evidence;
- notification of Office of the Prosecutor decisions, when so required by the ICC Statute and the Rules of Procedures of Evidence ('RPE'), to the Security Council, states parties and non-parties, complainants, and victims and witnesses;
- transmission of requests of assistance to states parties, intergovernmental organisations, non-governmental organisations and other legal or natural persons;

¹ Throughout this chapter I use the term "complaint" to refer to the transmission of the *notitia criminis*, or report of a crime, by any natural or legal person to the Office of the Prosecutor in accordance with Art. 15(1) of the ICC Statute. I have chosen this term because, as explained below in section 26.3.1., under the ICC Statute the report of a crime cannot be arbitrarily disregarded by the Office of the Prosecutor, but immediately activates its duties to gather the necessary information to assess its seriousness (Art. 15(2)), to assess its seriousness (Art. 15(2)), and to notify the person(s) that reported the crime of its decision not to take further action with regard to the situation of crisis within which such a crime allegedly took place (Art. 15(6)).

- conclusion of such arrangements or agreements not inconsistent with the ICC Statute that may be necessary to facilitate the cooperation of states, intergovernmental organisations, non-governmental organisations or other legal or natural persons;
- provision of the necessary administrative support to make effective those measures taken to ensure the confidentiality of the information, the protection of victims and witnesses and the preservation of the evidence;
- translations;
- authorisation of official travel.

In this chapter, I address a number of issues relating to the administrative and managerial functions of the prosecutor that, in my view, need to be dealt with at this early stage of the establishment of the Office of the Prosecutor.

26.2. Organisation of the Office of the Prosecutor

26.2.1. Organisational Adjustments and Material Guidelines to Overcome the Problems Derived from the Current Regulation of the Principles that Direct the Organisation of the Office of the Prosecutor and Its Performance

26.2.1.1. The Principles of Unity and Organisation into a Hierarchy as Office of the Prosecutor Organisational Principles

One of the main innovations of the Napoleonic model of the Procuracy (*ministère public*) consisted of the principle of unity defined as “*le ministère public est un et indivisible*”. This principle has two dimensions: an organisational dimension consisting of the unity of the institution and a functional dimension commonly referred to as the unity in the performance of its functions. The organisational dimension of the principle of unity entails that the Procuracy is organised as one indivisible institution, whose members are mere representatives of the institution who can be replaced without causing any change in the procedural rights and burdens of the Procuracy. The functional dimension of the principle of unity of the Procuracy entails that all members of the Procuracy, when acting in its representation, must follow unified criteria and reject different approaches to similar legal issues. Therefore, the functional dimension of the princi-

ple of unity guarantees the co-ordinated action of all members of the Procuracy by forbidding them to approach legal issues on the basis of their own criteria.

The principle of unity of the Office of the Prosecutor, though not as clearly defined as in some national jurisdictions, is embraced by Article 42(1) and (2) of the ICC Statute that provides for the Office of the Prosecutor to be “a separate organ of the Court”, grants the prosecutor “full authority over [its] management and administration”, and provides for one or more deputy prosecutors to assist the prosecutor in the performance of his or her functions. In addition, only Articles 34 and 42 of the ICC Statute use the term “Office of the Prosecutor”, while, *inter alia*, Articles 15, 18, 19, 53, 54, 56, 57, 58, 60, 61, 65, 68, 72, 81, 82 and 84 use the term “Prosecutor” to refer to the Office of the Prosecutor. This confusion between the institution of the Office of the Prosecutor and the head of such an institution has, in my view, its roots in the conception of the Office of the Prosecutor as one indivisible institution represented by the prosecutor (in this chapter, I only use the term “prosecutor” when specifically referring to the head of the Office of the Prosecutor).

Some national legal systems, such as the Spanish one,² provide for several protective mechanisms against arbitrary replacements by superiors of subordinate members of the Procuracy assigned to a given case, including:

1. requiring the concerned superior to motivate in writing such replacements; and
2. requiring the concerned superior to notify his or her reasons for such replacements to the Council of the Procuracy that controls their legality and appropriateness.

Neither the ICC Statute nor the RPE provide for any protective mechanism against arbitrary replacements by superiors, in particular by the prosecutor, of subordinate members of the Office of the Prosecutor assigned to a given case or project. However, none of these international instruments precludes the establishment of such protective mechanisms in additional Office of the Prosecutor regulations.

² See Spain, Estatuto Orgánico del Ministerio Fiscal, Ley 50/1981, 30 December 1981, Art. 23.

The functional dimension of the principle of unity of the Procuracy is implemented in national systems through a set of internal mechanisms whose proper operation is guaranteed by the principle of organisation into a hierarchy. For instance, in the Spanish legal system, Articles 24 and 25 of the Estatuto Orgánico del Ministerio Fiscal provide for two mechanisms to establish the unified criteria that direct the performance of the functions of the Procuracy by any of its members, in which the input of all the members of the Procuracy plays an important role.

The first of the above-mentioned mechanisms consists of the instructions given by the chief of the Procuracy (Fiscal General del Estado) to his or her subordinates with regard to both general legal issues and particular cases. The second mechanism consists of periodic meetings of the members of the Procuracy (Junta de Fiscales de Sala) to study both new general legal issues and specific complex legal issues, to establish common criteria for the performance of their functions, and to guarantee the adequate implementation of functional dimension of the principle of unity of the Procuracy. The chief of the Procuracy regularly attends these meetings to defend the legality and appropriateness of the unified criteria that he or she has already established, or intends to establish, through his or her instructions. Though the decisions taken at these meetings are not binding on the chief of the Procuracy, they are in practice pretty much taken into account by him or her when issuing or amending his or her instructions.

The fact that neither the ICC Statute nor the RPE expressly provide for mechanisms to establish the unified criteria that direct the performance of Office of the Prosecutor functions by any of its members does not mean that the functional dimension of the principle of unity of the Office of the Prosecutor is not embraced by them. On the contrary, Article 42 implicitly embraces such a dimension. The ICC Statute defines the Office of the Prosecutor as an indivisible institution headed by the prosecutor who has “full authority over the management and administration of the Office”. Similarly, the functional dimension of the principle of unity of the ICTY and ICTR Offices of the Prosecutor is respectively embraced by Article 16(2) of the ICTY Statute and Article 15(2) of the ICTR Statute, although neither the Statutes nor the RPEs of the *ad hoc* tribunals expressly provide for any mechanism to establish the unified criteria that direct the performance of their respective Offices of the Prosecutor functions.

The main reason for the drafters of the ICC Statute and the RPE not to provide for any such mechanism has been the belief that their establishment falls within the discretion of the prosecutor to organise the Office of the Prosecutor because it is directly related to the effective performance of the Office's functions. This very same rationale has caused the drafters of the ICC Statute and the RPE not to develop the organisation of the Office of the Prosecutor by creating additional bodies within the Office such as a Council, or by establishing periodic meetings of the Office members. Indeed, both the ICC Statute and RPE merely refer to the prosecutor, one or several deputy prosecutors and remunerated and *gratis* personnel.

The organisation of the Office of the Prosecutor has been partially developed in the budget for the first financial period so as to provide for the necessary budgetary allocations to start its staffing. However, such a complementary legislative instrument does not address any of the organisational issues put forward in this chapter, and therefore they should be addressed in the additional regulations of the Office of the Prosecutor.

The principle of organisation into a hierarchy reflects a pyramidal organisation of the Procuracy whose members must perform their functions in accordance with the instructions issued by their superiors. It exclusively directs the internal organisation of the Procuracy, and by no means does it entail any kind of dependence of the Procuracy on any external power. In addition, it is an instrumental organisational principle because it is a consequence of the principle of unity of the institution, and its main goal is to guarantee the effective implementation of the functional dimension of principle of unity of the Procuracy.

The scope of application of the principle of the organisation into a hierarchy of the Procuracy varies among the national legal systems. In some national legal systems, such as the Spanish one, there can be found up to three types of limits to the scope of application of such a principle. First, there is the right/duty of every member of the Procuracy to oppose his or her superiors' instructions, including the chief of the Procuracy's instructions, that in his or her view violate the law or are inappropriate. Second, the subordinates' duty to obey their superiors' instructions is limited to their written activities, and thus it does not extend to their oral activities, considered more personal and only limited by the interest of justice. Finally, as a result of the internal character of the principle of organisation into a hierarchy, a member of the Procuracy's violation of his or

her superiors' instructions only gives rise to the disciplinary responsibility of such a member, but it does not produce any external effects.

The ICC Statute and the RPE expressly establish the principle of organisation into a hierarchy of the Office of the Prosecutor when granting to the prosecutor “full authority over the management and administration of the Office, including the staff, facilities and other resources” (ICC Statute Article 42), which includes the power to put in place regulations for the management and administration of the Office (RPE Rule 9). As a result of the lack of development of the organisation of the Office of the Prosecutor in the ICC Statute and RPE, no limit to the scope of application of the principle of organisation into a hierarchy of the Office has been provided for. However, this lack of express provision of limits to the scope of application of such a principle does not mean that the drafters of the ICC Statute and RPE rejected them. On the contrary, as has already been mentioned, it is the consequence of the drafters' belief that the establishment of such limits falls within the discretion of the prosecutor to organise the Office of the Prosecutor. Therefore, in my view, certain limits to the scope of application of the principle of organisation into a hierarchy of the Office of the Prosecutor should be provided for in the additional regulations of the Office.

26.2.1.2. The Principles of Political Discretion and Indirect Dependence on the States Parties as the Principles that Direct the Performance of Office of the Prosecutor Functions

Although the drafters of the ICC Statute and RPE intended to shape the Office of the Prosecutor as an organ of justice that acted independently to make sure that the general interests intended to be protected through the ICC criminal justice system were, indeed, adequately protected, there are several elements in the ICC Statute and RPE that, in my view, show that such a conception of the Office of the Prosecutor has not been, to an important extent, embraced by them. Among these elements, two deserve special attention.

1. The broad discretion granted to the Office of the Prosecutor for the performance of many of its functions, especially those that it has to carry out in the triggering procedure.
2. A set of subtle mechanisms through which the prosecutor is made indirectly dependent on the states parties, either individually con-

sidered or as members of the Assembly of States Parties and its Bureau.

The drafters of the ICC Statute declared in its Preamble that the object and purpose of the Statute is the creation of a permanent ICC³ in order “to put an end to impunity for the perpetrators”⁴ of “the most serious crimes of concern to the international community as a whole”,⁵ which “must not go unpunished”.⁶ The drafters of the ICC Statute also stated in the Preamble that the ICC will complement the investigations and prosecutions of such crimes carried out by national courts,⁷ and will act in full respect and co-operation, though keeping its independence, with the United Nations and its purposes and principles.⁸ Finally, the drafters concluded that by creating a permanent ICC and by putting an end to the impunity of the perpetrators of the “most serious crimes of international concern”, the “delicate mosaic of all peoples of the world”⁹ and their peace, security and well-being¹⁰ will be preserved, and “lasting respect for and the enforcement of international justice” will be guaranteed.¹¹

Therefore, the drafters of the ICC Statute made in its Preamble a strong commitment to end the culture of impunity that is seriously decreasing the efficacy of the existing national and international mechanisms to enforce the proscription of those conducts that most seriously undermined the superior values of the international community. As a result of such a commitment, a permanent ICC that, on the basis of the equality of all members of the international community,¹² will guarantee lasting respect for the prohibition to commit “the most serious crimes of international concern” was created.

³ Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Preamble, para. 9 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

⁴ *Ibid.*, para. 5.

⁵ *Ibid.*, paras. 2 and 4.

⁶ *Ibid.*, para. 4.

⁷ *Ibid.*, paras. 4, 6 and 10.

⁸ *Ibid.*, paras. 7 and 8.

⁹ *Ibid.*, para. 1.

¹⁰ *Ibid.*, paras. 2 and 3.

¹¹ *Ibid.*, para. 11.

¹² *Ibid.*, paras. 7 and 8, in connection with the Charter of the United Nations, 26 June 1945, Arts. 2(1) and 4 (<http://www.legal-tools.org/doc/6b3cd5/>).

However, through the back door of Articles 17(1)(d) and 53(1)(c) and 2(c), the drafters of ICC Statute have, in my view:

1. unmade some of the political decisions that are at the core of the ICC criminal justice system (including the choice for criminal prosecutions over amnesty laws as tools to guarantee the peace, security and well-being of the international community); and
2. granted to the organs of the ICC, and particularly to the Office of the Prosecutor, the power to determine what general interests triumph over putting an end to the impunity of the alleged perpetrators of the gravest crimes for the international community and the interests of the victims.

By granting such a power to the Office of the Prosecutor, the drafters of the ICC Statute have turned an intended organ of justice, that was supposed to make sure that those general interests embraced by the ICC Statute were indeed protected by the ICC criminal justice system, into a “quasi-political” organ which defines: 1) which general interests are to be protected by the ICC criminal justice system; and 2) which political goals are to be achieved by such a system in connection with a given situation of crisis. As a result, the principle of political discretion has been substituted for the originally intended principle of legality as the principle that mainly directs the performance of Office of the Prosecutor functions.

In addition, by carrying out such a substitution, the incentives given to the Security Council, states parties, non-state parties, and other legal and natural persons to put political pressure on the Office of the Prosecutor have been exponentially increased because the adoption of political decisions that should have been taken by the states parties now fall within the powers of the Office of the Prosecutor. In this regard, it can be said that the broader the political discretion granted to the Office of the Prosecutor, the higher its exposure to political pressures from external powers.

The granting of political discretion to the Office of the Prosecutor has come at a cost to its independence. The main justification for the independence of the Office of the Prosecutor was that its functions were mainly going to consist of making sure that the political decisions of the states parties, which constitute the core of the ICC Statute, were effectively implemented through the ICC criminal justice system. In other words, the Office of the Prosecutor was going to be a defender of the public in-

terests that the states parties intended to be protected through the ICC criminal justice system.

However, once the Office of the Prosecutor has been turned into a “quasi-political” organ with the power to decide which public interests deserve, and which do not deserve, to be protected through the ICC criminal justice system, the principles of democratic representation and political accountability have required the inclusion in the ICC Statute and RPE of a number of subtle mechanisms through which the Office of the Prosecutor has been made indirectly dependent on the states parties. These mechanisms include, *inter alia*, the following:

1. Unlike the ICC judges who are elected and removed by a two-thirds majority of the members of the Assembly of States Parties, the prosecutor and the deputy prosecutors are elected and removed by only an absolute majority of the members of the Assembly of States Parties.¹³
2. Broad definitions plus non-exhaustive lists of examples are the techniques used to define the concepts of “serious misconduct”, “serious breach of duty” and “misconduct of a less serious nature” in Articles 46 and 47 of the ICC Statute and Rules 24 and 25 of the RPE. As a result, the set of behaviours of the prosecutor or the deputy prosecutors that can give rise to disciplinary responsibility is uncertain, and the Assembly of States Parties and its Bureau have the power under Articles 46 and 47 of the ICC Statute and Rules 29 and 30 of the RPE to define them *ex post facto*.
3. While an ICC judge can only be temporally suspended from duty by the Bureau of the Assembly of States Parties after the majority of ICC judges have recommended his or her removal from office, the prosecutor may be temporally suspended from duty by the Bureau immediately after the Presidency transmits to the Bureau a complaint against the prosecutor of “sufficiently serious nature” filed with it by any natural or legal person.¹⁴

¹³ *Ibid.*, Arts. 39(5), 42(2) and 46(2)(a)–(b).

¹⁴ International Criminal Court, Rules of Procedure and Evidence, 9 September 2002, ICC-ASP/1/3 (‘ICC RPE’) (<http://www.legal-tools.org/doc/8bcf6f/>). Rule 28 states that “where an allegation against a person who is the subject of a complaint of a sufficiently serious nature, the person may be suspended from duty pending the final decision of the competent organ”. This provision is complemented by the International Criminal Court, Rules of Procedure of the Assembly of States Parties, 3 September 2002, ICC-ASP/1/3 (‘ICC RASP’)

4. While the ICC judges can only be removed from office after the majority of ICC judges have so recommended, a mere complaint filed with the Presidency by any natural or legal person could be enough to bring the issue of the removal of the ICC prosecutor to the Assembly of States Parties.¹⁵
5. Unlike minor disciplinary measures against the ICC judges that are taken by the Presidency, minor disciplinary measures against the ICC prosecutor are adopted by the Bureau of Assembly of States Parties after the filing of a complaint with the Presidency by any natural or legal person.¹⁶
6. No definition of the expression “unable to exercise the functions” entrusted by the ICC Statute to the prosecutor or a deputy prosecutor is provided for in the ICC Statute or in the RPE.
7. No procedure is provided for in the ICC Statute or in the RPE to remove the prosecutor or a deputy prosecutor from office due to his or her inability to exercise the functions entrusted by the ICC Statute to him or her.
8. Articles 18(1) and 19(2)(b) grant to any state which, having jurisdiction over a situation of crisis or a case, is investigating or prosecuting such a situation of crisis or case, and the power to challenge the admissibility of such a situation of crisis or of such a case. However, while Article 18 proceedings have strict time limits, are directed by the principle of concentration of proceedings, and the decisions taken by the Pre-Trial and Appeals Chambers

(<http://www.legal-tools.org/doc/15918d/>), Rule 81 of which states that “after having heard the person concerned, the Bureau, when the seriousness of the complaint and the nature of the evidence so warrant, may, in accordance with Rule 28 of the Rules of Procedure and Evidence, suspend him/her from duty pending final decision”. Therefore, only when the complaint against an ICC judge or the prosecutor is transmitted to the Bureau of the Assembly of States Parties may the Bureau suspend him or her from duty pending final decision. However, while a complaint against an ICC judge is only transmitted to the Bureau after a two-thirds majority of ICC judges have recommended his or her removal from office (ICC Statute, Art. 46(2)(a), ICC RPE, Rule 29(2), and ICC RASP, Rule 81(1)), a complaint filed with the Presidency against the prosecutor is automatically transmitted to the Bureau unless it is “anonymous” or “manifestly unfounded” (ICC Statute, Art. 46(2)(b), ICC RPE, Rules 26 and 29, and ICC RASP, Rule 81(1)).

¹⁵ ICC Statute, Art. 46(2)(a) and (2)(b), see *supra* note 3; ICC RPE, Rules 26 and 29, see *supra* note 14; ICC RASP, Rule 81(1), see *supra* note 3.

¹⁶ ICC RPE, Rule 30, see *supra* note 14.

have *erga omnes* efficacy, Article 19 proceedings do not have precise time limits, are not directed by the principle of concentration of proceedings, and the decisions taken by the Pre-Trial, Trial and Appeals Chambers do not have *erga omnes* efficacy (being only effective with regard to the parties to Article 19 proceedings). Therefore, while the current regulation of Article 18 proceedings enables the concerned states to introduce their legitimate interests in the triggering procedure without unduly delaying it, the existing regulation of Article 19 proceedings enables the concerned states to put forward dilatory techniques at the investigative, pre-trial and trial stages of the criminal proceedings by making successive challenges to the jurisdiction of the Court or the admissibility of the case.

9. The co-operation regime between the states parties and the ICC forbids the prosecutor, save in exceptional circumstances,¹⁷ to carry out any investigative step outside the seat of the Court. Investigative steps can only be carried out by the competent authorities of the requested state in accordance with its national legislation. At most, Article 99(1) provides, unless prohibited by the national legislation of the requested state, for the execution of the co-operation requests by the requested state “in the manner specified in the request, including following any procedure outlined therein or permitting any person specified in the request to be present at and assist in the execution process”.
10. Articles 87(7) and 112(2)(f) grant to the Assembly of States Parties the power to deal with states parties’ violations of their duty to co-operate with the Court. However, Article 112(2)(f) does not provide for any specific sanction that the Assembly of States Parties may impose on a state party that fails to comply with its duty to co-operate with the Court. Therefore, it can be stated that, in the absence of voluntary co-operation of the requested states parties, it is highly unlikely that an investigation can be successfully carried out by the prosecutor.
11. On the basis of the partnership between the ICC and the United Nations provided for in the ICC Statute, and within the co-operative relationship between the Office of the Prosecutor and

¹⁷ ICC Statute, Arts. 57(3)(c) and 99(4), see *supra* note 3.

the Security Council, Article 87(5)(b) and (7) establishes that, when the Security Council refers a situation of crisis to the Office of the Prosecutor, the Court may refer to the Security Council the problems arising from the lack of co-operation of any requested state. Following such a referral the Security Council may impose, in accordance with Chapter VII of the United Nations Charter, economic, political or military sanctions on the uncooperative states.

12. Article 112(2)(b) to (d) grants to the Assembly of States Parties the powers to: a) oversee the management of the Office of the Prosecutor; b) approve the Office of the Prosecutor budget; and c) approve the acquisition and use of additional resources by the Office of the Prosecutor, including the use of *gratis* personnel offered by states parties, intergovernmental organisations or non-governmental organisations. As a result, the Assembly of States Parties has full control over all Office of the Prosecutor resources. Although the Assembly of States Parties' use of these powers to interfere in the investigations and prosecutions undertaken by the Office of the Prosecutor could constitute a violation of Article 42(2), no remedy against such a violation has been provided for in the ICC Statute or in the RPE.

Through the above-mentioned mechanisms, the legal position of the Office of the Prosecutor has been subtly weakened *vis-à-vis* the states parties so as to become indirectly dependent on them. Therefore, if as a result of granting to the Office of the Prosecutor broad political discretion for the performance of many of its functions the exposure of the Office to political pressure has been exponentially increased, by weakening the Office's legal position *vis-à-vis* the states parties in application of the principles of democratic representation and political accountability, the ability of the Office of the Prosecutor to resist political pressure has, to an important extent, been diminished.

The vulnerability of the Office of the Prosecutor to political pressure is, in my view, further increased by:

1. The concentration of Office of the Prosecutor powers on the prosecutor.

2. The lack of mechanisms for the collective participation of the members of the Office of the Prosecutor in the formulation of the unified criteria that direct the performance of its functions.
3. The lack of protective mechanisms against arbitrary replacements of the members of the Office of the Prosecutor.
4. The absence of any limits to the scope of application of the principle of organisation into hierarchy of the Office of the Prosecutor.
5. The lack of any internal control of legality of the instructions issued by the prosecutor or any other superior within the Office of the Prosecutor.

26.2.1.3. Proposed Organisational Adjustments and Material Guidelines

In order to strengthen the legal position of the Office of the Prosecutor *vis-à-vis* external powers, and particularly *vis-à-vis* the states parties, there are several measures that can be taken without having to amend the ICC Statute or RPE. First, the more states join the ICC criminal justice system, the less dependent the Office of the Prosecutor will be on the current states parties. Therefore, special efforts should be made by the Office of the Prosecutor, particularly by the Immediate Office of the Prosecutor, to promote the signature and ratification of the ICC Statute by states that are not parties. In my view, such efforts should initially be directed to conclude, in accordance with Article 54(3)(d), co-operation agreements with states that are not parties, and only at a later stage they should emphasise the actual signature and ratification of the ICC Statute

Second, the Office of the Prosecutor should promote the strict application of Article 19(5) that imposes on states the obligation to make their challenges to the jurisdiction of the Court or the admissibility of the case “at the earliest opportunity”. The Office of the Prosecutor should also promote the imposition of appropriate sanctions, such as the rejection *in limine* of such challenges, when states have manifestly failed to comply with their duties under Article 19(5). In addition, the Office of the Prosecutor should be active in encouraging to the Pre-Trial and Trial Chambers to join, in accordance with Rule 58 of the RPE, such challenges “to a confirmation or a trial proceeding as long as this does not cause undue delay”.

Third, the more precise material guidelines on how the Office of the Prosecutor is to use the political discretion granted to it by Articles 17(1)(d) and 53(1)(c) and (2)(c), the easier will be for it to resist the political pressure put on it by the states parties, the Security Council and other natural and legal persons. Therefore, a special effort should be made at this early stage of the building of the Office of the Prosecutor to come up with an exhaustive list of concrete material guidelines to be strictly applied by the Office in deciding how to use its broad political discretion. In addition, it should be taken into account that the more precise the definition of this set of material criteria, the less need, from a democratic representation and political accountability perspective, for the aforementioned set of mechanisms that make the Office of the Prosecutor indirectly dependent on the states parties.

With regard to the specific policy choices to be made by the Office of the Prosecutor, there are a number of reasons that call for the Office to restate the policy choices contained in the Preamble of the ICC Statute. First of all, the fight against the culture of impunity that has long made ineffective the existing national and international mechanisms of enforcement of the “most serious crimes of international concern” is today as necessary as it was at the time the ICC Statute was concluded.

Second, the creation of an international judicial watchdog body that, on the one hand, encourages national courts to investigate and prosecute such crimes and only exercise its jurisdiction when national courts are not doing their job properly, and, on the other hand, acts in cooperation with the international political body entrusted with the maintenance and restoration of international security and peace (the Security Council), is a well-thought-out idea that has resulted in more than 50 years of formal and informal consultations.

Finally, the choice for prosecutions over amnesty laws contained in the Preamble of the ICC Statute is not as unwise as some are trying to portray. Though some carefully drafted amnesty laws may have proven useful to induce human rights violators to agree to peace and relinquish power, it is difficult to deny that the alarming lack of criminal prosecutions for genocide, crimes against humanity and war crimes has created a common feeling that the perpetrators of “the most serious crimes of international concern” can easily get away with them. It is also difficult to deny that the dozens of express or *de facto* amnesty laws that have been passed during the last two decades have a lot of to do with the consolidation of this

culture of impunity. Indeed, we have entered in such a dynamic that, as a result, amnesties are always on the table in peace negotiations.

In order to break up this widespread culture of impunity that has only resulted in further crimes being committed, the Preamble of the ICC Statute contains a strong commitment for criminal prosecutions, so that amnesty laws cannot any longer be considered a “bargaining chip”. The *rationale* behind this option is that if human rights violators suspect that they can get an amnesty law in exchange for peace and withdrawal of power, they will not accept peace and relinquish power unless they are guaranteed that no criminal prosecution will be launched against them and their closest subordinates.

The experiences of national prosecutions, such as the ones carried out during the 1980s in Argentina and in recent years in Rwanda, and international prosecutions such as the ones undertaken by the ICTY and ICTR, have shown that it is not feasible to prosecute everyone involved in the commission of genocide, crimes against humanity or war crimes (that in some cases could include most of the members of entire institutions, such as political parties, the military or the police). As a result, it can be stated that the ICC has not been set up to make sure that national courts are investigating and prosecuting all the alleged participants in the commission of the crimes within the jurisdiction of the Court, nor has it been set up to investigate and prosecute thousands of suspects who have not been targeted by national courts. Therefore, the material guidelines for the use of the Office of the Prosecutor’s broad political discretion should primarily address the issue of who should be the targets of its investigations and prosecutions. In other words, such material guidelines should precisely define the personal scope of the Office of the Prosecutor’s investigative and prosecutorial functions.

In my view, such a policy choice should be directed by the international nature of the ICC and the strategic functions that it has been entrusted with. In other words, the definition of the personal scope of the Office of the Prosecutor’s investigative and prosecutorial functions should be directed to maximise the efficacy of the ICC to prevent and deter the commission of “the most serious crimes of international concern” by fighting at an international level against the culture of impunity that is paralysing national courts so as to empower them to investigate and prosecute those crimes effectively.

On the basis of these considerations, it is my view that the Office of the Prosecutor should expressly make a policy choice that favours widespread investigations of the crimes committed in the situations of crisis referred to the Office, but limits its prosecutions to the highest leaders that have masterminded or consented to their commission. In addition, when it comes to scrutinising national courts, the Office of the Prosecutor should make sure that such highest leaders do not get away with them. Therefore, in as much as national courts are diligently investigating and prosecuting them, the Office of the Prosecutor should not get involved in any given situation of crisis.

By making this policy choice, the creation of an adequate historical record would be ensured through the materials gathered during the investigation, which is already required by Article 54(1) of the ICC Statute. It would also ensure that the fight against impunity is fought on the most strategic front to defeat the culture of impunity, which would be the leadership and mastermind front. In fact, there is no better way to prevent and deter future crimes than securing the highest leaders who have masterminded, or consented to, the commission of “the most serious crimes of international concern”. Finally, such a policy choice will bring justice to the victims in the form of an authoritative declaration of the commission of such crimes, punishment of their masterminds and redress.

But what would happen then with the vast majority of perpetrators whose investigations and prosecutions by national courts would not be subjected to the scrutiny of the Office of the Prosecutor, and who would not be the target of the its investigations and prosecutions either. In my view, these other perpetrators should only be dealt with by the national courts of the concerned states. And here, outside of the scope of the Office of the Prosecutor’s investigative and prosecutorial functions, is where amnesty laws tied to less invasive accountability mechanisms, such as reparations to the victims and their families, establishment of truth commission to document past human rights abuses, and employment bans and purges to keep the perpetrators away from public positions, may still have a role to play.

In fact, though under this new scenario yesterday’s warmongers will no longer be accepted as today’s peacemakers, there will still be room for amnesty laws to be used, when absolutely necessary, as a bargaining chip to induce the rest of the members of an institution to force their highest leaders to relinquish power. In addition, even when amnesty

laws are not necessary as bargaining chips in peace negotiations, they could still be necessary to reinforce the stability of a state coming from a grave situation of crisis and to avoid the collapse of its criminal justice system.

In a situation where amnesty laws and truth commissions are the path chosen by the concerned states, it is my view that international prosecutions strictly limited to the highest political, military, religious or economic leadership will not infringe on the efficacy of such a truth commission. In fact, the opposite scenario can be foreseen if such amnesty laws required full co-operation with the investigations and prosecutions of the highest leaders that have masterminded, and consented to, the commission of “the most serious crimes of international concern”. Nevertheless, in assessing the possibility of passing amnesty laws, the concerned states should take due care of the problems posed by exceptionally egregious and cruel perpetrators, so that exceptions to the exclusion of criminal responsibility for such egregious perpetrators are in any case included in such amnesty laws.

Fourth, a number of organisational measures should be introduced to: a) promote the collective participation of the Office of the Prosecutor members in the formulation of the unified criteria that direct the performance of the Office’s functions; b) establish certain basic protective mechanisms against the arbitrary replacement of the Office of the Prosecutor members; c) establish certain limits on the scope of application of the principle of organisation into a hierarchy of the Office of the Prosecutor; and d) promote a certain level of internal control of the legality of the instructions issued by the prosecutor and other superiors within the Office of the Prosecutor. Among the organisational measures that may be taken for these purposes, I recommend the following:

1. The creation of an Office of the Prosecutor Council composed of 13 members:¹⁸ the prosecutor, the deputy prosecutors, the chief of the Administrative Unit, one additional member of the Immediate Office of the Prosecutor at a P-4 or lower level, the director of investigations and three members of the Investigation Division,¹⁹ and the

¹⁸ If the above-proposed Triggering Procedure Division were created, the director of such a division and three of its members (one at the P-5 level, one at the P-4 level and one at the P-3/P-2 level) should also be members of the Office of the Prosecutor Council. In such a case, it would be composed of 16 members.

¹⁹ One at the P-5 level, one at the P-4 level and one at the P-3/P-2 level.

director of prosecutions and three members of Prosecution Division.²⁰ Except the prosecutor, the deputy prosecutors, the chief of the Administrative Unit, the director of investigations and the director of Prosecutions, the members of the Office of the Prosecutor Council should be elected by their respective constituencies for a two-year period.

2. The Office of the Prosecutor Council should be chaired by the prosecutor. It could act in plenary or through committees. It should take its decision by a simple majority of its members, the vote of the president being decisive in case of a tie. Members of the Council against whom disciplinary proceedings are being carried out will not sit as members, but they will become defendants in such proceedings. Members of the Office of the Prosecutor Council whose instructions or replacement decisions are being controlled by the Council will not have the right to vote in the adoption of the Council decisions.
3. The functions of the Office of the Prosecutor Council should, in my view, be, *inter alia*, the following:
 - To propose to the prosecutor changes in the organisation of the Office of the Prosecutor.
 - To report to the prosecutor on the material and personal needs of the Office of the Prosecutor.
 - To report to the prosecutor on the promotion of the members of the Office of the Prosecutor.
 - To propose to the prosecutor the appointment of new members of the Office of the Prosecutor.
 - To carry out disciplinary proceedings against the members of the Office of the Prosecutor apart from the prosecutor and the deputy prosecutors.
 - To report, if so requested by the replaced Office of the Prosecutor member, to the prosecutor on the legality and appropriateness of the reasons given any superior within the Office, including the prosecutor, to substitute one Office of the Prosecutor member for another member in a specific investigation, prosecution or project. On the

²⁰ One at the P-5 level, one at the P-4 level and one at the P-3/P-2 level.

basis of the Office of the Prosecutor Council report, the prosecutor or competent deputy prosecutor shall take a final decision on the merits of such a replacement.

- To report, if so requested by the concerned Office of the Prosecutor member, on the appropriateness and legality of the instructions given by any superior within the Office, including the prosecutor. On the basis of such a report, the prosecutor or competent deputy prosecutor shall take a final decision on the merits of such instructions.
 - To give advice to the prosecutor whenever he or she so requests.
4. The establishment of weekly meetings of the members of the Prosecution Division and of the members of the Investigation Division²¹ to: a) study general and specific legal, investigative or analytical issues; b) establish common criteria for the performance of their respective functions; and c) give advice to the prosecutor or the competent deputy prosecutor if so requested. The prosecutor should chair these meetings if he or she is present, and otherwise they should be chaired by the director of investigations or the director of prosecutions respectively. Decisions at the Investigation and Prosecution Divisions' meetings should be taken by simple majority, the vote of the president being decisive in case of a tie. These decisions should be reported by the director of investigations and prosecutions respectively to the prosecutor or the competent deputy prosecutor. At the Investigation and Prosecution Divisions' meetings *ad hoc* committees to study specific substantive issues could be created.
 5. The mandatory justification in writing by any superior within the Office of the Prosecutor, including the prosecutor, of the substitution of one member for another member in a specific investigation, prosecution or project.
 6. The granting to the replaced Office of the Prosecutor member of the right to request the review of his or her substitution in a particular investigation, prosecution or project to the prosecutor or the competent deputy prosecutor, who, upon having heard the report of the

²¹ If the Triggering Procedure Division proposed below were created, there should also be meetings of the members of the Triggering Procedure Division held on a weekly basis. The prosecutor should chair these meetings if he or she is present, and otherwise by the director of the Triggering Procedure Division.

Office of the Prosecutor Council, should decide on the legality and appropriateness of the reasons given to justify such a substitution.

7. The establishment of the following review mechanism of allegedly illegal or inappropriate instructions or orders.²² A member of the Office of the Prosecutor who receives an instruction or order that he or she considers illegal or inappropriate should write a report explaining the reasons for his or her conclusions and send it to the superior who issued the controversial instruction or order. If the superior ratifies his or her instruction or order, the concerned Office of the Prosecutor member may request its review by the prosecutor or the competent deputy prosecutor. The prosecutor or the competent deputy prosecutor should decide on legality and appropriateness of such an instruction or order upon having heard the report of the Office of the Prosecutor Council.

26.2.2. Organisational Adjustments Derived from the Triggering Procedure

26.2.2.1. The Triggering Procedure as an Autonomous Procedure in the International Criminal Court Criminal Justice System: Subject, Parties and Proceedings

Unlike the ICTY and the ICTR Statutes that merely provide for a criminal procedure, in my view the ICC Statute provides for:

1. Triggering procedure (Articles 13–15, 18, 53(1)(3)(4).
2. Criminal procedure (Articles 54–74, 76–78, 80–84, 103–108, 110–111).
3. Civil procedure (Articles 57(3)(e), 75, 79, 85, 109).

These three types of procedures are carried through seven different types of proceedings:

²² The establishment of a review mechanism of superior orders would avoid putting Office of the Prosecutor members in the difficult situation of failing to comply with superior orders or carrying out certain acts with the conviction that they are illegal or manifestly inappropriate. By doing so, an internal control of legality directed to prevent abuses of power by the Office of the Prosecutor in the performance of its functions would be also set up. Finally, such a review mechanism of superior orders could be borrowed by national military regulations so as to avoid putting subordinates in the difficult situation of violating superior orders or committing crimes within the jurisdiction of the Court, especially not being obedient to superiors orders, a defence under the ICC Statute.

1. Three types of triggering proceedings that are respectively applicable to Security Council referrals, state party referrals and Article 15(1) of the ICC Statute complaints.
2. Two types of criminal proceedings that are respectively applicable to Article 5 and Article 71 crimes.
3. Two types of civil proceedings that are respectively applicable to Article 75 and Article 85 civil responsibility.

The budget for the first financial period of the Court provides for the following Office of the Prosecutor organisation: a) an Immediate Office of the Prosecutor with an Administrative Unit attached to it; b) a Prosecution Division that comprises a Prosecution Section, a Legal Advisory and Policy Section and an Appeals Section; and c) an Investigation Division that includes an Information and Evidence Section and an Analysis Section. This organisation seems to have been designed on the basis of the administrative, investigative and prosecutorial functions entrusted by the ICC Statute to the Office of the Prosecutor. However, in my view, it partially forgets the key functions entrusted to the Office in both the triggering and civil procedures.

In my opinion, the triggering procedure is an autonomous procedure within the ICC criminal justice system whose subject, parties and proceedings are perfectly distinguishable from those ones provided for in the criminal procedure.

In accordance with Articles 5, 11 and 12 of the ICC Statute, the states parties have granted to the ICC jurisdiction over the crimes provided for in the ICC Statute when they are committed in the territory of a state party or by a national of a state party, or when the Security Council refers to the ICC a situation of crisis in which such crimes appear to have been committed. But this does not necessarily mean that, after the alleged commission of such crimes, the ICC may directly exercise its jurisdiction over them. In my opinion, the states parties have granted to the ICC a jurisdiction which is deactivated (a “potential jurisdiction”) and that is only activated with regard to a particular situation of crisis abstractly defined by personal, territorial and temporal parameters (“in-being jurisdiction”) when the following circumstances occur:

1. The personal, territorial and temporal parameters that define such a situation of crisis are included within the personal, territorial and temporal limits of the potential jurisdiction of the Court.

2. The available information provides a reasonable basis to believe that crimes within the material jurisdiction of the Court have allegedly been committed in such a situation of crisis.
3. The lack of action, the unwillingness or the inability of national jurisdictions to properly investigate and prosecute the crimes allegedly committed in such a situation of crisis.
4. The lack of any request made by the Security Council to the Court in order for the latter not to activate its potential jurisdiction with regard to such a situation of crisis.
5. The sufficient gravity of the crimes allegedly committed in such a situation of crisis.
6. The lack of substantial reasons to believe that, despite the gravity of the crime and the interests of victims, the activation of the potential jurisdiction of the Court with regard to such a situation of crisis would not serve the interests of justice.

Although the states parties could have opted for the automatic activation of the potential jurisdiction of the Court with regard to a specific situation of crisis whenever the above-mentioned circumstances occur, in my opinion, they finally did not do so. In fact, in my view, Articles 15(4), 18(2) and 53(1) of the ICC Statute provide for the activation of the potential jurisdiction of the Court with regard to a particular situation of crisis through the express declaration of the competent organ of the Court that all six above-mentioned circumstances occur in connection with such a situation of crisis.

The power to pronounce such a declaration constitutes a second dimension of the jurisdiction granted by the states parties to the ICC through the ICC Statute. This second dimension of the ICC jurisdiction, as opposed to its first dimension comprising the ICC investigative and prosecutorial powers, is evidence of the material primacy of the ICC over national jurisdictions and is exercised through the triggering procedure.

The subject of the triggering procedure comprises: a) the petition of the Security Council, a state party or the Office of the Prosecutor to activate the potential jurisdiction of the Court with regard to a specific situation of crisis (“activation request”); and b) the opposition of the concerned states to such a petition. The activation request and the opposition to it are founded on the occurrence, or the lack of occurrence, of the six above-mentioned circumstances with regard to a particular situation of crisis.

The ICTY and ICTR Statutes that define the situations of crisis over which the *ad hoc* tribunals exercise jurisdiction are unlike the ICC Statute, due to the fact that it creates a permanent International Criminal Court and it is impossible to foresee which situations of crisis will take place in the future. These statutes grant to the ICC a broad personal, territorial and temporal potential jurisdiction that is universal when the Security Council refers a situation of crisis to the Court. However, as we have explained above, in order for the Court to be able to exercise the investigative and prosecutorial powers conferred upon it by the ICC Statute, it is necessary that its potential jurisdiction be activated with regard to specific personal, territorial and temporal parameters that are defined through the triggering procedure. Needless to say, the definition in the ICTY and ICTR Statutes of the personal, territorial and temporal parameters that define the situations of crisis over which the *ad hoc* tribunals exercise their jurisdiction leaves no room for the establishment of any triggering procedure directed to the definition of such parameters

As it is further explained below, the ICC Statute confers upon the Office of the Prosecutor a role of the greatest importance in the triggering procedure. In fact, its role is so vital that the drafters of the ICC Statute, fearful of leaving the adoption of such important decisions in the hands of one person (the prosecutor as single head of the Office of the Prosecutor), introduced certain safeguards against potential abuses of power by him or her. The most important of these safeguards is contained in Articles 13(a) and (b), 14(1), 15(5) and 6, 18(1) and 19(3) of the ICC Statute, and consists of having made *situations of crisis*, abstractly defined by personal, territorial and temporal parameters, the subject of the triggering procedure (while the subject of the criminal procedure consists of *cases* that comprised specific facts that allegedly amount to one or more crimes within the jurisdiction of the Court).²³

²³ I use the language “situation of crisis” to clarify the meaning of the term “situation” in Arts. 13(a) and (b), 14(1), 15(5) and 6, 18(1) and 19(3) of the ICC Statute, see *supra* note 3. The adjective “crisis” refers to a concept that is opposed to the concepts of long-standing situations and controversial practices rooted in the culture of certain peoples. In my view, the object and purpose of the ICC Statute, as established in its Preamble, is not to provide for additional protections against those controversial practices that are not shared by all peoples of the world. Therefore, I believe that controversial practices, such as labour or social discrimination against women, gays and lesbians, or ethnic or racial minorities, or female genital mutilation, that could, hypothetically, amount to the crimes against humani-

Articles 13(a) and (b), and 14(1) provide that, in order to avoid politically motivated referrals to the Office of the Prosecutor, the Security Council or the states parties may only refer to the Office situations of crisis. In addition, Article 18(1) makes clear that the Article 53(1) Office of the Prosecutor decision whether or not to activate the potential jurisdiction of the Court because there is a “reasonable basis to proceed” must be made in connection with the whole situation of crisis referred to by a state party (and it may not be made with regard to specific facts that took place within it).

Due to the lack of investigative resources of the victims and witnesses of the crimes within the jurisdiction of the Court, Articles 13(c) and 15(1) enable any natural or legal person to communicate to the Office of the Prosecutor information on specific crimes (“to file a complaint” or “to transmit the *notitia criminis* to the Office of the Prosecutor”). However, in order to avoid politically motivated investigations, Article 15(5) and (6) implicitly provides that both Article 15(2) on preliminary inquiry and Article 15(3) on activation request must be extended to situations of crisis abstractly defined by personal, territorial and temporal parameters.

Finally, as a result of the *fast track* triggering proceedings provided for when the Security Council refers a situation of crisis to the Office of the Prosecutor Article 18(1) of the ICC Statute is not applicable, and therefore the ICC Statute does not expressly establish that upon a Security Council referral the potential jurisdiction of the Court may only be activated with regard to situations of crisis. However, considering that Article 13(b) requires the Security Council to refer to the Office of the Prosecutor situations of crisis as opposed to specific cases, and that whenever the triggering procedure is not initiated upon a referral of the Security Council the standard “reasonable basis to proceed” in Articles 15(4) and 53(1) is applied to situations of crisis and not to specific facts, it can be concluded that upon a Security Council referral the potential jurisdiction of the Court may only be activated with regard to situations of crisis.

Therefore, the activation of the potential jurisdiction of the Court with regard to the crimes committed in the territory of Sierra Leone since the initiation of the civil war in 1991 by all parties to the conflict would be consistent with the distinction between situations of crisis and cases

ty of persecution or sexual violence, fall outside the jurisdiction of the Court, and therefore their elimination should be encouraged by other means.

contained in the ICC Statute.²⁴ However, the activation of the potential jurisdiction of the Court over the alleged crimes committed by the Revolutionary United Front ('RUF') as a result of its takeover of large parts of Freetown on 6 January 1999, or over the crimes committed by Foday Sankoh (the former leader of the RUF) prior to his detention by the Nigerian authorities at the end of 1996, would, in my view, violate such a distinction. Indeed, under the ICC criminal justice system these last two examples would constitute cases and not situations of crisis, and could only be investigated and prosecuted if the potential jurisdiction of the Court has been previously activated over the crimes committed in the territory of Sierra Leone during the civil war.

As a result of having made situations of crisis the subject of the triggering procedure, as happens in the ICTY and ICTR (where their respective Offices of the Prosecutor investigate and prosecute the crimes allegedly committed by all parties to the situations of crisis that respectively took place in the territories of the former Yugoslavia since 1991 and Rwanda and its neighbouring states during 1994), the Office of the Prosecutor is bound under Article 54 of the ICC Statute to investigate and prosecute the crimes committed by the different parties to the situations of crisis over which the potential jurisdiction of the ICC is activated through the triggering procedure.

The parties in the triggering procedure vary depending on who initiates it by making an activation request (the Security Council, a state party or the Offices of the Prosecutor on the basis of a complaint made by any legal or natural person). As a result, the Security Council (Article 13(b)), a state party (Articles 13(a) and 14) and the ICC prosecutor (Articles 13(c), 15(1) and 15(3)) may become petitioners, while the concerned states parties and non-parties may oppose such a request in accordance with Article 18(2). However, when the Security Council becomes the petitioner by referring a situation of crisis to the Office of the Prosecutor, the triggering procedure provided for in Article 53(1), (3) and (4) is a *sui generis* procedure in which there is no opponent (Article 18 proceedings are not applicable) and the Office of the Prosecutor is entrusted with taking the final decision whether or not to activate the potential jurisdiction

²⁴ All the examples contained in this chapter are merely hypothetical because, as provided for in Art. 11(1) of the ICC Statute, the ICC does not have jurisdiction over crimes committed before the entry into force of the Statute, see *supra* note 3.

of the Court with regard to the situation of crisis referred to by the Security Council.

The structure of the triggering proceedings also varies depending on who initiates them by making the activation request. Articles 13(b) and 53(1), (3) and (4) provide for simplified and expedient proceedings when the Security Council is the petitioner, while Articles 13(c), 15 and 18 provide for extremely complex proceedings, in which two admissibility decisions of the Pre-Trial Chamber (Articles 15(4) and 18(2)) and another two of the Appeals Chamber (Article 81(1)(a) and 18(4)) may well be necessary when the Office of the Prosecutor is the petitioner. Finally, Articles 13(a), 14, 18 and 53(1), (3) and (4) provide for proceedings that are of an intermediate level of complexity and expediency when a state party is the petitioner. As some protective measures proceedings, they are divided in two parts: Article 15 and Article 18 proceedings.

26.2.2.2. Article 18 Proceedings as the Second Part of the Triggering Procedure when a State Party or the Office of the Prosecutor is the Petitioner

In my opinion, Article 18 of the ICC Statute proceedings amount to a second part of the triggering procedure when a state party or the Office of the Prosecutor is the petitioner for the following reasons:

1. The subject of Article 18 proceedings are those situations of crisis for which the competent organ of the Court has provisionally activated the potential jurisdiction of the Court in accordance with Articles 15(4), 53(1) and 3, and 81(1)(a). Article 18(1) imposes on the Office of the Prosecutor the duty to notify all states parties and the concerned states non-parties of the decision by which the competent organ of the Court, at the request of a state party or the Office of the Prosecutor, provisionally activates the potential jurisdiction of the Court over a particular situation of crisis, so as to enable the concerned states opposed to such a decision by alleging, within a one-month time limit, the formal primacy of their national jurisdictions. Hence, the subject of Article 18 proceedings (situations of crisis abstractly defined by personal, territorial and temporal parameters) is perfectly distinguishable from the subject of the criminal procedures in the ICC criminal justice system (cases comprised of specific facts that allegedly amounts to one or more crimes within the jurisdiction of the Court).

2. Considering that the concerned states have been excluded from Articles 15 and 53 proceedings, the *rationale* behind Article 18 proceedings is to give an opportunity to the concerned states to oppose the activation of the potential jurisdiction of the Court on the basis of the investigations and prosecutions that their national jurisdictions are carrying out, or have carried out, with regard to the crimes allegedly committed within the situations of crisis referred to in the activation requests of the state parties or the Office of the Prosecutor. In this regard, Article 18(2) provides that within one month of the above-mentioned notification, “a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdictions with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided in the notification to States”.
3. Following the general rule in the triggering proceedings initiated upon an activation request of the Security Council or a state party, Article 18(2) entrusts to the Office of the Prosecutor jurisdictional functions, such as to decide in first instance on the merits of the opposition of the concerned states. As a result, irrespective of the organ of the Court that has provisionally activated the potential jurisdiction of the Court over the situation of crisis referred to in the activation request, the Office of the Prosecutor is granted the power to indefinitely suspend the efficacy of such a decision (Article 18(2)), the suspension decision not being reviewable by any of the chambers of the Court (Article 18(2)). Only those Office of the Prosecutor decisions that reject the opposition of the concerned states are automatically reviewed by the Pre-Trial Chamber (Article 18(2)).
4. Finally, the so-called “preliminary” character of Article 18 Office of the Prosecutor rulings regarding admissibility can only be understood if Article 18 proceedings are considered the second part of the triggering procedure when a state party or the Office of the Prosecutor is the petitioner. In this regard, the expression “preliminary” in the Article 18 heading refers to the fact that the Pre-Trial or Appeals Chambers rulings on the admissibility of the situation of crisis that is the subject of Article 18 proceedings cannot have *res iudicata* efficacy over the admissibility of any given case regarding to specific facts that took place within such a situation of crisis. Logically, given that the triggering and criminal procedures have differ-

ent subjects (situation of crisis versus cases), it is not possible that the decisions on admissibility taken in the triggering procedure have *res iudicata* efficacy in subsequent criminal procedures.

5. The expression “preliminary” in the Article 18 heading also means that, as the subject of Article 18 proceedings is a specific situation of crisis, the scrutiny of national investigations and prosecutions of the crimes allegedly committed within such a situation of crisis cannot be as detailed as in Article 19 proceedings, where the admissibility analysis is exclusively focused on a specific case. Therefore, as the level of scrutiny in Article 18 proceedings is lower than that of Article 19 proceedings, the level of information required to carry out such a scrutiny will also be lower. As a result, the fact that a general analysis of the admissibility of a situation of crisis is carried out in the triggering procedure under Article 18 does not preclude more detailed analysis of the admissibility of cases regarding specific crimes allegedly committed within such a situation of crisis.
6. In addition, it has to be said that the expression “preliminary” in the Article 18 heading does not mean that the decisions of the Office of the Prosecutor (Article 18(2)), the Pre-Trial Chamber (Article 18(2)) and the Appeals Chamber (Article 18(4)) are not final. On the contrary, such decisions put an end to the triggering procedure and have *erga omnes* efficacy, being therefore binding on all concerned states.

26.2.2.3. The Criminal Procedure in the International Criminal Court’s Criminal Justice System: Subject, Parties and Proceedings

Only once the competent organ of the Court has activated the ICC potential jurisdiction over a particular situation of crisis and has defined the personal, temporal and territorial parameters that define such a situation of crisis, the Office of the Prosecutor may initiate, on its own motion or on the basis of complaints made by any legal or natural person, the investigation and prosecution of any of the crimes that have allegedly been committed in such a situation of crisis. Each crime allegedly committed in such a situation of crisis may, hypothetically, be the subject of a different criminal procedure. Therefore, the Office of the Prosecutor may initiate several criminal procedures with regard to crimes committed within the

same situation of crisis. Unlike the triggering procedure, each of these criminal procedures:

1. has a penal nature because the ICC exercises through it the *ius puniendi* which has been entrusted to it by the ICC Statute;
2. has a subject composed of precise facts which allegedly amount to one or several of the crimes within the jurisdiction of the Court;
3. has two parties: the Office of the Prosecutor and the person(s) investigated or accused (the competent chamber of the Court will determine on a case-by-case basis the level of participation of the victims);
4. is conducted through proceedings that are comprised of four stages: a) an investigative stage; b) a pre-trial stage; c) a trial stage; and d) an appeals stage.

As a result, the triggering procedure is not only an autonomous procedure within the ICC criminal justice system but it is previous to, and necessary to, the initiation of any criminal procedure within the ICC criminal justice system. It therefore constitutes a key component of such a system. While the ICTY and ICTR Statutes clearly define the situations of crisis over which the *ad hoc* tribunals exercise their jurisdiction, the ICC Statute only defines the personal, temporal and territorial limits of the potential jurisdiction of the ICC. The triggering procedure, unknown to the ICTY and ICTR, is precisely the procedure through which the ICC exercises its power to decide whether or not it is going to exercise its investigative and prosecutorial powers over the crimes committed in a given situation of crisis, such as the ones existing in Chechnya, Côte d'Ivoire, Colombia or the Middle East.

26.2.2.4. Functions Entrusted to the Office of the Prosecutor in the Triggering Procedure

Not only is the triggering procedure a key element in the ICC criminal justice system, the Office of the Prosecutor has also been given a key role in the procedure that includes, *inter alia*, the following functions:

1. Receiving Article 13(a) and (b) of the ICC Statute activation requests made by the Security Council or states parties.

2. Carrying out Rule 104 of the RPE preliminary inquiries after the making of activation requests by the Security Council or states parties.
3. Deciding whether or not to activate the potential jurisdiction of the Court over the situations of crisis referred to in the Security Council activation requests (Article 53(1)).
4. Deciding whether or not to provisionally activate the potential jurisdiction of the Court over the situations of crisis referred to in the states parties activation requests (Article 53(1)).
5. Deciding, at the request of the Pre-Trial or Appeals Chambers, whether or not to reconsider its decision not to activate, or not to provisionally activate, the potential jurisdiction of the Court over the situations of crisis referred to in the Security Council or states parties activation requests (Article 53(3)(a)).
6. Deciding, on the basis of new facts or new evidence provided for by the Security Council or the states parties, whether or not to reconsider its decisions not to activate, or not to provisionally activate, the potential jurisdiction of the Court over those situations of crisis referred to in the Security Council or states parties activation requests (Article 53(4)).
7. Receiving Article 15(1) complaints from any natural or legal person.
8. Carrying out Article 15(2) preliminary inquiries after the filing of Article 15(1) complaints with the Office of the Prosecutor.
9. Requesting the Pre-Trial Chamber to take the appropriate measures to ensure the efficiency and integrity of the proceedings when there is a serious risk that it might not be possible for a testimony to be taken subsequently (Rule 47(2) of the RPE).
10. Deciding whether or not to make activation requests regarding those situations of crisis referred to in Article 15(1) complaints (Article 15(3)).
11. Notifying victims of its Article 15(3) activation requests so as to enable them to make representation to the Pre-Trial Chamber in accordance with Article 15(4) (Rule 50 of the RPE).

12. Notifying complainants of its decisions not to make activation requests regarding those situations of crisis referred to in Article 15(1) complaints (Article 15(6)).
13. Deciding, on the basis of new facts or new materials provided for by the complainants, whether or not to reconsider its decisions not to make an activation request over the situations of crisis referred to in Article 15(1) complaints (Article 15(5) and (6)).
14. Deciding whether or not to appeal Article 15(4) Pre-Trial Chamber decisions not to provisionally activate the jurisdiction of the Court over the situation of crisis referred to in Office of the Prosecutor activation requests because of the lack of “reasonable basis to proceed” (Article 82(1)(a)).
15. Notifying all states parties and concerned states non-parties of Articles 15(4) and 53(1) decisions to provisionally activate the jurisdiction of the Court over the situations of crisis referred to in the states parties or the Office of the Prosecutor activation requests (Article 18(1)).
16. Deciding, on the basis of the merits of the concerned states’ allegations relating to the formal primacy of their national jurisdictions, whether or not to indefinitely suspend the efficacy of the decisions to provisionally activate the potential jurisdiction of the Court over the situations of crisis referred to in the activation requests of the states parties or the Office of the Prosecutor (Office of the Prosecutor deferrals as provided for in Article 18(2)).
17. Supervising the continued willingness and ability of the concerned states to properly investigate and prosecute the crimes committed within those situations of crisis referred to in Office of the Prosecutor or Office of the Prosecutor activation requests (Article 18(5)).
18. Periodically reviewing, on the basis of the new information gathered through the above-mentioned supervisory functions, its decisions (Office of the Prosecutor deferrals) to indefinitely suspend the efficacy of the decisions to provisionally activate the potential jurisdiction of the Court over the situations of crisis referred to in the activation requests of the states parties or of the Office of the Prosecutor (Article 18(3)).

19. Requesting the Pre-Trial Chamber for authorisation to pursue necessary investigative steps in accordance with Article 18(6).
20. Requesting of the Pre-Trial Chamber confirmation of its decision to reject the opposition of the concerned states to the activation of the potential jurisdiction of the Court over those situations of crisis referred to in the activation requests of the states parties or the Office of the Prosecutor (Article 18(2), *in fine*).
21. Deciding whether or not to appeal, in accordance with Article 18(4), the Pre-Trial Chamber's decision not to confirm the Office of the Prosecutor's decision to reject the opposition of the concerned states to the activation of the potential jurisdiction of the Court over those situations of crisis referred to in the activation requests of the states parties or the Office of the Prosecutor.
22. The adoption during the triggering procedure of the necessary measures to ensure the confidentiality of the information, the protection of victims and witnesses and the preservation of evidence.²⁵

Contrary to what could be deduced from the Office of the Prosecutor organisation designed in the budget for the first financial period of the Court, I believe that the proper performance of the key above-mentioned functions is to require the allocation of a high level of personnel and material resources, especially during the first years of the Court. As a result, I believe that the proposed organisational adjustments below should be introduced at the earliest opportunity.

26.2.2.5. The Risk of Office of the Prosecutor Abuses of Its Article 15(2) of the ICC Statute and Rule 104 of the RPE Preliminary Inquiry Powers to Carry out Article 54 Investigations

Article 15(2) of ICC Statute imposes upon the Office of the Prosecutor the duty to “analyse the seriousness of the information received” from any legal or natural person, and enumerate a number of investigative steps that the Office is empowered to carry out for the purposes of fulfilling such a duty (seeking additional information from states, organs of the United Nations, intergovernmental or non-governmental organisations, or other reli-

²⁵ Material guidelines are, in my view, needed for the exercise of many of the functions entrusted with the Office of the Prosecutor during the triggering procedure.

able sources, and receiving written or oral testimony at the seat of the Court).

In my view, three are the main goals to be achieved through the Office of the Prosecutor preliminary inquiries provided for in Article 15(2):

1. Analysing the seriousness of the information received pursuant to Article 15(1).
2. Determining the personal, territorial and temporal parameters that define the situations of crisis within which the crimes referred to in Article 15(1) complaints have been allegedly committed.
3. Verifying the occurrence of the above-mentioned six circumstances that must occur for the potential jurisdiction of the Court to be activated over such situations of crisis.

Therefore, Article 15(2) preliminary inquiries constitute the intermediate stage between the reception of Article 15(1) complaints relating to specific crimes and Article 15(3) Office of the Prosecutor activation requests over those situations of crisis within which such specific crimes have allegedly been committed. In this regard, it is my view that Article 15(2) Office of the Prosecutor preliminary inquiries play, to a certain extent, a similar role to the one played by the investigations that the Security Council and the states parties have to carry out before making an activation request in accordance with Articles 13(a), 13(b) and 14. However, while the Security Council and the states parties may decide whether or not to make activation requests, and, thus, whether or not to undertake previous investigations of the situations of crisis referred to in them, Article 15(2) imposes on the Office of the Prosecutor the duty to carry out a preliminary inquiry after having received an Article 15(1) complaint about specific crimes within the jurisdiction of the Court, leaving up to the Office of the Prosecutor's technical discretion the determination of the specific investigative steps that must be carried out to comply with such a duty.

In fact, Articles 13 (a) and 53(1) have been drafted on the assumptions that: a) the Security Council must have had to carry out a detailed investigation before declaring that a situation of crisis constitutes a threat to international peace, a breach of international peace or an act of aggression; and b) the Security Council, when making an activation request, will provide the Office of the Prosecutor with the necessary material to determine whether or not the above-mentioned six conditions for the activation

of the potential jurisdiction of the Court over the situation of crisis referred to in its activation request occur. Article 14 expressly imposes on the states parties that make an activation request the duty to, as far as possible, “specify the relevant circumstances” and transmit to the Office of the Prosecutor “such supporting documentation as is available” to them.

For this reason, Article 53(1), unlike Article 15(2), does not expressly provide for any Office of the Prosecutor preliminary inquiry when the Security Council or a state party make an activation request. However, Rule 104 of the RPE partially modifies the above-mentioned system by providing for Office of the Prosecutor preliminary inquiries upon Security Council or state parties’ activation requests. By doing so, the position of the Office of the Prosecutor *vis-à-vis* the Security Council and the state parties has been strengthened because it enables the Office of the Prosecutor not to rely exclusively on the materials provided by the Security Council or the states parties in deciding whether or not to activate the potential jurisdiction of the Court over the situations of crisis referred to in their activation requests.

Despite the fact that Rule 104 of the RPE grants to the Office of the Prosecutor the same powers granted to it by Article 15(2), the scope of Rule 104 Office of the Prosecutor preliminary inquiries should be far more limited than the scope of Article 15(2) Office of the Prosecutor preliminary inquiries because their only purpose is to obtain additional information to better decide, in accordance with Article 53(1), whether or not to activate the potential jurisdiction over situations of crisis referred to in the Security Council or states parties activation requests.

The goals to be achieved through Article 15(2) preliminary inquiries and the fact that such preliminary inquiries are carried out before any activation request has been made provide for some implicit limits to their scope. One of them is the limitation of the investigative steps that can be taken by the Office of the Prosecutor to those of non-coercive nature. However, the language of Article 15(2) leaves, in my view, room for the Office of the Prosecutor to resort to many of Article 93 forms of state parties co-operation in the development of its preliminary inquiries, including:

1. The identification and whereabouts of persons or the location of items.

2. The voluntary questioning of victims and witnesses in the territory of the states parties.
3. The service of documents, including judicial documents.
4. The provision of records and documents, including official records and documents.
5. The examination of places or sites, including the exhumation and examination of gravesites.
6. Any other type of assistance not of a coercive nature that is not prohibited by the law of the requested state.

In this regard, it is my view that Article 86 of the ICC Statute states parties' duty to co-operate with the Court extends to all activities of the Court, including the preliminary inquiries and the triggering procedure. Except those investigative steps that can be carried out by the Office of the Prosecutor in the seat of the Court, the rest will have to be conducted by the competent authorities of the requested states in accordance with the procedures established in their applicable national laws (Article 99(1)). In addition, unless expressly prohibited by the national laws of the requested states, the procedures outlined by the Office of the Prosecutor in its requests should be followed, and Office of the Prosecutor personnel should be allowed to be present if the Office so requests (Article 99(1)).

Neither Article 15(2) of the ICC Statute nor Rule 47 of the RPE provide for any express time limit in the development of preliminary inquiries by the Office of the Prosecutor. However, both the purposes of Article 15(2) preliminary inquiries and the right of the complainants to be notified of the Office of the Prosecutor decisions not to make activation requests over the situations of crisis within which the specific crimes referred to in their complaints have allegedly been committed require for such preliminary inquiries to be completed by the Office of the Prosecutor within a reasonable time.

Despite of the fact that the subject of Article 15(2) preliminary inquiries are situations of crisis (as opposed to cases) and that they are carried out before any activation request has been made, there is an undeniable risk that the Office of the Prosecutor may abuse its Article 15(2) powers to carry out Article 54 investigations of specific facts and suspects. Such a risk derives, in my view, from the following factors:

1. The experience of the ICTY and ICTR shows that political, military, economic and religious leaders of the concerned states are

likely to be actively or passively involved in the commission of the crimes being investigated. Rule 50 of the RPE notification of the Office of the Prosecutor activation requests to victims and Article 18(1) notification of the decisions to provisionally activate the jurisdiction of the Court to the concerned states will put such leaders on notice of the risk of their being targeted by Office of the Prosecutor Article 54 investigations and prosecutions. Therefore, the Office of the Prosecutor may well be tempted to confidentially carry out Article 54 investigations as if they were part of their Article 15(2) preliminary inquiries.

2. Due to the fact that, except under the exceptional circumstances provided for in Articles 57(3)(d) and 99(4), Article 54 investigative steps must be carried out through the co-operation of the states parties, the additional powers granted to the Office of the Prosecutor for the conduct of its Article 54 investigations are quite limited.
3. The lack of precise time limits to complete Article 15(2) preliminary inquiry.

Using Article 15(2) powers to carry out Article 54 investigations would not only violate the ICC Statute but it would also create the perception that the Office of the Prosecutor conducts politically motivated investigations. In addition, such practices are likely to erode the trust of the states parties on the fairness of Office of the Prosecutor and, thus, to limit their co-operation with the Office. As a consequence, and considering that, to a very important extent, the effectiveness of the Office of the Prosecutor in the performance of its functions depends on the co-operation of the states parties, and that most of the victims, witnesses, alleged perpetrators and evidence will be in the territory of the concerned states, the Office could be put in an untenable situation. In fact, I believe that this kind of practice is contrary to one of the main goals to be achieved by the Office of the Prosecutor: making states parties and states non-parties, to the extent possible, trust it in order to secure their co-operation while preserving its independence. For this reason, all efforts should be made to create the appearance that the Office of the Prosecutor is taking all the measures within its powers to avoid politically motivated investigations and prosecutions, including the introduction of the organisational adjustments proposed in the following paragraph.

26.2.2.6. Organisational Adjustments of the OTP Derived from the Triggering Procedure: Specific Proposals

The creation of a fourth division within the Office of the Prosecutor entrusted with the exercise of its functions in the triggering procedure is, in my view, required by the following factors:

1. The shaping of the triggering procedure as an autonomous procedure that plays a key role within the ICC criminal justice system.
2. The importance of the functions conferred upon the Office of the Prosecutor in the triggering procedure and the high level of personal and material resources needed for their proper performance.
3. The need to create the appearance that the Office of the Prosecutor is taking all the measures within its powers to avoid politically motivated investigations, and particularly to impede as far as possible the use of Article 15(2) of the ICC Statute and Rule 104 of the RPE powers to carry out Article 54 investigations.

This new division could be called the Triggering Procedure Division and, in my opinion, should comprise the following two sections:

1. *The Preliminary Inquiries Section.* This section should be mainly composed of analysts because: a) The limited powers granted to the Office of the Prosecutor by Article 15(2) and Rule 104 turn the in-house analysis of the information received into the Office's main investigative tool during the preliminary inquiries; b) Situations of crisis, and not cases regarding specific crimes, are the subject of the preliminary inquiries; and c) The main purpose of the preliminary inquiries is to determine *prima facie* whether or not crimes within the jurisdiction of the Court have been committed within a specific situation of crisis, and thus overall contextual analysis of the information received by the Office of the Prosecutor constitutes the key element of such preliminary inquiries. However, a few investigators should also be part of this section for the purposes of taking voluntary witness statements at the seat of the Court in accordance with Article 15(2), *in fine*, and Rule 47 of the RPE.
2. *The Litigation Section.* This section should comprise two sub-sections: the Litigation Sub-Section and Triggering Procedure Advisory Sub-Section. The former should be entrusted with: a) evidentiary issues regarding the sufficiency or insufficiency of evidence to determine *prima facie* that crimes within the jurisdiction of the

Court have allegedly been committed within a particular situation of crisis; and b) the litigation of such evidentiary issues before the Pre-Trial and the Appeals Chambers. The Triggering Procedure Advisory Sub-Section should be entrusted with issues regarding the jurisdiction of the Court, the admissibility of situations of crisis, the use of political discretion and victims.

Due to the fact that the first functions that the Office of the Prosecutor will have to perform are those entrusted to it in the triggering procedure, and considering that hundreds of complaints have already been received relating to quite a different number of situations of crisis, I consider it necessary to create the above-proposed Triggering Procedure Division as soon as possible.

Being aware that administrative proceedings and budgetary allocations may delay its coming into being for some time, it is my view that as a first step towards the creation of the Triggering Procedure Division, the following organisational adjustments should be made at the earliest opportunity:

1. The creation of a Preliminary Inquiries Sub-Section within the Analysis Section of the Investigation Division.
2. The assignment of one or two investigators of the Investigation Division to the taking of voluntary witness statements at the seat of the Court in accordance with Article 15(2) of the ICC Statute and Rule 47 of the RPE.
3. The creation of a Triggering Procedure Litigation Sub-Section within the Prosecution Section of the Prosecution Division.
4. The creation of a Triggering Procedure Sub-Section within the Legal Advisory and Policy Section of the Prosecution Division.

26.2.3. Organisational Adjustments Derived from the Civil Procedure

As has already been mentioned, the ICC Statute, unlike the ICTY and ICTR Statutes, creates up to three different types of procedures: the triggering procedure, the criminal procedure and the civil procedure (Articles 57(3)(e), 75, 85 and 109). However, as I have already pointed out, the organisation of the Office of the Prosecutor provided for in the budget for the first financial period of the Court has been mainly designed on the basis of the functions entrusted to the Office in the criminal procedure. Thus, it is my view that the current organisation of the Office does not re-

flect the key functions that the Office has been entrusted with in the triggering and civil procedures. Hence, in order for the Office of the Prosecutor to carry out such functions properly some organisational adjustments are needed.

However, while the Office of the Prosecutor functions in the triggering procedure are the first functions that the Office will have to carry out, the functions in the civil procedure are among the last ones to be performed by it. Therefore, while the organisational adjustments derived from the triggering procedure need to be urgently undertaken, the organisational adjustments derived from the civil procedure can be taken at a later stage.

Due to the fact that many of the crimes within the jurisdiction of the Court are mass crimes that may affect thousands of victims, the performance of the functions entrusted to the Office of the Prosecutor in the reparation proceedings may, at some stage, entail a huge amount of work that could justify the creation of a Civil Procedure Division within the Office. Such a division should, in my view, be composed of two sections: a) Economic Assets Investigation Section; and b) Civil Litigation Section. The Economic Assets Investigation Section should be composed of investigators with ample experience in white-collar crimes and it should be in charge of searching for the economic assets of the persons investigated or prosecuted so as to request the competent Chamber, in accordance with Article 57(3)(e), their embargo to the concerned states parties at the earliest opportunity. The Civil Litigation Section should be composed of experienced lawyers in the field of civil litigation and it should be in charge of all civil litigation matters, including embargo requests, before any of the Chambers of the Court.

However, for the time being, and as a first step towards the creation of a Civil Procedure Division within the Office of the Prosecutor, the following organisational adjustments would, in my view, suffice:

1. The creation of an Economic Assets Investigation Section within the Investigation Division specialised in searching the economic assets of the persons investigated or prosecuted (in order to complete the organisation of the Investigation Division, a Criminal Investigation Section as opposed to the Economic Assets Investigation Section could be created as well).

2. The creation of a Sub-Section within the Prosecution Section of the Prosecution Division specialised in civil litigation.

26.2.4. Organisational Adjustments Derived from the Participation of the Victims in the ICC Proceedings and Other Victims' Issues

A particular feature of the ICC Statute is the role given to the victims in the triggering, criminal and civil procedures. In the triggering procedure, Article 15(3) and (4) grants to victims the right to “make representations” to the Pre-Trial Chamber. Rule 50(1) of the RPE imposes on the Office of the Prosecutor, unless the exceptional circumstances thereby established occur, the duty to inform victims of its Article 15(3) activation requests so as to enable them to exercise their right to make representation to the Pre-Trial Chamber. Considering that Article 15(3) activation requests refer to whole situation of crisis, as opposed to cases regarding specific crimes, the Office of the Prosecutor may have to notify thousands of victims of its activation requests. For this reason, it is important to implement as soon as possible a system that will enable the Office of the Prosecutor to properly comply with such a duty (see section 26.3.2.).

Taking into account the high potential number of victims in a particular situation of crisis, issues relating to the determination of the exceptional circumstances under which victims should not be inform of Article 15(3) activation requests, victims' legal representation, and victim and witnesses' protective measures will likely increase the workload of the Office of the Prosecutor in the triggering procedure. In addition, considering that the potential number of victims, the level of victims' participation in the proceedings and the protective measures available are different in the triggering and criminal procedures, it is more than likely that the victims' issues arising in the respective procedures will differ as well.

As a result, the creation of a Triggering Procedure Division will also enable the Office of the Prosecutor to treat victims' issues in the triggering procedure properly. In my view, the proposed Triggering Procedure Advisory Sub-Section should be responsible for dealing with such issues. As I have already pointed out, while the Triggering Procedure Division is created, and due to the different nature of victims' issues in the triggering and criminal procedures, the Triggering Procedure Sub-Section of the Legal Advisory and Policy Section of the Prosecution Division should, in my view, deal with victims' issues in the triggering procedure.

In addition to the right to “submit observations” in Article 19 proceedings, Article 68(3) leaves to the competent chamber of the Court the determination of the level of participation of the victims in the ICC criminal proceedings. Therefore, it will be very helpful to have material guidelines within the Office of the Prosecutor with regard to victims’ participation in the criminal proceedings. These material guidelines could be part of the initial Office of the Prosecutor regulations or be formulated at a later stage by the Legal Advisory and Policy Section of the Prosecution Division. Likewise, in the future material guidelines on victims’ participation in the civil proceedings may also be necessary to be drafted by the Legal Advisory and Policy Section.

In addition, this section should provide legal advice at any time on any matter relating to victims’ participation in the ICC criminal and civil proceedings and on protective measures for victims and witnesses. Due to the foreseeable amount of work related to victims’ issues in the criminal and civil proceedings, it may be a good idea to create in the future a Sub-Section in the Legal Advisory and Policy Section of the Prosecution Division specialising in victims’ issues in the criminal and civil proceedings. Finally, if as a consequence of the amount of civil litigation in the ICC, a Civil Procedure Division is created within the Office of the Prosecutor, such a division, particularly its litigation section, should be responsible for dealing with victims’ issues in the ICC civil proceedings.

Finally, I believe that it is key for the proper performance of the Office of the Prosecutor functions regarding victims’ issues to clearly define the supportive role of the Administration Unit of the Immediate Office of the Prosecution Division in matters such as the reception of victims’ complaints and requests, notification to victims of Office decisions, and administrative support to provide for protective measures for victims and witnesses throughout the triggering, criminal and civil procedures.

26.2.5. Organisational Adjustments Derived from the Role of the Office of the Prosecutor as Primary Custodian of the Complementarity Regime

26.2.5.1. The Principle of Complementarity of the International Criminal Court: Formal Primacy of National Jurisdictions and Material Primacy of the International Criminal Court

While the relationship between the concurrent jurisdiction of the ICTY and ICTR, on the one hand, and national courts, on the other, is directed by the principle of primacy of the *ad hoc* tribunals,²⁶ the relationship between the concurrent jurisdiction of the ICC and national courts is directed by the principle of complementarity.²⁷ In accordance with this principle, the ICC may only exercise its jurisdiction when national courts are inactive or they are “unwilling” or “unable” to properly conduct their investigations and prosecutions.

Article 17(3) of the ICC Statute defines the term “unable” as a “total or substantial collapse or unavailability” of a national judicial system that causes a state to be “unable to obtain the accused or the necessary evidence and testimony or otherwise to carry out its proceedings”. Whereas Article 17(2) defines “unwillingness” in terms of: a) purposely shielding the alleged perpetrators from criminal responsibility through national proceedings; b) unjustified delay in conduct of national proceedings that is inconsistent with the intent to bring the alleged perpetrator to justice; or c) lack of independence in the conduct of national proceedings that is inconsistent with the intent to bring the alleged perpetrators to justice.

Which national courts are relevant for the purpose of the application of the principle of complementarity? In other words, is the exercise of the ICC jurisdiction exclusively dependent on the lack of action, unwillingness or incapacity of the national courts of those states directly concerned with a given situation of crisis, that is the territorial state, the state of nationality of the alleged perpetrators and the state of nationality of the victims? Or, on the contrary, is the exercise of ICC jurisdiction also depend-

²⁶ See International Criminal Tribunal for the former Yugoslavia, Statute, adopted 25 May 1993, Art. 9 (<http://www.legal-tools.org/doc/b4f63b/>); International Criminal Tribunal for Rwanda, Statute, adopted 8 November 1994, Art. 8 (<http://www.legal-tools.org//8732d6/>).

²⁷ ICC Statute, Art. 1 establishes that the ICC “shall be complementary to national criminal jurisdictions”. This provision is further developed, *inter alia*, by Arts. 17, 18, 19 and 53(1)(b) and 2(b) of the ICC Statute, see *supra* note 3.

ent on the lack of action, unwillingness or incapacity of the national courts of whichever state that has adopted in its national legislation the principle of universal jurisdiction over the crimes within the material jurisdiction of the ICC?

The answer to this question must be derived from what is, in my view, the cornerstone of the ICC Statute: that the ICC does not replace any of the existing mechanisms of investigation or prosecution of the “most serious crimes of international concern” at either an international or a national level, but it complements them. Therefore, the entry into force of the ICC Statute does not affect the content of the obligations *aut dedere aut iudicare* of the states parties to the Geneva Conventions,²⁸ its First Additional Protocol²⁹ and the Convention against Torture.³⁰ In addition, the content under customary international law of the principle of universal jurisdiction over the “most serious crimes of international concern” is not affected by the ICC Statute either.³¹ On the contrary, in my view, the ICC Statute strengthens the legitimacy of such a principle inasmuch as it creates an international judicial body entrusted with the function of making sure that the investigations and prosecutions carried out by national courts on the basis of the principle of universal jurisdiction are properly conducted.

As a result, it can be concluded that the investigations and prosecutions undertaken by the national courts of any state party or non-party preclude the ICC from exercising its jurisdiction unless such national

²⁸ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31, Art. 49 (<http://www.legal-tools.org/doc/baf8e7/>); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85, Art. 50 (<http://www.legal-tools.org/doc/0d0216/>); Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 238, Art. 129 (<http://www.legal-tools.org/doc/365095/>); and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Art. 146 (<http://www.legal-tools.org/doc/d5e260/>).

²⁹ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, Art. 85(1) (<http://www.legal-tools.org/doc/d9328a/>).

³⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Art. 5(2) (<http://www.legal-tools.org/doc/713f11/>).

³¹ See International Court of Justice, *Democratic Republic of Congo v. Belgium*, Arrest Warrant of 11 April 2000, Joint and Separate Opinions of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002 (<http://www.legal-tools.org/doc/23d1ec/>).

courts are found to be “unable” or “unwilling” to carry out their own criminal proceedings (principle of formal primacy of national jurisdictions over the ICC). Hence, it would seem that the ICC is an *ultima ratio* jurisdiction that is not only complementary but also subsidiary to national jurisdictions.

However, as it has already been pointed out, the ICC Statute not only enables the ICC to exercise its jurisdiction when national courts are not doing properly their job but it also grants the ICC the jurisdiction to decide whether or not national courts are doing their job properly. As a result, had the ICC Statute come into force by the time it was adopted, the ICC would have had the power to decide whether or not the proceedings undertaken against General Augusto Pinochet by Chilean courts, and, especially, the decision of the Santiago Court of Appeals of 9 May 2001 on the case of the Caravan of Death declaring Pinochet medically unfit to stand trial, were independent, impartial and intended to bring Pinochet to justice.

Therefore, the ICC Statute has created a *watchdog* court that will take over when it considers that national courts are not up to the job of investigating and prosecuting genocide, crimes against humanity and war crimes. From this perspective, it is difficult to negate the material primacy of the ICC over national jurisdictions. Indeed, the drafters of the ICC Statute had no alternative if they wanted to create an effective *watchdog* court that, by threatening to take over, would encourage national courts to do a better job in investigating and prosecuting “the most serious crimes of international concern”.

In addition, the drafters of the ICC Statute have, to a certain extent, sacrificed the role that the ICC could have played in the investigation and prosecution of the “most serious crimes of international concern” in order to promote its role as provider of incentives for national jurisdictions to properly investigate and prosecute such crimes. This conclusion can be drawn, in my view, from the following factors:

1. The intent of the drafters not to substitute any of the existing national or international enforcement mechanisms of the “most serious crimes of international concern”.
2. The broad definition of the personal scope of application of the principle of formal primacy of national jurisdictions over the ICC

(including all states that have introduced in their national laws the principle of universal jurisdiction).

3. The broad definition of the temporal scope of application of the principle of formal primacy of national jurisdictions over the ICC (all stages of the ICC proceedings before a final judgment is issued).
4. The lack of precise time limits for the concerned states to challenge the jurisdiction of the Court or the admissibility of a case in accordance with Article 19(2)(a) and (b) of the ICC Statute (unlike the one-month time limit provided for in Article 18).
5. The fact that, unlike Article 18 proceedings, Article 19 proceedings are not directed by the principle of concentration of proceedings, and the decisions taken by the Pre-Trial, Trial and Appeals Chambers do not have *erga omnes* efficacy (being only effective with regard to the parties to Article 19 proceedings).

When creating a *watchdog* Court that, by threatening to take over, would encourage national courts to do a better job in investigating and prosecuting “the most serious crimes of international concern”, the drafters of the ICC Statute did not provide the Court with the means to effectively undertake a number of investigations and prosecutions of the crimes allegedly committed in several situations of crisis. (In addition to the above-mentioned factors, it has also to be taken into account that, save exceptional circumstances, the Office of the Prosecutor cannot directly carry out investigative steps on the territory of the states parties and that no specific sanctions are provided for the failures of the states parties to comply with their duties to co-operate with the Court.) However, the drafters of the Statute did provide the Court with the necessary means to carry out its role as provider of incentives for national jurisdictions to properly investigate and prosecute such egregious crimes, and, if necessary for states to take seriously the incentives given by the Court, to take over a limited number of investigations and prosecutions. For this reason, it can be concluded that:

1. The principle of the complementarity is the cornerstone of the ICC criminal justice system.
2. Safeguarding the proper application of the complementarity regime, and not investigating and prosecuting the crimes within the jurisdiction of the Court, is the single most important task of the Court.

Criminal investigations and prosecutions are only the means to make credible to states the Court's threat of taking over from national jurisdictions so as to "force" the latter to properly investigate and prosecute the "most serious crimes of international concern". In my view, it is the "medical protocol" that drafters have prescribed for the ICC to use in its fight against the culture of impunity that is paralysing the existing national and international enforcement mechanisms. Therefore, on this point, the ICC is diametrically opposed to the ICTY and ICTR.

26.2.5.2. The Office of the Prosecutor as the Primary Custodian of the Complementarity Regime in the Triggering Procedure

The Office of the Prosecutor is, in my view, the organ primarily entrusted with safeguarding the complementarity regime during both the triggering and the criminal procedures, especially before the issuing of an arrest warrant or an order to appear in accordance with Article 58 of the ICC Statute

Due to its key role during the triggering procedure, the Office of the Prosecutor is primarily entrusted with the first screening of national courts' investigations and prosecutions of the crimes allegedly committed within those situations of crisis that are the subject of the triggering procedure. First, one of the main purposes of Article 15(2) of the ICC Statute and Rule 104 preliminary inquiries is to obtain the necessary information as to determine whether or not national jurisdictions have investigated or prosecuted, or are investigating or prosecuting, such crimes adequately.

Second, upon completion of the preliminary inquiries, and only if the Office of the Prosecutor concludes that national jurisdictions are not doing their job properly, it may: a) activate, or provisionally activate, in accordance with Article 53(1), the potential jurisdiction of the Court over the situations of crisis referred to in the Security Council or states parties activation requests; or b) make Article 15(3) activation requests over the situations of crisis within which the crimes referred to in Article 15(1) complaints have been allegedly committed.

Third, having the activation of the potential jurisdiction of the Court been provisionally accorded by a Pre-Trial Chamber decision (Article 15(4)), an Appeals Chamber decision (Article 81(1)(a)) or an Office of the Prosecutor decision (Article 53(1)), Article 18(2) grants the Office of

the Prosecutor the power to suspend the efficacy of such decisions if it concludes, on the basis of the allegations of the concerned states, that national courts are properly investigating and prosecuting the crimes allegedly committed within the situations of crisis which are the subject of the triggering procedure.

Fourth, if the Office of the Prosecutor suspends the provisional activation of the potential jurisdiction of the Court, Article 18(3) and (5) imposes upon it the duties to: a) supervise the development of the investigations and prosecutions carried out by national jurisdictions; and b) periodically review its suspension decision on the basis of the new information about such investigations and prosecutions.

Finally, only when the Office of the Prosecutor considers that national jurisdictions are not properly investigating and prosecuting the crimes committed within the situations of crisis which are the subject of the triggering procedure, the Pre-Trial Chamber and, if so requested, the Appeals Chamber, may definitively activate the potential jurisdiction of the Court over such situations of crisis (Article 18(2) and (4)).

26.2.5.3. The Office of the Prosecutor as the Primary Custodian of the Complementarity Regime in the Criminal Procedure, Especially before the Issuing of an Article 58 Arrest Warrant or Summons to Appear

As has already been pointed out, once the potential jurisdiction of the Court is activated over a situation of crisis, the Office of the Prosecutor, on its own motion, or at the request of any natural or legal person, may open an Article 54 investigation with regard to any of the crimes allegedly committed within such a situation of crisis. By doing so, the Office of the Prosecutor initiates a criminal procedure whose subject is a case comprising specific facts that allegedly amount to one or more crimes within the jurisdiction of the Court, and which is composed of four stages: investigation, pre-trial, trial and appeal.

The position of the Office of the Prosecutor is quite different during an Article 54 investigation than during the rest of the stages of the criminal procedure. Before the issuing of an Article 58 arrest warrant or summons to appear, the Office of the Prosecutor is not only the only party in the proceedings, it is also the organ of the Court that is in charge of the proceedings, the Article 57 supervisory powers of the Pre-Trial Chamber

being rather limited. The Office of the Prosecutor is the organ entrusted, *inter alia*, with the following functions: a) the reception of information about crimes allegedly committed within the situation of crisis over which the potential jurisdiction of the Court has been activated; b) the development of investigations with regard to such crimes (Article 54(1)); c) the collection, examination and preservation of the evidence (Article 54(3)(a) and (f)); d) the protection of the confidentiality of the information received (Article 54(3)(e) and (f)); and e) the protection of victims and witnesses (Article 54(3)(f)).

In addition, Article 19(11) makes the Office of the Prosecutor the primary custodian of the complementarity regimen during this stage of the criminal proceedings because it grants to it the power to, on its own motion or at the request of a concerned state, suspend the investigation of a case because national jurisdictions are properly investigating or prosecuting the specific crime(s) which constitute its subject, or have done so. If the Office of the Prosecutor decides to suspend one or several of its Article 54 investigations, Article 19(11) entrusts the Office of the Prosecutor with supervisory functions of the development of the national investigations and prosecutions that include: a) the periodic request of information to the concerned States; and b) the periodic review of its suspension decisions on the basis of the new information about the development of the national proceedings. In addition, Article 19(11), *in fine*, grants to the Office of the Prosecutor the power to reverse, at any time, its decisions to suspend its investigations, and thus to proceed with them if national proceedings are not conducted in an appropriate manner.

Once an arrest warrant or an order to appear is issued in accordance with Article 58, the Office of the Prosecutor is no longer the organ of the Court that is primarily in charge of the criminal proceedings, and assumes a position of party in them. From this point, the ICC Statute entrusts the Pre-Trial, the Trial and the Appeals Chambers with the function of directing the criminal proceedings (see Articles 59 ff.). For this reason, in my opinion, once an arrest warrant or a summons to appear is issued, Article 19(11) is no longer applicable, and, thus, if the Office of the Prosecutor finds out that national jurisdictions are investigating or prosecuting the same case it can only seek an admissibility ruling from the competent Chamber as provided for in Article 19(3).

However, even after the issuing of an arrest warrant or a summons to appear, the Office of the Prosecutor keeps a key role in safeguarding

the complementarity regime. First, as already pointed out, the Office of the Prosecutor may seek at any time before the end of the trial an admissibility ruling in accordance with Article 19(3). Second, Article 19(10) entrusts the Office of the Prosecutor with a general supervisory function of the development of national proceedings whenever the competent chamber of the Court has declared the inadmissibility of a case. Therefore, once a case is declared inadmissible, the Office of the Prosecutor is in charge of supervising that national jurisdictions conduct their investigations and prosecutions properly with regard to such a case. And whenever the Office of the Prosecutor is “fully satisfied” that this is not happening, Article 19(10) enables it to submit a request to the chamber of the Court that declared the inadmissibility of the case to have such a decision reviewed.

26.2.5.4. Proposed Organisational Adjustments

Considering that there can be multiple cases within one situation of crisis, and that, in accordance with the principle of universal jurisdiction, many states can investigate and prosecute the crimes within the jurisdiction of the Court, it is likely that the Office of the Prosecutor will have to dedicate many personnel and material resources to comply with its functions as the primary custodian of the complementarity regime. For these reasons, it is my view that some organisational adjustment in the Office of the Prosecutor should be made to enable it to carry out such a key role properly, especially considering that the principle of complementarity constitutes the cornerstone of the ICC Statute and that its safeguard is the single most important task of the Court.

These organisational adjustments should, in my view, respect the distinction between the triggering and the criminal procedures embraced by the ICC Statute. As explained above, the analysis of national courts’ investigations and prosecutions are of a more general nature in the triggering procedure because they are undertaken with regard to whole situations of crisis, and thus the threshold for decisions in favour of the admissibility is lower. On the contrary, in the criminal procedure, the analyses of the proceedings carried out by national jurisdictions are much more detailed because they are focused on specific cases. As a consequence, the threshold for decisions in favour of the admissibility is quite higher.

These differences justify, in my view, that the Office of the Prosecutor’s functions as the primary custodian of the complementarity regime

in the Triggering Procedures be entrusted with the above-proposed Triggering Procedure Advisory Sub-Section of the Triggering Procedure Division, or, as a step towards the creation of the Triggering Procedure Division, with the Triggering Procedure Sub-Section of the Legal Advisory and Policy Section of the Prosecution Division.

On the other hand, the Office of the Prosecutor's functions as the primary custodian of the complementarity regime in the criminal procedure should, in my view, be entrusted to a Sub-Section of the Legal Advisory and Policy Section of the Prosecution Division specialised on Admissibility Issues. In addition, due to the interplay in Article 19 proceedings between admissibility and jurisdictional issues, and the enormous importance of Article 19 proceedings for the adequate development of the criminal proceedings in the ICC criminal justice system, such a Sub-Section should be also entrusted with Article 19 jurisdictional issues. Therefore, this Sub-Section of the Legal Advisory and Policy Section could be called the Admissibility and Jurisdictional Issues Sub-Section.

26.3. Enabling the Office of the Prosecutor to Comply with its Duties Derived from the Two Types of Right of Access to the Court Provided for in the ICC Statute and RPE

26.3.1. The Right to File Complaints with the Office of the Prosecutor by Any Natural or Legal Person³²

Article 15(2) and (6) of the ICC Statute implicitly imposes on the Office of the Prosecutor the duty to receive the *notitia criminis* communicated by any natural or legal person, including a state party or the Security Council when they do not act in accordance with Articles 13(a) and (b) and 14. In this regard, I consider that the duties imposed by Article 15(2) and (6) on the Office of the Prosecutor to “analyse the seriousness of the information received” and to “inform those who provided the information” of the de-

³² Throughout this chapter, I use the term “complaint” to refer to the transmission of the *notitia criminis*, or report of a crime, by any natural or legal person to the Office of the Prosecutor in accordance with Art. 15(1) of the ICC Statute. I have chosen this term because, as explained in more detail below, in accordance with the ICC Statute the report of a crime cannot be arbitrarily disregarded by the Office of the Prosecutor, but it immediately activates its duties to gather the necessary information to assess its seriousness (Art. 15(2)), to assess its seriousness (Art. 15(2)), and to notify the person(s) that reported the crime of its decision not to take further action with regard to the situation of crisis within which such a crime allegedly took place (Art. 15(6)), see *supra* note 3.

cision not to make an activation request over the situation of crisis within which the crimes reported have been allegedly committed, presupposes the existence of a previous Office of the Prosecutor duty to receive the *notitia criminis*.

The duties of the Office of the Prosecutor to “analyse the seriousness of the information received” and to “inform those who provided the information” of its decision not to make an activation request are also evidence of the granting to any natural or legal person of a right of access to the Court which entails something else than a mere power to communicate the *notitia criminis*, and that throughout this chapter I have referred to as the “right to file complaints with the Office of the Prosecutor”. Indeed, the right to file a complaint is defined in Article 15(2) and (6) as a right to provoke a certain activity from the Office of the Prosecutor, and thus it has no discretion to completely disregard the *notitia criminis* without having taken further action.

But which further action are the complainants entitled and the Office of the Prosecutor required to undertake? First, the complainant is entitled to the proper assessment of the *notitia criminis*, which includes the carrying out, within the sphere of powers granted to the Office of the Prosecutor at this early stage of the proceedings, of such preliminary investigative steps as may be necessary to obtain those materials needed for the adequate assessment of the *notitia criminis* (Article 15(2) preliminary inquiries).

Even though some could interpret Article 15(2) as granting political discretion to the Office of the Prosecutor in order to decide whether or not to undertake preliminary inquiries of the situation of crisis within which the crimes referred to in Article 15(1) complaints have been allegedly committed, I consider that the performance of this function is directed by the principle of legality. In my view, the term “may” in the second sentence of Article 15(2) should not be interpreted as giving any level of political discretion to the Office of the Prosecutor, but as defining the powers that the ICC Statute confers upon it in order to conduct its preliminary inquiries. Therefore, to “seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources that he or she deems appropriate” and to “receive written and oral testimony at the seat of the Court” are the types of preliminary investigative steps that the Office of the Prosecutor is legit-

imised to carry out when undertaking its preliminary inquiries at this early stage of the ICC proceedings.

In addition, Article 15(2) makes clear that such preliminary investigative powers are granted for the purposes of fulfilling the Office of the Prosecutor duty to “analyse the seriousness of the information received”. Hence, whenever it is necessary to obtain additional information for the proper assessment of Article 15(1) complaints, the Office of the Prosecutor must open a preliminary inquiry.

A last reason in favour of the interpretation hereby submitted of Article 15(2) is the substantial difference between the subject of Article 15(1) complaints (specific facts that allegedly amount to one or more crimes within the jurisdiction of the Court) and the subject of Article 15(3) Office of the Prosecutor activation requests (situations of crisis abstractly defined by personal, territorial and temporal parameters). Therefore, being specific facts the subject of Article 15(1) complaints, it is hard to see how the Office of the Prosecutor, without having first undertaken Article 15(2) preliminary inquiries, may be able to determine the territorial, temporal and personal parameters that define the situations of crisis within which the crimes referred to Article 15(1) complaints have been allegedly committed.

It also seems rather difficult for the Office of the Prosecutor to be able to decide, in accordance with Article 15(3) of the ICC Statute and Rule 48 of the RPE, on the appropriateness of the investigations and prosecutions already developed, or being developed, by national courts without having first taken some preliminary investigative steps to gather information about such investigations and prosecutions. Furthermore, the complainants’ lack of means to conduct investigations prior to the filing of their complaints with the Office of the Prosecutor reinforces its duty to carry out preliminary inquiries to gather the necessary information to properly decide whether or not there is “reasonable basis” to make activation requests.

However, this does not mean that the Office of the Prosecutor must open a preliminary inquiry upon reception of a complaint. On the contrary, it inevitably enjoys a certain degree of technical discretion (as opposed to political discretion) inherent to the performance of its legal functions in order to decide whether or not, in light of the content of the complaints and the materials accompanied to them, they are completely unfounded.

Article 15(6) expressly grants the complainants the right to be informed of the Office of the Prosecutor decision not to make an activation request over the situation of crisis within which the crimes referred to in their complaints have been allegedly committed. The purpose of this right is to empower the complainants to hand over to the Office of the Prosecutor new information that could force it to reconsider its decision not to make an activation request.

Therefore, though Article 15(6) does not establish any precise time limit for the completion of Article 15(2) Office of the Prosecutor preliminary inquiries, their extension beyond what, in accordance with the specific circumstances of any given preliminary inquiry, could be considered a “reasonable period of time” would, in my view, amount to a violation of such a right. As a consequence, though the Office of the Prosecutor enjoys a certain degree of inherent discretion to determine what additional information should be gathered through Article 15(2) preliminary inquiries in order to properly assess Article 15(1) complaints and what preliminary investigative steps should be taken to achieve such a goal, it can only exercise its inherent discretion within the limits implicitly imposed by the purposes of Article 15(2) and the content of the right of the complainants.³³

The functions and duties of the Office of the Prosecutor described above only become active after the reception of an Article 15(1) complaint. But what happens before such a reception takes place? In my view, Articles 13(c) and 15(1), (2) and (6), by making the activation of the above-mentioned functions and duties dependent on the reception of a complaint, implicitly impose on the Office of the Prosecutor a prohibition to initiate any preliminary inquiry without having previously received an Article 15(1) complaint.

Although the first part of Article 15(1) states that “[t]he Prosecutor may initiate investigations *proprio motu*”, the second part of this provision expressly requires that an “investigation” be opened “on the basis of information on crimes within the jurisdiction of the Court”.³⁴ Therefore,

³³ On the risk of abuses by the Office of the Prosecutor of its Art. 15(2) powers to conduct Art. 54 investigations, see *supra* section 26.2.2.5.

³⁴ The term “investigation” in Art. 15(1) of the ICC Statute has a different meaning than the term “investigation” in Art. 54. In my view, the interpretation of Art. 15(1) in accordance with the rest of Art. 15, and in the light of its object and purpose, calls for the conclusion that the meaning of the term “investigation” in Art. 15(1) is that of “preliminary inquiry”.

the literal interpretation of Article 15(1), as a whole, not only does not conclusively support the attribution to the Office of the Prosecutor of the power to *proprio motu* initiate a preliminary inquiry directed to obtain the *notitia criminis*, but also seems to establish the communication of the *notitia criminis* as a *conditio sine qua non* for it to take any preliminary investigative steps.

In this regard, the difference between the language used in Article 15(1) of the ICC Statute and the language used in Articles 18(1) and 17(1) of the ICTY and ICTR Statutes is rather significant. These two last provisions expressly provide for an investigation to be opened by the ICTY and ICTR's Offices of the Prosecutor either "*ex officio*" or "on the basis of information obtained from any source". Therefore, unlike Article 15(1) of the ICC Statute, the ICTY and ICTR Statutes expressly confer upon the Office of the Prosecutor political discretion to *proprio motu* initiate either a preliminary inquiry or an investigation directed to find out *the notitia criminis*.

Articles 15(2), (3) and (6) of the ICC Statute provide that "[t]he Prosecutor shall analyse the seriousness of the information received [...]", so that "[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation". But "[i]f, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information". Therefore, if from the literal interpretation of Article 15(1) it is not possible to conclude whether or not the Office of the Prosecutor has been granted the power to actively search for the *notitia criminis*, its systematic interpretation in the light of Articles 15(2), (3) and (6) leads to the conclusion that its powers to conduct preliminary inquiries are only triggered by the reception of the *notitia criminis*.

This interpretation of Article 15(1) is perfectly consistent with its systematic interpretation in the light of Articles 13 and 14. In fact, Article 13(a), (b) and (c) provides for three alternative *conditio sine qua non* to set in motion the activity of the Court. The first is the referral of a situation of crisis by a state party (state party activation request). The second is the referral of a situation of crisis by the Security Council (Security Council activation request). Finally, the third is not described in Article 13(c), which merely refers to Article 15 for its determination, and, as has

been shown above, Article 15 defines this third alternative *conditio sine qua non* as the communication of the *notitia criminis* to the Office of the Prosecutor (filing of a complaint with the Office) by any natural or legal person.

This interpretation of Article 15(1) is also supported by its object and purpose. Articles 13(c) and Article 15(1) are only two pieces of the complex triggering procedure provided for in Articles 13, 14, 15, 18 and 53. This triggering procedure has been designed to achieve two main goals:

1. Guaranteeing the efficacy of the Court, so that the lack of referrals by States Parties or the Security Council does not impede the Court to effectively exercise its jurisdiction; and
2. preventing politically motivated investigations and prosecutions as a result of Office of the Prosecutor abuses of its political discretion.

Therefore, interpreting Articles 13(c) and 15(1) as granting to the Office of the Prosecutor political discretion to undertake preliminary inquiries without having first been communicated the *notitia criminis* would, in my view, seriously undermine the balance struck at the Rome Conference between the two above-mentioned goals.

Finally, from a pure economic perspective, and considering the limited funding that the Office of the Prosecutor is likely to have, it is dubious whether the Office could legitimately relocate economic resources from ongoing triggering, criminal or civil proceedings into preliminary inquiries that are initiated without having even received the *notitia criminis*. If such a relocation of resources were permissible under the ICC Statute, it would only bring about an increase in political pressure put on the Office of the Prosecutor by the states or other political entities concerned in ongoing preliminary inquiries, investigations and prosecution to take resources away from them in order to be allocated into new preliminary inquiries.

For all these reasons, I submit that Articles 13(c) and 15(1), in order to avoid the paralysis of the Court, and considering that the material jurisdiction of the Court extends to “the most serious crimes of international concern”, universalise the right of access to the Court by granting to any natural or legal person the right to file complaints with the Office of the Prosecutor. However, in my view, such provisions do not grant to the Of-

vice the political discretion to undertake preliminary inquiries without having first been communicated the *notitia criminis*.

26.3.2. The Right of the Security Council and the States Parties to Become a Party to the Triggering Procedure

Article 13(a) and (b) of the ICC Statute provides for the referral of situations of crisis where it appears that crimes within the jurisdiction of the Court have been committed, or are being committed, by the states parties or the Security Council to the Office of the Prosecutor. By doing so, Article 13(a) and (b) grants to states parties and the Security Council the right of access to the Court. The content of this right, however, significantly differs from the content of the right of access to the Court granted by Article 15(1) to any natural or legal person.

As has already been pointed out, the latter, to which I have referred throughout this chapter as the right to file complaints with the Office of the Prosecutor, is a complex right that includes: a) the right to communicate the *notitia criminis* to, or to file a complaint with, the Office; b) the right to have the Office carry out a preliminary inquiry to obtain the necessary information for the proper assessment of the *notitia criminis*; c) the right to be informed of the Office decision not to request the activation of the potential jurisdiction of the Court over the situation of crisis within which the crimes referred to in the *notitia criminis* have allegedly taken place; and d) the right to transmit additional information to the Office with regard to such a situation of crisis in order to have the Office to reconsider its decision not to make an activation request.

The content of the right of access to the Court granted by Article 13 (a) and (b) to the states parties and the Security Council is defined by Article 53(1), (3) and (4) of the ICC Statute and Rules 104 to 110 of the RPE in far broader terms, and includes:

1. The right to request the Office of the Prosecutor to activate of the potential jurisdiction of the Court with regard to a situation of crisis in which crimes within the jurisdiction of the Court appears to have been committed (Article 13(a) and (b)).
2. The right to transmit to the Office of the Prosecutor documentation in support of their activation requests (Article 13(a) and (b), 14(2) and 53(1)).

3. The right to make the Office of the Prosecutor assess the seriousness of the activation requests and to carry out preliminary inquiries to obtain the necessary information for the proper assessment of seriousness of the activation requests (Article 53(1) and Rule 104).
4. The right to have the Office of the Prosecutor decide on the merits of the activation request (Article 53(1)).
5. The right to be notified by the Office of the Prosecutor of its decision to reject the activation requests in accordance with Article 53(1) and Rule 105).
6. The right to request the Pre-Trial Chamber to review the Office of the Prosecutor decisions to reject the activation requests (Article 53(3)(a)).
7. The right to be notified by the Pre-Trial Chamber of its decision on the merits of the Office of the Prosecutor decisions to reject the activation requests (Rule 105).
8. The right to appeal the Pre-Trial Chamber decisions to confirm the Office of the Prosecutor decisions to reject the activation requests (Article 81(1)(a) and Rule 154 RPE).
9. The right to be notified of the Appeals Chamber decisions (Article 83(4)).
10. The right to make new activation requests to the Office of the Prosecutor with regard to the same situation of crisis on the basis of new evidence or new facts (Article 53(4)).³⁵

If the broad content of the right of access to the Court granted by the ICC Statute to the states parties and the Security Council is analysed in connection with the conception of the triggering procedure as an autonomous procedure that must take place before any criminal proceedings may be initiated and in which the Office of the Prosecutor is granted by ICC Statute genuine jurisdictional functions as the primary custodian of the complementarity regime, it can only be concluded that such a right of access

³⁵ No additional right is, however, granted to the requesting/deferring states parties during Art. 18 proceedings because they are excluded from such proceedings.

the Court amounts to the right to become a party, the petitioner, to the triggering procedure.³⁶

26.3.3. Proposals to Enable the Office of the Prosecutor to Comply with Its Duties Derived from the Two Types of Right of Access to the Court Provided for in the ICC Statute and the RPE

In order for the Office of the Prosecutor to comply with its duties derived from the two types of right of access to the Court provided for in Articles 13, 14, 15 and 53 of the ICC Statute, and given the large number of Article 15(1) complaints that the Office is already receiving and will probably continue to receive in the future, the following measures should be taken:

1. Establishment by the Administrative Unit of the Immediate Office of the Prosecutor of a system to store activation requests (Article 13(a) and (b)) and complaints (Article 15(1)).
2. Implementation by the Administrative Unit of the Immediate Office of the Prosecutor of the appropriate procedures to enable the Office of the Prosecutor to comply with its duties to inform states parties, the Security Council, Article 15(1) complainants and victims. In this regard, I think that it is important to: a) come up with a variety of means to comply with such information duties (public announcement, personal certificate mail, electronic mail, fax and so on); and b) establish a protocol in which clear criteria are defined to determine when each of the information means should be used. In doing so, I believe that the following factors should be taken into consideration: a) integrity and effective conduct of the ICC proceedings; b) well-being of victims and witnesses; c) capacity of the

³⁶ In this regard, it is my view that the granting to the Security Council of the right to become a party to the triggering procedure is a key element of the co-operation between the ICC and the Security Council. In fact, being that the ICC is a supranational jurisdictional organ entrusted with the investigations and prosecutions of the “most serious crimes of international concern”, it is difficult to think of any other legal or natural person with an stronger interest to promote the investigation and prosecution of these crimes than the political organ entrusted with the maintenance of international peace and security. In addition, if the establishment of a permanent ICC intended to overcome the shortcomings of the *ad hoc* justice, and thus, it intended to eliminate the need for the Security Council to create new *ad hoc* international criminal tribunals, it was necessary to grant to the Security Council the right to promote the activation of the potential jurisdiction of the Court regarding those situations of crisis that constitute a threat to the peace, a breach of the peace or an act of aggression.

Administrative Unit of the Immediate Office of the Prosecutor; d) effectiveness of the each of the information means; and v) consequences of Office of the Prosecutor failures in effectively complying with its duties to inform of its decisions.

3. Creation as soon as practicable of a Triggering Procedure Division.

26.4. Use of *Gratis* Personnel: The Office of the Prosecutor Internship Programme

26.4.1. Why an Office of the Prosecutor Internship Programme?

On the basis of the general criteria for the use of *gratis* personnel established by the Assembly of States Parties, the Office of the Prosecutor Regulations should contain the basic administrative rules of the internship programme.

The experience with this kind of programme at the ICTY Office of the Prosecutor is very positive. Around 40 interns work each semester for the ICTY Office of the Prosecutor in both the general and the special internship programmes. As most of the positions are of a legal nature, interns are either qualified young lawyers or near completion of their law studies, with a special focus on public international law, international humanitarian law, human rights law, private international law, criminal law, comparative law or criminology.

The functions that they perform depend on the team that they are assigned to. If they are assigned to investigative or trial teams they provide great help in, *inter alia*, searching for exculpatory materials under Rule 68, analysing trial testimony, creating charts and other pre-trial documents, putting together the available evidence for indictments reviews, proofing witnesses and even drafting motions. If they are assigned to the Appeals Unit or the Legal Advisory Section they carry out a variety of research in both international and comparative criminal law. Due to their unique knowledge about their own jurisdictions, the assistance provided for interns is especially valuable when national law is used to support the submissions of the ICTY Office of the Prosecutor.

Given the wide range of functions entrusted by the ICC Statute to the Office of the Prosecutor, and, especially, its key role both in the triggering procedure and as the *primary custodian of the complementarity regime*, the Office of the Prosecutor internship programme may constitute

an essential element in the day to day performance of such functions. In this regard, interns familiar with the legal systems of those states concerned with the ICC proceedings could give an extremely valuable assistance to the performance by the Office of the Prosecutor of these functions.

An internship programme would have an advantage over other types of *gratis* personnel in that its participants would not have a hidden agenda because they are not employed by any governmental or non-governmental agency or organisation (for this reason it is my view that each applicant should be sponsored and/or nominated by an educational institution). In addition, if the internship programme is perceived as facilitating future access to a professional position in the Office of the Prosecutor, the number of applicants will be high and their work the finest.

26.4.2. Brief Description of the Basic Organisation of the Office of the Prosecutor Internship Programme

In order to facilitate the management of the programme, and given the material limitations of the Office of the Prosecutor during its first years and the strong competition posed by existing internship programmes at other international organisations and tribunals, I think that there should be only one Office of the Prosecutor internship programme, administratively run by the Administrative Unit of the Immediate Office of the Prosecutor.

Senior Management of the Office of the Prosecutor (probably the deputy prosecutor in charge of human and other resources and administrative issues) should decide at the beginning of each semester, upon consultation with the Office of the Prosecutor sections that participate in the internship programme and the co-ordinator of the programme:

1. The number of interns that the Office of the Prosecutor can host during the following semester; and
2. how many interns are to be allocated in the following semester to each of the Office of the Prosecutor sections that participate in the internship programme.

On the basis of these two decisions, the tasks of the Administrative Unit of the Immediate Office of the Prosecutor should, *inter alia*, encompass the following:

1. Make sure that the instructions to apply for a position in the internship programme are properly posted on the ICC website. In

these instructions, it should be clearly stated which Office of the Prosecutor sections are hosting interns during a given semester and how many interns are hosted by each section. In addition, applicants should be required to expressly select in its application the specific section they are applying for.

2. Co-ordinate the selection procedure.
3. Communicate to applicants and former interns administrative matters such as the instructions to apply, the status of the selection procedure and the internship programme certificates.
4. Provide interns with the space and technical equipment necessary to perform their tasks.
5. Welcome the new interns, and organise both an induction course and an ongoing training programme for all interns.
6. Inform and help interns with the check-in and check-out procedures.
7. Keep files of former interns and current applicants.
8. Advise the competent deputy prosecutor in all matters relating the internship programme.
9. Draft internship administrative instructions or guidelines.
10. Mediate among interns and staff members if questions or problems arise that cannot be solved through the intern supervisor of the concerned section.

In addition, the following functions should be conferred upon each of the Office of the Prosecutor sections that participates in the internship programme:

1. Establish additional eligibility requirements for the internship positions in each section.
2. Propose to the competent deputy prosecutor the acceptance of those candidates who are going to carry out their internship in such sections.
3. Co-ordinate the workload assigned to each intern in the section.
4. Ensure that the intern regulations relating to working hours and nature of the assignments are complied with.
5. Write letters of recommendation.

In order to carry out the above-mentioned functions, a personnel officer of the Administrative Unit of the Immediate Office of the Prosecutor should be designated as the internship programme co-ordinator. In my view, the performance of his or her tasks as internship programme Co-ordinator should not exceed 75 per cent of his or her working hours. In addition, each section that participates in the internship programme should designate among its members an intern supervisor, who will be directly linked with the overall internship programme co-ordinator. The amount of time invested by each intern supervisor will depend on the number of interns assigned to his or her section in a given semester, and in no case should exceed 25 per cent of his or her working hours.

26.4.3. Draft Office of the Prosecutor Internship Programme Regulations

26.4.3.1. Applicability

The present regulations contain the rules governing the ICC Office of the Prosecutor internship programme. The programme will have the dual function of training young professionals and providing expertise to the Office.

26.4.3.2. Overall Format of the Programme

During the first two weeks of each semester, the competent deputy prosecutor, upon consultation with the Office of the Prosecutor sections that participate in the internship programme and the co-ordinator of the programme, shall decide, on the basis of the Office needs and space availability, the number of internship positions that will be offered the following semester in each of the sections that participate in the programme. The duration of an internship will range from a minimum of the three months to a maximum of six months.

26.4.3.3. Status of Interns

Interns are not considered in any respect as officials or staff members of the Office of the Prosecutor. However, interns are bound by the same duties and obligations as staff members. Interns do not enjoy any of the privileges and immunities accorded to Office of the Prosecutor officials under the provisions of the agreement signed between the ICC and the govern-

ment of the Netherlands concerning the headquarters of the ICC. Having in mind that interns are unpaid, the best way to compensate them is by giving them as much interesting work as possible so they can have a work experience that is rewarding and enriching. To this end, their talents and abilities should be taken into account as far as possible when assignments are given out.

26.4.3.4. Duties of Interns

Interns are to refrain from any conduct that would adversely reflect on the Office of the Prosecutor or the ICC, and should not engage in any activity that could interfere in the performance of its tasks at the Office. Interns are to respect the impartiality and independence required of the Office of the Prosecutor and the ICC and the obligation not to seek or accept instructions regarding the services performed from any government or from any authority external to the Office. Interns are to keep confidential any and all unpublished information made known to them by the Office of the Prosecutor or any personnel therein during the course of the internship that they know or ought to have known. Interns are not to make public or, except with the explicit authorisation of the competent deputy prosecutor, not to publish any reports or papers on the basis of information obtained during their participation in the programme, both during and after completion of the internship.

26.4.3.5. Eligibility Criteria

26.4.3.5.1. General Eligibility Criteria

The majority of the internship positions available are of a legal nature. Applicants must have a university degree or be in the final stage of their studies. Preference is given to law graduates who are acquainted with one or more of the following disciplines: public international law, international humanitarian law, human rights law, private international law, criminal law, comparative law and criminology. Applicants applying for a non-legal internship need degrees or advanced training relevant to the section they wish to apply for. Applicants are expected to be at an early stage in their career. Applicants must be proficient in English and/or French, both written and oral. Knowledge of other official languages of the Court is an asset. Applicants should be aged between 20 and 35 years old. Applicants should be sponsored and/or nominated by an educational institution.

26.4.3.5.2. Additional Eligibility Criteria

Additional eligibility criteria for the internship positions available within a given Office of the Prosecutor section may be established at the request of the concerned section.

26.4.3.6. Selection Procedure

The applicant must submit to the internship programme co-ordinator a completed application form, accompanied by the certification of nominating and/or sponsoring educational institution form, a covering letter stating the reasons for applying, two written references, copies of university degrees and/or diplomas, or a list of courses taken. If applying for legal internship positions, a sample of the candidate's written work should be attached to the application. Only applicants who have submitted all this necessary material will be considered. Any previous correspondence with the ICC will not be taken into account during the selection process.

Applicants must select only one of the Office of the Prosecutor sections that participates in the programme in which they would like to complete their internship. The internship programme co-ordinator shall reject incomplete applications and those others that belong to applicants who do not meet the general and special requirements described above.

Once the application deadline has expired, the internship programme co-ordinator shall forward the completed applications to the sections chosen by the applicants. A panel of three members of each section participating in the programme will recommend to the competent deputy prosecutor as many candidates as interns assigned to each section for the following semester, and will prepare a waiting list in which the rest of applicants will be included. Such panels will be chaired by the intern supervisor of the each section and, as far as possible, will include one of the interns working for each section.

The competent deputy prosecutor shall review the sections' proposals and accept the participants in the programme. The internship programme co-ordinator shall inform the applicants as soon as possible of the competent deputy prosecutor's decision as to the selected and non-selected candidates.

26.4.3.7. Selection Criteria

Participants in the internship programme will be selected among applicants who are able to work at the Office of the Prosecutor for at least three months, being the maximum of an internship six months. Those applicants who are able to work for six months will be preferred over those others who can only work for a shorter period of time.

26.4.3.8. Internship Programme Co-ordinator

A personnel officer of the Administrative Unit of the Immediate Office of the Prosecutor shall be appointed internship programme co-ordinator. He or she will be responsible, under the general direction of the competent deputy prosecutor, for the organisation of the internship programme as a whole. He or she shall be the main link between interns and staff members at the Office of the Prosecutor and as such shall mediate among interns and staff members if questions or problems arise that cannot be solved through the intern supervisor of the concerned section.

The internship programme co-ordinator shall be entrusted, *inter alia*, with the following functions:

1. Advising the competent deputy prosecutor in all matters relating to the internship programme.
2. Drafting internship administrative instruction or guidelines.
3. Ensuring that the instructions to apply for a position in the internship programme are properly posted on the ICC website.³⁷
4. Overall co-ordination of the selection procedure.
5. Communications between applicants and former interns and the Office of the Prosecutor regarding administrative matters such as the instructions to apply, the status of the selection procedure and the issuing of the internship programme certificates.
6. Welcoming new interns, and organising both an induction course and an ongoing training programme or lecture series for all interns.

³⁷ These instructions have to specify which Office of the Prosecutor sections are hosting interns during a given semester and how many interns are being hosted by each of the participant sections. They must request that each applicant expressly select in his or her application the section which he or she is applying for.

7. Providing interns with the space and technical equipment necessary to perform their tasks.
8. Informing and helping interns with the check-in and check-out procedures, and any other administrative matters.
9. Mediating among interns and staff members if questions or problems arise that cannot not be solved through the intern supervisor of the concerned section.
10. Keeping files of former interns and current applicants.

26.4.3.9. Intern Supervisors

Each section that participates in the internship programme shall designate one of its members as intern supervisor. The intern supervisors will co-ordinate the workload assigned to each intern under his or her supervision with to ensure that each intern does not have either nothing to do or too many tasks given by different people at once. Intern supervisors will also serve as contact points for the interns under their supervision throughout the time of the internship, and will: a) give them personal insights into the working of the Office of the Prosecutor; b) regularly check upon the interns; c) introduce interns to people that may be of interest for the intern, both from a professional and personal perspective; and d) be a point of reference for career advice.³⁸

In addition to the above-mentioned functions, intern supervisors will be entrusted, *inter alia*, with the following functions:

1. Advising the chief of his or her section on any matters related to the involvement of the section in the internship programme, including the establishment of additional eligibility requirements and selection criteria.
2. Co-ordinating the selection procedure within his or her section.
3. Ensuring that the intern regulations relating to working hours and nature of the assignments are complied with.
4. Writing letters of recommendation.

³⁸ After the initial years, once the personnel at the Office of the Prosecutor has significantly increased, the idea of introducing a mentorship programme, such as the General Internship Programme of the Office of the Prosecutor of the ICTY, could be considered.

26.4.3.10. Intern Representatives

During the first month upon arrival, the internship programme co-ordinator will instruct the interns to designate one or two representative(s) for three periods of two months.³⁹ The intern representative(s) are a point of contact for anyone wanting to address issues concerning the intern group as a whole. They will voice any needs and requests from the intern group.

26.4.3.11. Intern Librarian

Upon arrival, the internship programme co-ordinator shall designate, on a voluntary basis, one of the interns as intern librarian. Before leaving, each intern shall e-mail to the intern librarian an electronic copy of all research memos that he or she has written during his or her internship. The intern librarian will store an electronic copy of all research memos received in a folder created for these purpose within the Office of the Prosecutor network.

26.4.3.12. Check-In

All interns have to report to the internship programme co-ordinator of the Administrative Unit of the Immediate Office of the Prosecutor on their first day of work. The co-ordinator will escort the interns to their section after the check-in is completed. A briefing checklist will be handed to every new intern and has to be completed within the first week at the Office of the Prosecutor.

26.4.3.13. Security Pass

Only the Administrative Unit is authorised to issue or extend security passes. Any incorrect information on the pass should be reported to the Administrative Unit.

³⁹ Altogether between three and six representatives will be chosen. The system is designed to: a) give an opportunity to represent their fellow interns to any intern who wish to do so; and b) avoid having a single intern representative deal with too many problems.

26.4.3.14. Work Schedule

All internship positions offered by the ICC are on a full-time basis. The working hours at the Office of the Prosecutor are from 09:00 to 17:30. Any deviation from this rule has to be authorised by the Administrative Unit as well as by the competent deputy prosecutor. Requests for different working hours should be handed to the Administrative Unit in writing. From time to time interns can be expected to work longer hours in order to meet deadlines; however, this should not be a regular occurrence.

An important aspect of the internship programme is ongoing lectures and training sessions. An intern who wishes to attend these programs should not be prevented from doing so by work requirements.

If an intern is required to work a significant number of extra hours or to work weekends arrangements should be made to grant extra leave days to that intern to compensate for this time. When giving an assignment to interns, intern supervisors should pay special attention to the amount of work that interns already have to do at that time.

26.4.3.15. Nature of the Tasks

It is not appropriate to assign large amounts of clerical work, such as photocopying, to interns. Interns must be given a reasonable load of substantive legal or analytical work. The skills and interests of interns should be taken into account as much as possible in assigning projects. Efforts should be made to give each intern a wide variety of assignments in order to ensure that he or she has a well-rounded experience, and does not spend the entire internship working on one or two types of tasks.

26.4.3.16. Intern Involvement

Interns should be integrated to the largest extent possible with the section they are assigned to. They should be introduced to every person working in their section. Interns should be invited – if confidentiality allows – to as many section meetings as possible, regardless of whether the subject of that meeting pertains to the assignment the intern is working on at that particular moment. This will allow the intern an inside look at how proceedings work, the issues that arise and who is working on what issue. Interns should generally be included on e-mail distribution lists to keep them informed of what is going on in their section. Interns should be giv-

en regular feedback about their work. This includes the quality of their work product and an evaluation of the contribution they make to the project the section is working on. Interns should be given the opportunity to attend as many court proceedings as possible. If the intern is working on a specific case, the section should point out particularly interesting hearings.

26.4.3.17. Professional Development

The internship programme co-ordinator is responsible for providing an ongoing training or lecture series for interns throughout the internship. The Office of the Prosecutor should strive to ensure that speakers from different sections give talks on their particular field of expertise. Speeches should address specific legal or analytical issues but also provide the interns with factual and political background information. Attention should be paid to obtain speakers from sections that interns usually do not have contact with, such as those not participating in the internship programme. As long as capacity constraints so allow, interns should be given access to all internal training opportunities including, but not limited to, advocacy, computer, legal and analytical training.

26.4.3.18. Official Holidays

The official holidays are equally applicable to interns than to staff members.

26.4.3.19. Annual and Sick Leave

Interns are eligible for two and half days leave per month. In order for leave to be approved a leave request form has to be completed. The intern supervisors approve the leave by signing the form. The form has to be forwarded to the internship programme co-ordinator prior to the day(s) of leave. He or she will give the final approval by certifying the leave request form. Annual leave days have to be accumulated before taking them. Advance leave days require a special approval and should be requested in writing to internship programme co-ordinator.

Interns must provide written notice to their supervisors and to the internship programme co-ordinator should illness or other unforeseen circumstances prevent them from coming to work or completing their intern-

ship. A doctor's note is required if the number of days absent from work exceeds three consecutive working days.

26.4.3.20. Health Insurance

Interns are responsible for securing adequate insurance coverage prior to the first day of work at the Office of the Prosecutor. Interns are not included in any health insurance scheme plan may be arranged by the Office. Neither the Office nor the ICC accepts any responsibility for costs arising from accidents and/or illness incurred during the internship.

26.4.3.21. Salary and/or Compensation

The Office of the Prosecutor is unable to provide participants in the internship programme with remuneration, nor is it possible to provide any reimbursement for any expenses incurred during the internship. Accordingly, all successful applicants are expected to make their own arrangements for travel, lodging and living expenses during the internship period.

26.4.3.22. Change of Address

If an intern's address is changed, a change of address form is to be completed. The original of the form should be handed to the Administrative Unit.

26.4.3.23. Family Members

Interns who are not citizens of the Netherlands are not entitled to bring any family members to reside in the Netherlands.

26.4.3.24. Employment at the Office of the Prosecutor or at Any of the Other Judicial Organs of the ICC

Interns cannot apply for employment either at the Office of the Prosecutor or at any of the other judicial organs of the ICC during the period of their internship or during the six months immediately thereafter.

26.4.3.25. Employment in the Netherlands

Interns are not entitled to seek gainful employment in the Netherlands while they are participating in the internship programme.

26.4.3.26. Early and Late Completion

Interns planning to leave early should inform the internship programme co-ordinator in due time. A memo stating the reasons and the intern supervisor's approval has to be provided. The internship programme co-ordinator will review each case and has the authority to give the final approval.

The minimum duration for an internship at the Office of the Prosecutor is three months. Should an intern wish to extend his or her internship, a request to the internship programme co-ordinator signed by the intern supervisor is required. The internship programme co-ordinator will review each case and has the authority to give the final approval. The maximum duration for an internship is six months.

26.4.3.27. Separation from Service

Interns are to provide the Office of the Prosecutor with a copy of all materials prepared during their internship. Interns are to comply with all required departure procedures at the end of their internship. Interns are required to leave the Netherlands within 14 days after the conclusion of their internship.

26.4.3.28. Check-Out

A check-out form and the internship questionnaire must be completed by the intern before departure. Interns should ensure that their records (for example, that the leave balance is accounted for) are in order before departing.

26.4.3.29. Letters of Recommendation and Certificates

If an intern so requests, his or her supervisor shall write a letter of recommendation specifying the functions carried out by such an intern and assessing his or her performance.

On completion of the internship programme, interns are required to complete a substantive questionnaire on their assignments. This questionnaire should be handed to the internship programme co-ordinator. This will be included in their files and will be forwarded, upon request, to the sponsoring institution, government body or private organisation. Once the completed check-out form is received by the internship programme co-

ordinator, a certificate stating the time period and section of the internship will be given to all interns who complete their internship. All check-out procedures have to be followed.

Breach of any of the above rules may result in early termination of the internship and/or receiving no certificate.

On the Exercise of Prosecutorial Discretion

Avril McDonald and Roelof Haveman*

27.1. Introduction

It is necessary to identify the points at which the prosecutor of the International Criminal Court ('ICC') can exercise discretion to investigate and to prosecute crimes within the Court's jurisdiction, and at all these points it must be decided what the applicable criteria are for guiding these choices. What are the types of discretion that the prosecutor can exercise: legal, political, ethical/moral, practical/pragmatic, and how should the prosecutor exercise this discretion?

Prosecutorial discretion can be situated somewhere between the poles of "yes, if" and "no, unless". The first option – "yes, if" – is what in some jurisdictions is called the legality principle. At the beginning of the ICC's work, it may be tempting to choose this first option, investigating and subsequently prosecuting as many cases as possible, to guarantee that within the first seven years of its existence at least some substantive cases are dealt with before the Court, and thus proving its importance. However, if not from the start then within a short time period, there will be limits to the Court's capacity. The Court, for this and other reasons, will have to decide what its purpose, role, capacity and limitations in a particular situation are. These are decisions that will, in the first instance, have to be

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made by the Office of the Prosecutor. There are many possible criteria that the prosecutor may use to guide him or her in deciding: 1) whether to initiate an investigation; and 2) whether to actually prosecute. The prosecutor will have to decide what the guiding principles of the Court and of the Office of the Prosecutor itself are. Some are mentioned in the ICC Statute, of which complementarity is the best known. The complementarity criteria of inability and unwillingness seem to provide the answer to the question of which cases to investigate and prosecute. However, on second thoughts, these criteria solve few problems as they are much too vague. Moreover, many other factors can be considered when deciding on whether or not an investigation should be started. As far as possible, these should be based on objective ('scientific') rather than subjective ('intuitive') factors, although obviously it will not be possible to make a clean separation between them, especially at the point of deciding whether or not to initiate an investigation. And, in the final analysis, the mix of relevant factors is such that there may be little that is 'scientific' about deciding to pursue a particular case.

Underlying the issue of prosecutorial discretion, and when and how it can and should be exercised, is the deeper and much more difficult question of what the Court is actually established to achieve. How does it (and the outside world) perceive its function? What is its role and what is its philosophy? The principle of complementarity also seems to provide some answers to these questions: the Court is there to investigate and prosecute cases where national jurisdictions are unable or unwilling to do so. Yet, the principle of complementarity, as it is merely sketched out in the ICC Statute, begs more questions again than it answers, and does not provide a satisfactory answer to the most fundamental questions concerning what the ICC is really for. And the complementarity principle may in fact obscure the real purpose of the ICC. For the ICC is not merely a court of last resort – there to step into the breach when national mechanisms for achieving justice fail. It could have, *inter alia*, an exemplary function, an educational function, a didactic function, a monitoring function, a consultancy function and advisory function, as well as other purposes that will emerge with time and which must be determined.

Discovering what exactly the Court is for, will be a gradual process and not merely the result of a flash of inspiration. How the prosecutor exercises his or her discretion in deciding which investigations to initiate and which prosecutions to pursue will be critical in shedding light on this

question. While political considerations will be inescapable, the choices that are made in the early stages, and the reasons behind those choices, will set the tone for years to come and will strongly influence public perceptions of the Court and what it is for. It is therefore of critical importance that the Office of the Prosecutor gives long and hard thought to the issue of prosecutorial discretion and how it should be exercised.

In this chapter, we try to shed some light on considerations which play a part with respect to prosecutorial discretion, subsequently, in the initiation of an investigation and of a prosecution, without pretending to be able to provide all the answers.

27.2. Prosecutorial Discretion in the Initiation of an Investigation

27.2.1. Prosecutorial Discretion under Article 53(1)

Article 53(1) of the ICC Statute sets forth the factors that the prosecutor *shall* consider in deciding to initiate an investigation:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under Article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

The language of Article 53(1) (“shall consider”) suggests that the three stipulated bases for considering to proceed with an investigation are mandatory and exhaustive and not merely illustrative. Moreover, they are cumulative, insofar as the prosecutor must at least *consider* all of them. However, as is clear from the last sentence of paragraph 1, the prosecutor may decide not to proceed with an investigation solely on the basis of sub-paragraph (c), in which case he or she shall inform the Pre-Trial Chamber. This is logical, since if the conditions set out in the preceding sub-paragraphs are not met, there can be no question of any exercise of prosecutorial discretion under sub-paragraph (c). It is clear that within the limits stipulated in Article 53(1) considerable prosecutorial discretion remains in deciding whether or not to initiate an investigation. The enumerated criteria for deciding whether to initiate an investigation rely largely on subjective decision-making by the prosecutor. It is he or she who must

make the subjective calculation of what is “reasonable” under sub-paragraph (a), whether the case is admissible under Article 17 – an article which itself allows for the exercise of extensive prosecutorial discretion – whether there are “substantial reasons” for believing that an investigation would not serve the interests of justice, and what are all the relevant circumstances to be considered. What is relevant in one situation may not be relevant in another, and it is up to the prosecutor to make this determination.

Considering that the work of the Court, and the work of the prosecutor in particular, will be the subject of extensive public scrutiny, and that perceptions of the prosecutor’s work and how his or her mandate is executed are as important as facts, particularly in the early phase of the Court’s work, the need for ‘objectifying’ or pinning down the largely subjective criteria articulated in Article 53(1) seems obvious.

To avoid fuelling any already existing perceptions of the ICC as a political court, to minimise any accusations of bias, and to increase transparency and boost the credibility of the Court as a strictly judicial institution, it is necessary to identifying the guiding principles underpinning the exercise of prosecutorial discretion and to identify criteria which can be applied in each instance in order to determine whether the conditions of Article 53(1) have been fulfilled.

27.2.2. Article 53(1)(a)

Sub-paragraph (a) would seem to present the least difficulty. Information will be available to the prosecutor indicating that ICC crimes may have been committed. A first impression, with respect to the problem of discretionary power, is that the question is not whether a crime has been committed, but rather which crime, out of the huge pile of cases presented to the prosecutor, to investigate. On second thoughts, however, the question of whether a crime has been committed can also turn out to be a highly political question, for example in cases where alleged crimes have been committed by peacekeepers. The process of labelling certain facts as a “crime within the jurisdiction of the Court” is therefore not to be neglected.

Moreover, while it is difficult to define what is “reasonable” in this context, one could imagine that the prosecutor should be convinced that there is at least *prima facie* evidence that crimes within the Court’s jurisdiction have been committed. One consideration must be whether an inves-

tigation is feasible, and further, what is meant by feasible in this context? The volume and quality of evidence? The co-operativeness of the country involved? Here, ethical and pragmatic considerations may conflict.

27.2.3. Article 53(1)(b) and Article 17

For an investigation to proceed, the case must be admissible under Article 17. The latter is a provision that allows for considerable prosecutorial discretion. Given that the potential investigatory caseload is vast, and that the decision-making capacity may not be concentrated in a single individual, it is vital that the Office of the Prosecutor lays out detailed criteria for deciding whether a case is admissible under Article 17 and when it is clearly not admissible, so that uniformity in decision-making can be realised.

Sub-paragraphs (2) and (3) of Article 17 provide some insight into the meaning of “inability” and “unwillingness”, but still leave room for a large degree of prosecutorial discretion. For example, deciding what amounts to “an unjustified delay” under Article 17(2)(d) is no straightforward task. Neither is the meaning of the words “to bring the person concerned to justice”. Does the latter mean the indictment or arrest of a suspect? Or the commencement of trial? Or the conclusion of the criminal justice process? Which standards should apply here? Those set by other international criminal courts, for example the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), are hardly exemplary. Even such a guardian of human rights standards as the European Court of Human Rights permits states, particularly those experiencing states of emergency, a generous margin of appreciation. Is it just to hold states emerging from armed conflict, or indeed those still in the throes of conflict, to the same standards are those at peace, with fully functional criminal justice systems? Clearly, a sliding scale of what constitutes an unjustified delay should be adopted if genuine unwillingness is to be discerned.

The ICC prosecutor must also determine the relationship between unwillingness and inability. What might appear as unwillingness may be *de facto* inability. Assistance by the ICC or other bodies or states to transitional states seeking to overcome obstacles to prosecute could minimise instances of inability or perceived unwillingness, and a major question for the ICC itself will be deciding what role it should play in rehabilitating or in encouraging the rehabilitation of the criminal justice systems of states that appear to be unable or unwilling. While at first sight the ICC might understandably perceive such a role as going beyond its mandate, in fact it

may well come to realise that at least part of its inherent role lies in being a sort of ‘ombuds-court’. For if the ICC is to take on the caseload of even a fraction of the cases of states that are manifestly unable or unwilling to prosecute, it could quickly find itself log-jammed. Inability and unwillingness of themselves are obviously not the only justifications for the ICC to assume jurisdiction, but if the ICC is to fulfil its side of the complementarity bargain, it might consider a role for itself in assisting states that are unable and persuading and encouraging states that are unwilling. Rather than assume such a role itself, in a hands-on way, it could alternatively consider the possibility of a role for itself in guiding or directing others (including states acting, for example, through diplomatic channels) more in a position to offer this sort of assistance. It can also address the inability question by means of establishing standards that states can follow in fulfilling their side of the complementarity pact. The question then arises of how best to stimulate national prosecutions and what to do with alternative dispute resolution mechanisms.

It should be obvious that many states, including states that are not in a state of conflict or a transitional stage, may have vested political interests in not pursuing a particular investigation or prosecution, and an interest in ‘offloading’ tricky or inconvenient cases to the ICC. There may be a genuine public interest, including at the international level, in seeing particular persons investigated, yet the ICC, for a plethora of reasons, including the purely practical, may not be best-placed to assume that burden. The ICC could quickly become overburdened by tricky yet worthy cases. The danger looms large, however, that the Court will be used as an instrument in a national political battle, thereby becoming politicised.

To address cases such as these, where there is a risk of certain individuals not being prosecuted at either the national or international levels, the ICC should establish standards that can be applied in a consistent way to determine whether states are positively meeting the requisite national standards to enable them to prosecute at the national level, as opposed to meeting a negative standard, that would enable the ICC to decline jurisdiction.

Another extremely difficult issue is how a court, with limited resources, headquartered in The Hague, will actually set about determining inability and unwillingness from a practical viewpoint. The prosecutor will lack the resources to monitor all trials of ICC crimes, although it could to some extent achieve this ambition by working with local non-

governmental organisations ('NGO'), including those that already have a good knowledge of the Court through their membership of the NGO Coalition for the International Criminal Court, for instance.

Because the question of inadmissibility under Article 17 is defined in the negative, while the ICC Statute gives some sense of what cases the ICC should not prosecute, it is not obvious which cases the ICC should investigate and ultimately prosecute. It is important that the Court, at the earliest possible stage, gives serious consideration to what types of cases it should be pursuing, all other questions of admissibility being settled.

27.2.4. Article 53(1)(c)

Sub-paragraph (c) is characterised by its vagueness. Notwithstanding the fact that the information available indicates that there is a reasonable basis to believe that an ICC crime has been committed, and the case would be admissible under Article 17, and regardless of the gravity of the crime and the interests of victims, the prosecutor may decide not to proceed to an investigation where he or she considers that it "would not serve the interests of justice". The question is: what is meant by justice here, what serves the interest of justice? And for whom is justice served? The victims? The state affected? International lawyers? The world? It could well be decided in a particular case that justice is served by not prosecuting before the ICC or even by stimulating prosecution in a particular case but by the encouragement of alternative disputes mechanisms.

Notwithstanding the fact that there is information indicating that an ICC crime has been committed and it is clear that the case is, in principle, admissible, what might be the criteria guiding the prosecutor in deciding to investigate a case? The guiding principle here, according to the ICC Statute, is what serves the interests of justice. Determining what serves the interest of justice (and whose interest is ultimately to be served by this determination) is an extraordinarily difficult if not impossible task. From which and whose perspective is this determination to be made? What serves the interest of the wider society – issues of peace and security, for instance – may not serve the interests of victims, yet both are factors to be weighed in considering whether justice is being served. What is meant by justice here? Justice in the narrow sense of criminal justice, or justice in the broader, restorative sense? Justice in terms of the rights of the accused? Justice in terms of the right of individuals the world over to live in peace and safe from international crimes? Given that one role of the Court

is to act as a deterrent, the choices that the prosecutor makes (for example, prosecuting only a few ‘examples’) could impact on its success in terms of deterrence.

We may conclude that Article 53(1) sets out two positive criteria that must be satisfied as a bare minimum: the facts (information available to the prosecutor) must provide a reasonable basis to believe that an ICC crime has been or is being committed; and that the case is admissible under Article 17. The third factor mentioned in sub-paragraph (c), far from assisting the prosecutor in the decision to proceed with an investigation, is a factor to weigh in the decision not to launch an investigation, notwithstanding the existing of other factors favouring an investigation. Yet it is sub-paragraph (c) that will probably be relied upon most by the prosecutor in deciding to investigate or not, given that it is the provision that allows him or her most scope for discretion. This paragraph is the least transparent of the three, giving no direction whatsoever, as the first two paragraphs do.

27.3. Prosecutorial Discretion in the Initiation of a Prosecution

The decision of the prosecutor to proceed with a prosecution is founded on negative rather than positive criteria. Article 53(2) enumerates the criteria the prosecutor, having undertaken an investigation, should consider in deciding not to proceed to prosecution:

- (a) There is not a sufficient legal and factual basis to seek a warrant or summons under Article 58;
- (b) The case is inadmissible under Article 17; or
- (c) The prosecution is not in the interests of justice, taking into account all the relevant circumstances, including the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.

The use of the word “including” in sub-paragraph (2)(c) suggests that the enumerated criteria are merely illustrative and not exhaustive and that the prosecutor not only can but must consider *all* the relevant circumstances.

27.3.1. The Role of Non-States Parties in the Exercise of Prosecutorial Discretion

The principle which must always be foremost in the prosecutor's mind is that of complementarity: the fact that the ICC is not intended as a forum to prosecute each and every violation of the crimes included in the Statute, but only there as a forum of last resort when national jurisdictions are unable or unwilling to prosecute.

Not clear from the Statute is the ICC's role in relation to third states: if a third state indicates its willingness to prosecute a person for an ICC crime – whether under the principle of universal jurisdiction or another, more traditional basis of jurisdiction – and is able to do so, should this be a valid factor for the prosecutor to consider in deciding not to initiate an investigation or a prosecution? The ICC Statute makes no provision in this regard; on the other hand, it is a factor that should not be discounted by the prosecutor. One of the *raisons d'être* of the Court is to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. If prosecution of a person accused of the core crimes can properly be undertaken in another jurisdiction, this lessens the need for the court to fulfil its role as forum of last resort. The ICC's position and role is that of default: it should be there to fulfil the prosecutorial role when there are no other available and adequate options. The prosecutor might well consider that available options outside the ICC regime can be considered in making his or her determination to prosecute.

Support for the proposition that the role of third states can legitimately be considered by the ICC prosecutor in considering whether or not to exercise prosecutorial discretion can be found in the provisions of the Preamble which recall “that it is the duty of every State [and not only states parties] to exercise its criminal jurisdiction over those responsible for international crimes” and affirm “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. There is no reason to believe that the references to “states” include only states parties to the ICC Statute. Furthermore, the Preamble emphasises “that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”. Again, this does not exclude national criminal jurisdictions of non-states parties. Finally, support

for the proposition that a valid prosecution in a non-state party should be a factor in deciding not to proceed with a prosecution before the ICC can be found in Article 17(1)(a) and (b), dealing with admissibility criteria. There is nothing in the language of these provisions to indicate that it is restricted to prosecutions in states parties. A logical reading would indicate that a legitimate prosecution in any state, including a non-state party, should be sufficient to find a case inadmissible before the ICC. Thus, arguably, under both paragraphs (1) and (2) of Article 53, in considering whether to investigate a case or proceed to prosecute, the existence of an investigation in a non-state party and a decision by that state not to prosecute are valid grounds for a finding of admissibility by the prosecutor. Similarly, there is no reason to suppose that the *ne bis in idem* principle only applies with respect to prosecutions conducted in states parties. To subject a person who has been legitimately tried by a non-state party to prosecution by the ICC would seem to be in violation of fundamental principles of justice and human rights.

27.3.2. A Duty to Prosecute?

A key question is whether, under certain circumstances, the ICC actually has a duty to prosecute. If, for example, a state party was found to be either unable or unwilling, and a third state was not willing to assume jurisdiction, one could argue that there is a duty on the ICC to prosecute if the alternative is impunity. After all, one of the reasons for the existence of the Court is “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. Moreover, the Preamble affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished”. There is a duty on states parties to the Geneva Conventions, for example, to prosecute grave breaches of the Conventions. Arguably, a similar duty binds parties to the Genocide Convention. It remains an open question whether the jurisdiction to prosecute crimes against humanity is permissible or obligatory. Since the ICC has been established by states, most of which are parties to these Conventions, and it embodies jurisdiction which has been granted to it by states, it could be considered as having residual jurisdiction over the core crimes, and a residual duty to prosecute those crimes where no other state is able or willing to.

The question of whether there is a duty to prosecute in a particular case cannot be separated from the question of what justice requires. These

two considerations could conflict. Justice may require a non-criminal process, but legally there may be a duty to prosecute. This consideration will certainly arise at the level of states. States may be legally bound to prosecute individuals in respect of certain crimes, but the ICC prosecutor might find that justice requires that this breach of international law is overlooked. A situation where the ICC prosecutor is seen to be encouraging breaches of international legal obligations by states at the same time may not serve the broader requirements of justice (in a global, as opposed to a local, sense).

27.3.3. Identifying the Court's Constituents

The Court will have to decide who its primary constituents are. If, for example, victims were considered to be among the core constituents, rather than the general public in all states (including non-conflict states), this could produce a rather different outcome in terms of the exercise of prosecutorial discretion. The needs of victims in a conflict-riven or transitional state may also not coincide with and may in fact conflict sharply with those of non-victims within that state, or with the state as a whole. Justice for an entire society may mean individual injustices for victims. At the same time, ignoring or sacrificing the needs of individual victims may not serve the long-term interests of the society.

27.3.4. What Ends Are to Be Served by Prosecutions?

The prosecutor will be faced with making certain difficult choices, among which are whether to prosecute the greatest number of perpetrators or whether to set and adhere to the highest possible standards in prosecutions. This is linked to the question of who are the Court's constituents. If the prosecutor were to decide that the role of the ICC is really as a sort of model court, then the greatest interest would lie in pursuing selective prosecutions and in observing the highest possible standards, including in terms of fair trial. Trying to achieve both could be counter-productive.

If the ICTY is to serve as an example, it is clear that the more people that are prosecuted, the greater the delays in the length of the trial of those persons who are accused. So the ICC prosecutor could decide that the main benefit of the existence of the Court is to prosecute only a few, and to lead by example in terms of the application of fair trial standards. Of course, making this choice will mean that the prosecution ends up hav-

ing to make more “political” choices about who to prosecute, with the inherent risk of accusations of political bias. In resolving these questions, the prosecutor will have to consider the relationship between the ICC and the human rights courts and bodies, and whether it is bound by the standards they set.

The prosecutor must decide if the Court’s main function is to be more symbolic and exemplary than real. If its role is mainly symbolic, then obviously more consideration will have to be given to adherence to the highest possible standards of criminal justice. If its main function is to make a real impact on international criminality, then greatest weight might be given to prosecuting the greatest number of people possible.

Deciding whom to prosecute is not only a matter of choosing between different situations, different countries, different conflicts and different individuals, from the wide choice that will be available. If, for example, one end to be served by international prosecutions is to build an authoritative historical record of what happened in a particular case, this could also influence the choice of whom to prosecute. However, in pursuing this goal, it might be better to leave this to a truth commission, which may be better equipped to give a full record of a situation as a whole, instead of relatively isolated cases of crimes committed by individuals.

27.4. Some Concluding Remarks: Guidelines

Neither the ICC Statute nor the Rules of Procedure and Evidence provide much guidance for the prosecutor in deciding whether or not to initiate an investigation and to proceed with a prosecution. Article 53 sets out some criteria, but it begs more questions than it answers. Already many such questions have been raised in the preceding discussion. It seems to be of vital importance that guidelines are developed – and made public – giving direction to the decision either to initiate or not initiate an investigation. It is vital as the danger looms large that the Court is accused of starting investigations on entirely arbitrary grounds, and even based on political considerations.

Guidelines in the context of prosecutorial discretion are quite common in national jurisdictions wherein the prosecutor has wide discretionary power. However, it is clear that the national criteria are almost entirely useless on the supranational level of the ICC. The futility of the facts,

for instance, is unheard of as a factor in the context of the ICC, having to deal with the most atrocious crimes.

In the latter context, the prosecutor might, for example, consider factors such as:

- The scale of the crimes committed.
- The available evidence (difficult to assess in advance, and from a remote position).
- The level of public outrage (how outraged is the conscience of the world community?) and popular support for a particular investigation (subjective and hence difficult to assess).
- Security issues (whether conflict is ongoing, and at what point in an ongoing conflict the ICC might step in and investigate crimes: not prosecuting during an ongoing conflict might prolong conflict; conversely, the prospect of being held accountable might encourage parties to keep fighting).
- Threats to the security of a fragile transitional state by prosecuting key individuals.
- Political issues, including the existence of a peace treaty, amnesties (distinguish between democratic and non-democratic societies/popular will and conditional and unconditional), and a truth and reconciliation commission.
- The sincerity of alternative mechanisms, including a truth and reconciliation commission.
- The sincerity/transparency of national exercise of prosecutorial discretion.
- Existence of alternative mechanisms for achieving justice lack of infrastructure at the national level (inability).
- Measuring inability and unwillingness (how do you?).
- The period of time since the cessation of conflict (if a country in transition has not initiated investigations of serious crimes or prosecutions of those accused of committing such crimes, is it unwilling or merely tending to greater priorities? Should countries be given a period of grace by the ICC in which to get their act together?).
- The wishes of the victims (where this can be determined).

- The appropriateness of prosecuting at all and at a particular moment.

The prosecutor must also give careful consideration to the role of the ICC and other bodies in stimulating national prosecutions, and the extent to which these efforts have been embraced, rejected or simply ignored by the national jurisdiction.

Considering the role of the Court, it is of course not necessarily a matter of making a straightforward choice or of choosing between two or several extremes. The work and role of the Court could be envisaged as evolving over a series of stages. In the first instance, greater emphasis might be accorded to the Court's symbolic and exemplary role, stressing the fairness of a trial and the importance of the rule of law. In a later phase, and as the Court hits its stride, more utilitarian functions, such as crime control and deterrence, might assume greater significance. The ICC may set itself goals that are both realistic and idealistic. Those goals will be influenced by but cannot be identical to those set for national criminal courts. The ICC is not merely a criminal court on a larger or an international scale. It is necessary to think outside of the national criminal law paradigm, and to consider what supranational criminal law can and should achieve. It is not merely national criminal law writ large, but an entirely new animal, whose purpose is still being figured out. It is not only a question of asking what is the ICC for, but what supranational criminal law is for.

Collective Decision-Making

Rogelio Gómez Guillamón*

These notes were prepared to provide general ideas regarding the management of the Office of the Prosecutor of the International Criminal Court ('ICC'), with the purpose of presenting the prosecutor with a few relevant guidelines as soon as he or she begins exercising his or her functions. The following are personal observations, given without the practical and immediate knowledge of the activities of the Office of the Prosecutor. As a result, the comments are limited to the internal functioning of the Office.

The initial March 1998 draft Statute of the ICC only allowed two ways of activating the jurisdiction of the Court: referral of a situation by a state party or by the Security Council. This approach was criticised by many participants to the preparatory committee. Essentially, they claimed this procedure would seriously damage the credibility and the independence of the Court, as it would not be able to operate *ex officio*. Logically, the Office of the Prosecutor, as part of the structure of the ICC but with jurisdictional independence, has the duty of carrying out investigations and implementing the measures required for such investigations. Nevertheless, such an approach raised some concerns: granting *ex officio* authority to the prosecutor could make him or her a “master of the universe”, since he or she would always have the last word.¹ However, measures would need to be taken to avoid the risk of seeing the prosecutor adopting arbitrary decisions, as it would be considered inappropriate. Among the solutions discussed, it was suggested that the Office of the

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¹ Lawyers Committee for Human Rights, “The Accountability of an *Ex Officio* Prosecutor”, in International Criminal Court Briefing Series, 1998, vol. 1, no. 6.

Prosecutor could operate as a collective body. This composition of the Office, consisting of individuals from different nationalities and different legal systems, could dissipate the fear of a possibly autocratic prosecutor. The decisions would be adopted unanimously or at least by majority vote.

The final text of the ICC Statute introduced a third way of activating the Court's jurisdiction, as it authorised the prosecutor to initiate an investigation *propio motu*. It was decided that he or she would have full authority over the management and the administration of the Office of the Prosecutor (Article 42(2)). Therefore, he or she will put in place regulations to govern the operation of the Office (Rule 9 of the Rules of Procedure and Evidence). However, the fact that the prosecutor has full authority over the Office of the Prosecutor should not prevent him or from creating what is called in the Spanish legal system *Juntas de Fiscalía*, a council comprising all prosecutors of a *fiscalía*, in which the prosecutor and his or her staff would have formal discussions about the most significant issues. The final decisions of this body, though not necessarily binding on the prosecutor, would be laid down in written official minutes. However, this must not be considered an ordinary staff meeting, which would normally be informal, where the participants exchange opinions regarding particular or general issues. Rather, it is a formal meeting in which the opinion of the majority is final. Without binding the prosecutor, these opinions could impose a reasonable limitation on a possibly autocratic prosecutor and at the same time would also become an important element when the time comes for the Chambers to examine or review a decision made by the prosecutor, contemplated in Articles 15(3)–(4), 53(1)(c), 53(3)(a)–(b) and 61(1) and (7) of the ICC Statute, as well as the Rules 50, 107 to 110 and 121 of the Rules of Procedure and Evidence

In conclusion, and without giving further details, we suggest it might be convenient to institutionalise a collective decision-making mechanism, yet without binding the prosecutor to that final decision. Furthermore, we consider this mechanism to be very beneficial for the adoption of decisions on important issues, as well as being a relevant fact that could be submitted to the Chambers in their review functions, since the decisions would be taken in a consistently formal way. Without doubt, this approach would signify a certain self-limitation of the powers of the prosecutor, something we believe is not prohibited.

Legal Advisory Expertise

William J. Fenrick*

It is extremely important to develop a career legal staff for the Office of the Prosecutor of the International Criminal Court ('ICC'). Obviously, at the beginning, staff must be hired from elsewhere for a variety of posts, both senior and junior. Nonetheless, it is desirable to aim at developing a legal staff in which most or all of the lawyers are capable, at different stages of their careers, of acting as advisers on investigations, trial counsel, appellate counsel, and advisers in the Legal Advisory and Policy Section. The objective of career management policy for lawyers in the Office of the Prosecutor should be to develop, as far as possible, international criminal lawyers. This is not a simple task.

Presumably the legal intake will include both criminal lawyers and international lawyers. Generally speaking, international lawyers and criminal lawyers have many more differences between them than common law trained lawyers and civil law trained lawyers. Very few lawyers will have,

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at the commencement of employment, a foot in both the international law and criminal law camps. Some lawyers at the International Criminal Tribunal for the former Yugoslavia can now be described accurately as international criminal lawyers. Most cannot. It is strongly recommended that all practicable measures be taken to train as many of the lawyers from each camp so that they have a reasonable and verifiable level of competence in the bodies of law and skills particular to the other camp. Although many ICC staff lawyers will feel more comfortable performing either criminal law or international law-related tasks, versatility should be regarded as a virtue.

This does not, of course, preclude the possibility of some Office of the Prosecutor lawyers becoming “super specialists” in particular areas in addition to being competent generalists. Presumably the Legal Advisory and Policy Section would be responsible for developing and delivering an intellectually and practically rigorous training programme concerning the substantive and procedural law of the ICC. It would also administer and participate in the development of an equally rigorous training programme related to trial and appellate advocacy skills.

It is essential that at least one super specialist be developed, likely in the Legal Advisory and Policy Section, who has the highest possible level of expertise in the law related to combat activities – that is, unlawful attacks or deliberately inflicting terror on the civilian population – and that this super specialist develops a high level of understanding of military forces and how they operate, and also the ability to communicate with military personnel. This super specialist is unnecessary if the Office of the Prosecutor does not prosecute offences occurring during combat. He or she is, however, essential if such cases are prosecuted for the simple reason that lawful killing and property destruction also occur during combat, and a super specialist is necessary to distinguish between lawful and unlawful activities. If no such super specialist is hired or created and, consequently, the ICC Office of the Prosecutor prosecutes such cases incompetently (a very high risk), the ICC and the Office of the Prosecutor will be brought into disrepute, and any resultant decision may have an adverse impact on a vital part of international humanitarian law. I must emphasise that this body of law exists in order to reduce net human suffering in armed conflict. It is more important outside the courtroom than in it.

Competence Framework

Barry Hancock*

30.1. Introduction

In relation to the Office of the Prosecutor at the International Criminal Court ('ICC') this chapter seeks to address issues with a specific focus on:

1. issues relevant to quality control in the performance of prosecutors;
2. how to manage the training of prosecutors in ways that adequately correspond to their needs, assuring their proper participation, with sufficient regularity;
3. how to assist experienced prosecutors develop new skill sets and acquire additional working methods as required by criminality which may be new to them and more complex than crime with which they have previously dealt;
4. the need to regulate (in writing) within prosecution services the duties and obligations of prosecutors, as well as the management of the work of prosecutors;
5. the optimal combination of skill sets in the senior management of large prosecution services; and
6. effective use within prosecution services of general staff meetings, management meetings and communications from senior management to the staff.

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30.2. General Background

The ICC is a new organisation with no historical background in terms of the management of its own staff. It can, of course, point to the experience of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda, and more generally to the experience of numerous prosecution services around the world. But the ICC is crucially starting with a clean sheet. This could be a strength – there is no tradition or built-in culture to constrain it. Equally, it has no internal experience on which to base its management or human resources culture and there will be a danger of reinventing the wheel and making the same mistakes from which others have already learned hard lessons.

30.3. Basic Principles

The ICC and the Office of the Prosecutor will necessarily be complex organisations. This will make them potentially difficult to manage. One way of minimising the risks in managing such an organisation is to ensure that management processes and, in particular, human resource management processes are transparent and understood by all members of staff. The starting point for these processes may be to establish clear goals for the Office of the Prosecutor and then to build a framework of competences required of staff to deliver the performance that the prosecutor requires. This will enable him or her to ensure that all activity within the organisation is directed at delivering the objectives which have been set.

A competence framework could be developed, which will address the skills needed at all levels in the Office of the Prosecutor (see Table 1). This is simply a model (indeed a very naive one) with each layer of management taking on the necessary skills from the layer beneath, as well as new ones appropriate to the higher level. The real framework would be much more complex, with the descriptors being further broken down to be clear how the skills and abilities might be demonstrated, and its contents would need to be developed in a scientific manner. In existing organisations, this would be done by interviewing staff at all levels and defining the key indicators of skills and qualities. These form themselves into groups with the skills be used as descriptors. In a new organisation like the Office of the Prosecutor, it will be necessary to seek the views of the initial intake of staff, but it might also be productive to enquire of national prosecution services, as well perhaps as the ICTY, if they can be of assis-

tance. The Openbaar Ministerie in the Netherlands, the Crown Prosecution Service of England and Wales and the prosecution authority in Sweden, Åklagarmyndigheten, may be able to help.

Senior management	Leadership	Political awareness	Media skills
	<ul style="list-style-type: none"> • Inspires staff • Deals with crises coolly and effectively • Takes difficult decisions 	<ul style="list-style-type: none"> • Sees the big picture • Resists outside pressure • Keeps governments appropriately informed of the activities of the Office of the Prosecutor 	<ul style="list-style-type: none"> • Speaks well in public • Responds to media questions clearly and appropriately • Handles television and radio interviews effectively
Prosecutor managers	People management	Communication	Case management
	<ul style="list-style-type: none"> • Gets the best from staff • Conducts meetings in a participative and constructive manner 	<ul style="list-style-type: none"> • Keeps senior management informed • Cascades information from above to staff 	<ul style="list-style-type: none"> • Develops teams to ensure control of cases • Uses approved mechanisms to ensure that cases proceed timely and efficiently
Prosecutors	Legal expertise	International understanding	Language skills
	<ul style="list-style-type: none"> • Is well-versed in the procedures of the Court • Keeps up-to-date with law and precedent • Is a capable advocate 	<ul style="list-style-type: none"> • Appreciates the context of the workings of the Court • Is familiar with the political and historical nuances of the countries from which cases emanate 	<ul style="list-style-type: none"> • Be fluent in at least one of the working languages of the Court • Have good written skills

Table 1: Competence Framework for the Office of the Prosecutor.

There will be a parallel task of developing detailed job descriptions so that the prosecutor is able to set out clearly what each job entails and, by reference to the competence framework, the skills needed to carry it out.

30.4. Building on the Competence Framework

Once the framework has been settled, it can be used as the basis of almost all management activity.

30.4.1. Recruitment

An informed and well-structured recruitment process should provide the Office of the Prosecutor with the right people to do the jobs required. Methods of selection need to be considered – many organisations have depended too heavily on interviews which are less than objective. No doubt the Office of the Prosecutor will have many candidates from whom to choose. They will come from many countries and the prosecutor will not necessarily be able to depend on references he or she receives. The prosecutor will also need to be in a position to defend decisions made to disappointed applicants and, possibly, their governments.

Whatever method of selection is chosen, the aim of questions and tests should be to discover whether the candidate has, or is likely soon to acquire, the necessary skills, supported by relevant experience to do the job. The competence framework should be used as a transparent tool for the development of questions and tests, and it should be clear to the recruiters what indicators will show them that the necessary skills are in place. Using such a structured method will make it easier for the Office of the Prosecutor to provide feedback to unsuccessful candidates.

30.4.2. Appraisal, Training and Development

Once staff have been recruited, the prosecutor will wish to be satisfied that they are performing at the highest possible level and that there are mechanisms in place to ensure a steady improvement in their capabilities. It will be essential to have in place a system of appraisal that works in a constructive way to develop members of staff. This will be difficult if the appraisal system is also linked to pay, but that may be a link that it is difficult to avoid.

Again, the competence framework should be used as the basis of the appraisal system. Staff will in this way be clear about how they are being judged and what they need to do in the performance of their duties. Strengths and weaknesses can be identified and development points taken forward. Gaps in an individual's skill base can then be addressed through formal training, informal on-the-job training and/or development through working with, for example, a mentor.

The nature of the appraisal system will also have to be considered – will it be time-based (annual or more frequent) or case-based (some accountancy firms, for example, have job reports that are short appraisals of performance on each audit, which form the basis of an annual report). The key is that the system is used by managers and seen by staff as a continuing dialogue between managers and those managed by them. It should lead to training, development and, perhaps, progression. It should not be dealt with as an end-of-year school report which bears no relation to the ongoing work of the office. Staff should be encouraged to ensure that they have all the skills set out in the competence framework for the performance of their current job. However, they should also be looking to acquire skills appropriate to the level above so that there is not too steep a learning curve in the event of permanent or temporary promotion.

In this way new staff will have a clear idea of what is expected of them and more experienced staff will always be expected to develop their skills and knowledge to a higher level. An induction package should be developed for new staff and a formal probationary process put in place so that those who are clearly not up to the required standard and who will not reach it within, say, the first year of employment may be removed quickly.

30.5. Discipline and Inefficiency

The NGO Coalition for the ICC and the International Association of Prosecutors have submitted to the Office of the Prosecutor a possible draft of a code of conduct for the Office. This, containing as it does a list of duties and responsibilities for staff of the Office of the Prosecutor, can serve as the basis of a disciplinary code as well. There will, however, be a need for disciplinary procedures to be elaborated in writing. These should only be prepared in draft and discussed in due course with staff, a staff association or other relevant organisation.

Alongside this there will need to be a procedure for dealing with staff who underperform. Such a performance should be identified and dealt with through the appraisal system. The first step should always be to identify areas in which improvement is needed. This will lead to training or close supervision and mentoring. Clear targets for improvement should be set and progress closely monitored. Should the required improvements not be forthcoming, the Office of the Prosecutor will be able to proceed to dismiss the member of staff for inadequate performance. Presumably this will have to be in accordance with Dutch employment law.

30.6. Communication

One of the major issues facing large organisations is internal communication. There is a need for managers to be kept aware of what is being done by their staff and for the staff to have an input into management decisions and to understand why decisions, with which they may not agree, have been taken. It is essential that there is a regular series of management meetings. In the framework set out above there might be a monthly meeting of the prosecutor with senior managers. They, in turn, would have a subsequent meeting with their staff. In this way issues raised in the high-level meeting reach all staff quickly with an opportunity for explanation and discussion. Problems can be fed back or suggestions acted upon. Lower-level managers will also wish to meet with their staff more regularly to discuss routine matters relating to their work, and these could be held within in case team or more widely within a department.

Thought should also be given to a range of internal publications and how they should be used. Regular newsletters could be used to supplement the information given in staff meetings; bulletins could be issued on decisions taken and policies announced – these should be collected and retained until countermanded; and there could also be a less formal weekly or monthly newspaper which could range further than purely work-related issues.

Legal Training and the Prosecution

Roelof Haveman*

31.1. Introduction: An Open Atmosphere

In this chapter, the question of the legal training of staff will be discussed, and in particular how the Office of the Prosecutor at the International Criminal Court ('ICC') could benefit from the expertise of recognised academic institutions and individual academics, both in terms of training and other professional services which may be offered.¹

31.1.1. Linking Functions

The first question when thinking about ways in which academia may be of help to the Office of the Prosecutor of the ICC is: what are their respective functions and goals, in order to subsequently be able to link the two together? The question of the function of academia is relatively easy to

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¹ This will be done in my capacity as a scholar, experienced in training of both regular law students and practitioners – among whom are staff from the *ad hoc* tribunals – at postgraduate level, for example, in the LL.M. programme in public International law, specialisation international criminal law at Leiden University; training programmes for various groups of practitioners at Leiden University, The Hague campus; and writing regularly about developments in supranational criminal law from a more theoretical, academic point of view. See, for example, Roelof Haveman, Olga Kavran and Julian Nicholls (eds.), *Supranational Criminal Law: A System Sui Generis*, Intersentia, Antwerp, 2003, p. 368; and Roelof Haveman, “Rape and Fair Trial in Supranational Criminal Law”, in *Maastricht Journal of European and Comparative Law*, 2002, vol. 3, no. 9, p. 263.

answer: universities should at least have a role in the dissemination of existing knowledge and the creation of new knowledge.

The question of the function of the ICC is more difficult to answer. How does the Court – and the outside world – perceive its function? What is its role and what is its philosophy? The principle of complementarity seems to provide some answers to these questions: the Court is there to investigate and prosecute cases where national jurisdictions are unable or unwilling to do so. Yet, the principle of complementarity, as it is merely sketched out in the ICC Statute, begs more questions again than it answers, and does not provide a satisfactory answer to the most fundamental questions concerning what the ICC is really for. And the complementarity principle may in fact obscure the real purpose of the ICC. For the ICC is not merely a court of last resort – there to step into the breach when national mechanisms for achieving justice fail. It could have, *inter alia*, an exemplary function, an educational function, a didactic function, a monitoring function, a consultancy function and advisory function, as well as other purposes that will emerge with time and which must be determined.

Whatever role and function of the ICC are chosen, it is clear that academia can be involved in all these functions. In this chapter, some of the possibilities are discussed.

31.1.2. A Steep Learning Curve

Everyone beginning his work at the ICC faces a very steep learning curve, as one of the experienced staff members of the Office of the Prosecutor stated shortly before the current prosecutor of the *ad hoc* tribunals started in office. This pertains to all ranks and functions, from judges and the prosecutor to assistant legal officers.

The reason is that the law of the ICC and its predecessors, the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR'), is an entirely new phenomenon, *sui generis* of character: supranational criminal law. Its resemblance to existing law families and traditions is striking, yet at the same time deceptive. As it develops, supranational criminal law is growing to be a combination of many old law families and traditions, but at the same time is neither of them.

It is vital for the development of this new field of law that lawyers realise that they are participating in creating new law. This field of law is

still under construction. Although it cannot be said of any area of the law that it is completely fixed or static, it is particularly true for this area of supranational law, which has almost no precedent, both with respect to procedural law and substantive criminal law.

Although it may be expected that staff who are hired for the Office of the Prosecutor know the law – at least the law in books – and will have gained experience as practitioners, either in a domestic system or at one of the *ad hoc* tribunals, my experience is that often lawyers are, more than is desirable, captured in their own legal background, be it domestic criminal law (adversarial or inquisitorial), humanitarian law or international criminal law. With respect to those having gained experience in one of the *ad hoc* tribunals, one should realise that the tribunals' law is definitely not the same as the ICC law. Preconceptions about what the law is, and how it should be applied in practice, must be abandoned; persons working with this new system must learn to think about the law and the work of the ICC in a creative way.

The development of the ICC law, therefore, very much depends on an ongoing interaction between practitioners and academics, and on ongoing training of staff. This asks for an open and creative atmosphere at the Office of the Prosecutor, in two ways. 'Open' in the sense that there is room for staff to acknowledge that they do lack necessary knowledge, and 'open' in the sense that the Office of the Prosecutor gives ample space to influences from the outside world. There is yet a third way in which the ICC, and perhaps the Office of the Prosecutor in particular, has to be open, which is open to the world: outreach.

31.2. Open (1): A Learning Environment

It is not only extremely important that staff members realise that this law is new, developing, and that they take part in its development by creating new solutions to practical problems, it is as important that the Office of the Prosecutor is characterised by an atmosphere in which individuals can be *open* about the flaws and weaknesses in their own knowledge on particular subjects, and subsequently acquire the possibility to fill in these gaps. Different levels can be distinguished.

31.2.1. Induction Course

It is important that each staff member is offered a crash induction course in which the basic features of the law are explained. This seems to be vital at least for those staff members who have not gained any experience at one of the *ad hoc* tribunals. It is this group in particular that has to realise that the knowledge they have of their own well-known systems – of domestic criminal law, either adversarial or inquisitorial, of humanitarian law as an indirectly applicable set of norms, of human rights law as the mirror against which domestic systems are evaluated – is merely a starting point for understanding the supranational system. Even more particularly, lawyers with backgrounds in national law need to understand and appreciate not only that there are other systems but also that the ICC, while combining features of many national legal systems, is an entirely new system.

The best way to achieve this goal is by confronting persons with different legal backgrounds in small groups (maximum 12 persons), which will be guided by experts, both practitioners and academics. It is therefore not a one-way process, in which an expert is telling participants the ins and outs of the law; the course is an interaction between participants, and between the experts and the students. This confrontation between different legal backgrounds proved to be a very effective way to make lawyers realise that there is more between heaven and earth than their own legal background.

Topics that one might think of to discuss in this induction course include:

- Institutional aspects of the ICC and an international judicial body, and its relationship with the host nation, third states and relevant international institutions (such as the International Court of Justice and the Security Council).
- Getting acquainted with the procedural rules. The criminal process as a coherent system with the penal procedure seen as a process: pre-trial, trial, execution and the role of the various parties – prosecutor, defence lawyer, judge – at every stage. It is a process, moreover, that is coherent and consistent (for example, consequences of bench trial compared to jury trial; checks and balances). Different aspects of criminal procedure, both a general outline and specific topics, in particular those that show the difference between the var-

ious systems (for example, cross examination, dossier, admissibility rules, disclosure rules).

- Co-operation between the ICC and states (for example, states' main obligations under the ICC Statute *vis-à-vis* the Court in terms of co-operation; transfers of persons; co-operation regarding investigations; co-operation regarding sharing of evidence; competing requests).
- Sources of the substantive law (the primary applicable law; consequences of making crimes under international law into directly applicable crimes; secondary sources).
- That the supranational penal system, being first and foremost a penal system, should be fair; that fairness however is hard to determine.
- The notion of fair trial as the standard for a criminal trial. *Trias politica*, principle of legality (*nullum crimen* and *nulla poena*), defence rights, victims rights, equality of arms; in short, all the notions that make a trial fair; notion that a fair trial is not in the books, but has to be materialised in practice; that the fairness of this new system is hard to determine.

One topic that seems to be crucial for each and every staff member from the start is the concept of complementarity, and what this will mean for the ICC and for both states and non-states parties.

31.2.2. Practical Skills

Although, again, it may be expected that staff members have gained practical skills in their previous jobs, the pre-trial and trial procedure at the ICC has aspects unknown to many practitioners, in particular those who gained their experience at a national level. This is probably truer for practitioners from a civil law jurisdiction, trained in an inquisitorial process model, who, for example, have no experience in cross-examination. These lawyers may even see cross-examination as contrary to their basic view on professionalism. A short crash course on cross-examination techniques may be of great importance.

- One may think of training in small groups of at most six people. Shortly before the training begins, the participants receive a fact pattern of a case that could be tried in the ICC and a direct examina-

tion of one witness. Each individual participant will be required to prepare a cross-examination of this witness, dealing with one or two issues. The cross-examination should be no longer than 10 minutes. Each participant will actually conduct the cross-examination for the group and two or more members of the trainers. Actors will play the parts of the witnesses.

- The trainers will be experienced lawyers and teachers who will critique the participants both for substance and style. This is a widely used advocacy training format based on learning by doing. The lawyer learns both from conducting the examination and from the critique that follows. Those lawyers observing the cross-examinations also learn advocacy techniques from their colleagues' performances and from the critiques. By taking home the video which is made of the performance, the participant will be able to review his or her experiences, and if need be discuss aspects later with the trainer.

31.2.3. Education *Permanente*

The experience in the LL.M. programme in public international law at Leiden University, with legal staff from the ICTY and ICTR, is that they know very well what they are talking about on a very practical level, but lack the necessary academic, theoretical background to really 'discover' new possibilities in applying the law. These practitioners consider an academic reflection on their everyday work as extremely valuable. And they are right. Practitioners in general take too little time for these reflective moments. It should be considered necessary, however, to sometimes sit back with one's feet on one's desk and just reflect on everyday activities; some people suggest one should do this at least for one hour a day. Whatever period is best, it implies that practitioners should be given ample opportunity for academic reflection. The problem in practice, however, often is that people think that everyday work leaves no time for less practical matters, and they therefore leave this reflection until later. Even worse is when they are not given the opportunity to do this. A possibility of overcoming this practical threshold would be to provide every staff member with 'vouchers' for training modules, which they are expected to use within a certain time span.

Moreover, staff members should have easy access to training facilities that meet their most urgent needs. If possible, it should be predicted in

advance what needs exist, so that a staff member gets the possibility of adding to his or her knowledge just before he or she needs this knowledge in practice. In particular, at the start of the ICC, it will be possible to predict which knowledge is mostly needed at certain moments.

This means that there should be modules available on many different topics, from which each and every staff member can make his or her choice. As with the induction course, these training modules should be given for small groups, in which there is ample time for discussion and reflection on one's own practical experience, given by both academic and practice-trained lecturers. It may be advisable to differentiate between the various functions within the Office of the Prosecutor.

For some staff members who have been involved in practice for a relatively long time, it should be made possible to attend training on a more structured basis, for example an LL.M. programme in international criminal law. This should be part of a career plan that is made for each staff member.

31.3. Open (2): Ongoing Interaction

One of the dangers for the development of the law is that a monoculture grows, in which new influences and creative thoughts, concurring or differing opinions, are not accepted, consciously or unconsciously. It is therefore extremely important that a culture grows in which an ongoing interaction exists between the inside world of the Office of the Prosecutor and outsiders, in order to create an environment in which creative thought flourishes. The aim of this is the exploration of new developments, rather than the dissemination of existing knowledge.

These outsiders may be people in other parts of the ICC, but also academics from various backgrounds. It is very important that one does not shield itself from criticism; criticism is a valuable factor in the development of the law. One can learn a lot from one's critics. This ongoing interaction may be organised in various ways:

- guest lectures by speakers from different backgrounds on topics that are in discussion in a particular case;
- brainstorming sessions within a particular prosecutor's team, involving experts from different relevant fields of law;

- discussions to evaluate a particular case after this case has closed, in order to learn from previous experiences and mistakes.

Another interesting way of promoting interaction is to give staff members ample opportunity to give lectures to outsiders, for example universities, as this forces them to reflect on their knowledge gained in practice.

31.3.1. Expert Meetings

The development of this new field of law asks for discussions on a very high level between practitioners who have to act in a concrete case and academics who are especially experienced in this particular problem. In particular, topics that are crucial to the development of the law – problems that may be considered to be of principal character – demand a discussion at a level of high expertise, by both academics and practitioners. To start with, one might consider an expert meeting on prosecutorial discretion, that is, to identify the points on which the prosecutor of the ICC can exercise discretion to investigate and to prosecute crimes within the jurisdiction of the Court, and to decide what the applicable criteria are for guiding these choices on all these points.

Academia can organise and contribute to these kinds of expert meetings on topical questions. A pre-condition is that a network of experts is created that is willing and able to meet at very short notice.

31.3.2. Academic Safe Haven

It is my experience that there is a great need for practitioners to sometimes flee from the premises of hectic everyday courts, and find a safe haven for thinking and writing. In particular, those who have gained a remarkable experience should have the possibility of writing down the ideas they have developed. These writings can have the form of either a practice manual or a more academic theoretical reflection on everyday practice. Universities should – and can – create this academic ‘safe haven’ for practitioners, where they can study and write for four to six months, and subsequently publish articles or books.

31.3.3. Help Desk or Law Clinic

It has been suggested many times over the years to develop a help desk for staff of the various organs of the tribunals and the Court. Such a help

desk or law clinic should be able to answer urgent question within a very short time frame. Although this seems attractive, I doubt whether it is realistic. Moreover I do not think this is a function of academia. Universities have a function of thinking and rethinking the development of law – both retrospectively and looking to the future. They should follow the development of the law in practice with a critical eye, from a more dogmatic, theoretical point of view.

My suggestion would be to create a synthesis between academia and practice through discussion meetings, expert meetings and the like – as described in this chapter – rather than in an advisory function in urgent matters.

31.3.4. Electronic Data and Libraries

As for a concise library, we may expect the library of the Peace Palace to develop into an all-encompassing library, opening up all sources, both electronic and in print. It seems redundant to create the same facilities at a university in the vicinity of the ICC. As for the broader public, however, universities may play a part in developing a concise electronic information system on supranational criminal law.

31.4. Open (3): Outreach

There is a third function that academia may have, apart from disseminating knowledge and helping to develop the law within the scope of the ICC, and that is to disseminate knowledge outside the Court: outreach.

31.4.1. Explaining the Law

Outreach means, for instance, that the Court discloses to the public what it is doing. As the maxim goes, justice should not only be done, it should also be seen to be done. As one of the main responsibilities of academia, one may consider its role in society in explaining the law to the public. This can be done indirectly, for example by training and supporting diplomats and journalists, who on several occasions have expressed their need for knowledge on the legal background of what is happening at the tribunals and the Court. More directly one may think of training lawyers at a domestic level who actually have to work with the law. This refers not only judges and prosecutors but also to defence lawyers, considering

the importance of fair trials – of which the equality of arms is a crucial element.

31.4.2. Supporting States

There is another aspect to outreach, however, which may be at least as important as the explanatory function of what is done at the Court. This aspect deals with the admissibility criteria. The ICC prosecutor will have to determine the relationship between unwillingness and inability. What might appear as unwillingness may be *de facto* inability. Assistance to transitional states seeking to overcome obstacles to prosecute could minimise instances of inability or perceived unwillingness. A major question for the ICC itself will be deciding what role it should play in rehabilitating or in encouraging the rehabilitation of the criminal justice systems of states that appear to be unable or unwilling. The ICC might perceive such a role as going beyond its mandate. Rather than assume such a role itself, in a hands-on way, it could alternatively consider the possibility of a role for itself in guiding or directing others in a position to offer this sort of assistance. It can also address the inability question by means of establishing standards that states can follow in fulfilling their side of the complementarity pact. The question then arises of how best to stimulate national prosecutions and what to do with alternative dispute resolution mechanisms.

Both in assisting states to overcome obstacles to prosecuting cases and in developing standards, academia can play an important part. In doing so, universities can offer services which go beyond the ICC's mandate.

31.5. Precondition: Network of Experts

A precondition for these activities, in particular those that are going further than training – creating new knowledge rather than the dissemination of knowledge – requires a network of academics of high quality, who together with the practitioners bring the ICC law to a higher level. The scholars forming this network should consist of people from all jurisdictions and all main law traditions, so as to guarantee that this network is indeed able to contribute to the development of supranational criminal law. It should not consist exclusively of European or American or Euro-American activities. This Court is a world court, and therefore should be

influenced in its development by the whole world. For the same reason, it is important to take into account that a substantive part of the world is francophone, which should have consequences for all activities.

The members of this network should not per definition be the ‘big names’. Just below this level seems to be a far more interesting level of academia, with young lawyers and jurists who have no longer been raised in one of the old law families and traditions, but grow into a new kind of jurist: supranational criminal lawyers. It is in particular this type of jurist who can bridge the gap between the two main penal law systems, and between criminal law and humanitarian law. They have already come far on the steep learning curve that is supranational criminal law.

Reflections on Generalist-Specialist Collaboration, Internship Programme, and Comparative Law

Nobuo Hayashi*

32.1. Helping Generalists Help Themselves: The Optimal Use of Specialist Lawyers Available In-house

32.1.1. Introduction

This short contribution discusses the effective use of expert legal knowledge and resources available in the Office of the Prosecutor at the International Criminal Court ('ICC'). It addresses primarily the role of those lawyers who specialise in certain areas of law applied by the Court, and their relationship to those who do not specialise in any area or areas to the same degree. Discussion would inevitably be somewhat general as

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it remains to be seen how the Office of the Prosecutor's actual *modus operandi* evolves.

32.1.2. Need for Generalist–Specialist Collaboration

Effective international war crimes prosecution requires a mutually reinforcing combination of broad experience in criminal litigation, on the one hand, and highly specialised knowledge in the substantive law which the forum is called upon to apply, on the other. It is imperative that the Office of the Prosecutor secures at the outset of its operation, and constantly nurtures thereafter, an environment conducive to collaboration between generalist and specialist lawyers.¹

Such a combination of knowledge and experience is necessary for several reasons. First, the international forum before which war crimes are prosecuted must dispose of complex and technical matters of jurisdiction and definition of offences. Second, there are growing expectations that international criminal tribunals should set the standard for their municipal counterparts to follow. And third, there is an unusually narrow margin of error. Today, typical international criminal tribunals have just one layer of appellate proceedings. As a result, any uncorrected error will have long-term, if not irreparable, ramifications not only for the parties concerned but also for the development of international criminal law. Contemporary international criminal tribunals would also be operating in a politically charged, high-stake environment. Their rulings would almost inevitably affect sensitive issues of war and peace, national security, reconciliation as well as regional stability and development. Clearly, any prosecutorial organ attached to such fora must be alive to these considerations.

Ensuring effective generalist–specialist collaboration has been a major challenge for the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia ('ICTY'). Experience shows that, if left in the insular world of experts, specialist lawyers may remain aloof towards the range of skills and concerns relevant for the successful presentation of the prosecution case. Conversely, in the absence of active engagement by specialists, generalists risk being unassisted when litigat-

¹ Here, the term 'generalists' refers to those lawyers with overall responsibility for the successful presentation of the prosecution case. The term 'specialists' refers to those lawyers responsible for the consistency and quality of the position taken by the prosecution on matters falling within their respective areas of expertise. These two groupings are generic.

ing technical issues with which they may not be sufficiently familiar. When specialisation amounts to or otherwise involves alienation, a number of unfortunate consequences may ensue. For example, it may breed envy, mistrust and ill will; contribute to a decline in the general morale; create inefficiencies such as redundant and incompatible work being produced by generalists and specialists on the same issue; result in the prosecution taking inconsistent positions in different cases, or judges not receiving the proper technical assistance they may require from the prosecution; and so on.

32.1.3. The Role of Specialist Lawyers

Within the context of collaboration outlined above, this chapter briefly discusses several salient features that would characterise the role of specialist lawyers in the Office of the Prosecutor.

32.1.3.1. Acquisition, Maintenance and Development of Expert Knowledge

In view of the intricate framework of the ICC Statute, it is clear that the Office of the Prosecutor will require legal expertise in a wide range of issues. For this purpose, a small group of specialist lawyers would be assembled in-house. Their specialities would include general public international law,² international humanitarian law,³ international human rights law,⁴ international criminal law, procedure and evidence,⁵ general comparative law⁶ and comparative criminal law, procedure and evidence.⁷

² In particular, the theory of sources (for example treaties, custom, general principles of law), the law on the international legal personality of states and their succession, the law of the Charter of the United Nations, the law of international organisations, the law of treaties, the law of state responsibility, judicial settlement of disputes, and so on.

³ In particular, the laws and customs of war in general, the 1899 and 1907 Hague Regulations on Land Warfare, the various pre-1949 and 1949 Geneva Conventions, the 1954 Hague Cultural Property Convention and its Protocols, the 1977 Protocols additional to the 1949 Geneva Conventions, the 1980 Certain Conventional Weapons Convention and its Protocols, and so on.

⁴ In particular, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and other regional thematic as well as regional human rights instruments, including the work of their monitoring bodies, the various thematic and country procedures of the UN Human Rights Commission, including the activities of special rapporteurs, and so on.

It should be formally part of each specialist's responsibility to keep himself or herself fully abreast of the latest development in his or her respective area(s) of expertise. To the extent compatible with the Office's regulations and practices, specialists should be encouraged and actively supported to engage in academic discourse and critical reflection beyond the immediate surroundings of the Court. The long-term goal would be for each Office of the Prosecutor specialist lawyer to establish and maintain a visible presence in the scholarly circle of the area(s) falling within his or her expertise.

Needless to say, however, it is the Office of the Prosecutor, not the individual specialist himself or herself, that should be the primary beneficiary of such endeavours. Serious efforts must accordingly be made on the part of the specialist lawyers to place the fruits of their professional activities at the disposal of the Office. Thus, for example, at the conclusion of each external engagement, the specialist concerned might be asked to collect all relevant materials and submit a detailed report for storage and future reference.

As noted earlier, specialisation ought not to entail alienation. This means, among other things, promoting active personnel exchanges by inviting specialists to take part in litigation and by inviting generalists to conduct sustained research into legal issues of their choosing. Such exchanges would not only promote enhanced appreciation of each other's work but also facilitate the Office of the Prosecutor in its efforts to avoid compartmentalising legal skills and enable their flexible redeployment at short notice, should the circumstances so require.

⁵ In particular, the charters and judgments of the International Military Tribunal and the International Military Tribunal for the Far East, post-Second World War war crimes trials held under Control Council Law No. 10 and provisions of national military law, subsequent municipal war crimes trials, military justice systems, the Statutes and jurisprudence of the ICTY, the International Criminal Tribunal for Rwanda and special courts established under UN auspices, international judicial co-operation on criminal matters including extradition, and so on.

⁶ In particular, methodology, major legal traditions and their evolutions, and so on.

⁷ In particular, criminal law in common law and civil law systems, criminal procedure and evidence in inquisitorial and adversarial systems, principles of punishment, and so on.

32.1.3.2. Effective Sharing and Transfer of Expert Knowledge

It would be impractical to deploy a specialist directly wherever his or her expertise is relevant. Nor would such a deployment necessarily lend itself to the comprehensive presentation of the prosecution case, a role for which generalists would be better placed. Rather than relying exclusively on the specialists concerned, generalists should themselves be encouraged to acquire reasonably advanced knowledge and proficiency in certain key areas of the law and practice of the Court. Besides, generalists being able to help themselves in this manner would permit specialists to focus on developing their expertise further.

In view of these considerations, it would be proper for specialists to contribute to the case-related work of the Office of the Prosecutor primarily by transferring their expert knowledge to those ‘in the trenches’. They would provide expert advisory services and help equip their generalist colleagues with the necessary knowledge and skills in court. Below are examples of such services.

Providing staff legal training. Introduce new staff to the law and practice of the Court. Organise workshops, lecture series, symposia and other opportunities for continuous education and training at regular intervals. The primary purpose of staff legal training would be two-fold: first, to enable all staff to acquire knowledge and deepen their understanding of the law; and second, as noted earlier, to enable generalists to entertain – spontaneously and without technical assistance if necessary – recurrent issues of law otherwise falling within specialist lawyers’ respective areas of expertise.

Providing comprehensive working tools. Prepare and update desktop manuals for non-specialists on selected issues of public international law, international humanitarian law, international human rights law, international criminal law, procedure and evidence, and so on; full expositions of the prosecution’s position on the law and practice of the Court; collections of and commentaries to the ICC Statute, the Rules of Procedure and Evidence, the Elements of Crimes and other regulatory instruments; glossaries of essential terms for those on mission or in court in need of quick and accurate legal references yet unable to contact the specialist(s) concerned, and so on.

Providing consultation and review. Above and beyond the provision of training opportunities and working tools, engage in regular and

close consultations with generalists in the Office of the Prosecutor's casework. Not only would such consultations promote genuine sharing and transfer of expert knowledge, but they would also keep the need for last-minute reviews and quality control functions to a minimum. In this regard, where appropriate, the use of templates and other standard submissions might also be considered.

32.1.3.3. Formulation and Presentation of the Prosecution Position

The primary advisory capacity of specialist lawyers notwithstanding, there would be certain strictly exceptional circumstances where their direct involvement is in the interest of the Office of the Prosecutor – and, indeed, in the interest of the ICC as a whole. That would be the case, for instance, when the Court is seized for the first time – be it at the trial or appellate level – of an issue of general importance. The same would be true where the complexities and technicalities of the matter call for the availability of full expertise. The bench might also elect to invite the parties to offer technical assistance on a particular question of law. Depending on the situation, the direct involvement of specialists required might extend beyond the preparation of written submissions to include oral pleadings.

32.1.4. Responsibility and Acknowledgement

That no collaboration can be imposed upon generalists and specialists goes without saying. It would only emerge from their genuine efforts, mutual respect and some measure of success at working together. Even where an atmosphere of collaboration between generalists and specialists prevails, however, the fact remains that their respective roles ought to be defined, their responsibilities spelled out and their contributions acknowledged. In particular, as noted earlier, it is important that the development of expertise be formally recognised as part of each specialist's official duties. A way must also be found so that specialist lawyers' contributions to the Office of the Prosecutor's litigation work are properly acknowledged. Finally, a clear procedure should be established whereby specialists are authoritatively designated as the prosecution counsel in charge where their direct intervention is required.

32.2. Preparing Tomorrow's International Criminal Lawyers: An Internship Programme Rewarding for the Host and Participant Alike

32.2.1. Introduction

Generally speaking, there are two kinds of internship experience. One that is familiar to many involves mostly clerical work. 'Meaty' assignments are relatively rare. With limited learning opportunities and responsibilities, it is a strictly nine-to-five, Monday-to-Friday affair. Participants depart with something of an insider's view of the workplace and a 'shining line' on their resumes containing slightly inflated descriptions of their duties. For the host organisation, it is either that interns are too inexperienced to be given responsibilities, or that staffers are too busy to provide proper supervision, or both. The host both invests and expects little.

Then there is the other, perhaps somewhat less common, kind. Interns are fully integrated and virtually indistinguishable from other staff members. They are given important assignments and responsibilities, as well as the requisite support and guidance. The host, for its part, treats them with respect and professional courtesy. Interns put in long hours of their own accord, and leave the programme having earned appropriate acknowledgement and a career boost. The host trains and supervises interns closely so that its investment bears fruit.

Of course, most internship programmes fall somewhere between the two.⁸ But some are more successful than others. Nor does success neces-

⁸ It is common for public intergovernmental organisations to administer internship programmes. When they do, they tend to do so along the following lines. First, an internship programme is, at least in part, a means of supplementing the host organisation's labour force with relatively well-educated and moderately skilled volunteers. (They are usually students in final stages of their undergraduate degrees or pursuing their post-graduate qualifications. They often possess limited relevant experience outside their academic setting. Nor, with few exceptions, are they expected to perform at a level much beyond the skills they already have.) Second, it is of a fixed, non-renewable duration, usually between three and six months. Third, it is mostly uncompensated or otherwise without financial support. (There are some exceptions in this regard, however. At the World Trade Organisation, the World Intellectual Property Organisation, the European Commission, the European Parliament, the International Committee of the Red Cross and the European Court of Human Rights, most or all interns are paid.) Finally, where the host organisation does not remunerate or otherwise financially support its interns, it emphasises the 'intangibles' instead, such as on-the-job training privileges (where offered), networking opportunities, whatever work experience gained, and so on.

sarily depend on whether participants receive remuneration. What, then, makes a programme rewarding both for the participant and for the host organisation? What must the host do to heighten the level of investment and return at which it wishes to operate its internship programme? This section addresses several issues of principle and practicality that might assist the Office of the Prosecutor in deciding whether, and how, to organise an internship programme.

32.2.2. Do It for the Right Reason

Should the Office of the Prosecutor consider instituting an internship programme? The answer would be in the affirmative if it is for the purposes of raising an “invisible college of international criminal lawyers” – to borrow from Oscar Schachter’s famous remarks. As an organ of the new, permanent ICC, the Office of the Prosecutor has its share of long-term responsibility for and interest in promoting understanding of the Court and international criminal justice among the world’s governments, academia, the legal profession and civil society at large.⁹

An Office of the Prosecutor internship programme should provide present and future practitioners of international criminal law with unique opportunities for high-level training, integrated work and sustained research experience. Participants would be drawn from young members of the academic community including advanced post-graduate students and junior research and teaching staff, entry-level government and military officials, representatives of non-governmental organisations (‘NGOs’), attorneys in early stages of their criminal law practice and so on. For all practical purposes, they would be treated and expected to work as if they were part of the Office of the Prosecutor’s regular professional staff. In terms of assignment and supervision, no distinction would be made between interns and staffers of comparable standing – save any additional consideration as may be required to accommodate each intern’s special training and research needs. Participants would return home with a unique set of skills and experience having served, in effect, as full members of the Office of the Prosecutor. The Office, in turn, would benefit from their skills and output, an overall improvement in the collegiality and produc-

⁹ This imperative distinguishes the Office of the Prosecutor somewhat from its counterpart at the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), a temporary establishment whose tasks and interests are overshadowed by the immediacy of its mandate.

tivity of the Office and, above all, the gradual proliferation of practitioners and scholars genuinely familiar with its work.

The Office of the Prosecutor should not consider launching a programme simply because it needs to reduce the discrepancies between the volume of its workload and the size of its existing resources. Nor should any programme be established just so that the regular staff can relegate mundane tasks to interns and concentrate on ‘juicier’ ones. If the Office of the Prosecutor’s resources were deficient or otherwise inadequately allocated, the proper remedy would be either to rationalise the workload or to secure appropriate resource (re)allocations. Plainly, hasty recourse to unpaid, voluntary labour does nothing to solve the underlying problem. It merely displaces the problem from one location in the Office to another.

It might be conceded that, to some degree, every internship programme is inevitably resource-driven. Hiring a given number of interns, paid or unpaid, would indeed be fiscally less expensive than hiring the same number of staff on full pay. (After all, if the host organisation had sufficient resources to lavish on its interns, it might as well hire them as proper staffers.) One should not assume too lightly however that, in respect of a given project, the net resource savings of deploying (say) 10 unpaid interns would necessarily outweigh those of deploying (say) six fully paid staffers. It is a myth that interns do not (or should not) consume any resources of their host organisation. Intern-related resource expenditures do accrue, albeit indirectly. At a minimum, interns require: office and equipment; compensation in kind by way of training, work and research opportunities as well as other professional exposures; and extra efforts on the part of the host to sensitise its staff towards their needs and treatment. Leave the interns untrained, unsupervised, unappreciated and unmotivated, and their productivity will not rise much beyond the level where it makes more sense to continue than discontinue the programme. An internship programme on the cheap might prove altogether counter-productive.

If an internship programme must still be instituted for resource-based reasons, the host organisation should at least be open about its true purposes and recruit participants accordingly. No matter how prestigious the host organisation may be, it simply cannot keep attracting high-quality interns without doing its part of the bargain. Where the qualifications and expectations of interns exceed the work and treatment that the host organisation is willing to give them, the results are predictable. There will be

not only a small number of exasperated staffers tasked or naturally inclined to improve the programme but also a growing number of unhappy interns eager to share their experience with others. This will then be followed by a decline in the number and/or quality of the applications addressed to the programme.

32.2.3. Do It Right

How, then, should the Office of the Prosecutor organise its internship programme so that it actually delivers? This section identifies three major areas of concern, namely programme design, recruitment and selection, and implementation.

32.2.3.1. Programme Design

Every internship programme should be designed to reflect the level of host–participant expectations at which the host organisation wishes and is able to administer it. While the Office of the Prosecutor’s actual administrative and supervisory capacities remain to be seen, it would be useful to highlight the broad parameters within which its programme should operate.

Size. The size of an internship programme ought to be a function not of what work needs to be done, but of what opportunities and supervision the host organisation is prepared to offer. The Office of the Prosecutor must resist all temptations to expand the programme just to rectify its resource problems. Rather, it should do everything to keep the number of participants within a manageable range, say up to a maximum of five or thereabouts. This would allow the Office to engage each participant fully and focus its attention on his or her needs.

Duration. A fruitful internship experience would be around six months in length. Such is the time necessary for any meaningful professional experience in an organisation such as the Office of the Prosecutor. Too often, shorter internships result in their participants having to depart just when they begin to feel comfortable with the surroundings and to really enjoy the work. A six-month span also provides important windows of opportunities for improvement should the first months prove unsatisfactory. Moreover, the steeper the learning curve (as would be expected of any vigorous programme), the greater the need for several months of work for what has been learned to bear fruit. No individual internship

should go beyond six months, however, lest it give rise to false expectations of employment afterwards.

Range of assignments. The nature and scope of duties for Office of the Prosecutor interns should be comparable to – or, at any rate, not very much below – those for regular staff at the P-1 or P-2 levels. Thus, they would assist senior officers, collaborate with junior officers and undertake their own projects under supervision. Under no circumstances should they be singled out to do other people’s menial work. Depending on their particular backgrounds and career goals, some participants might be designated as research interns and others as litigation interns or intern practitioners. Each participant would complete at least one long-term project commissioned by the Office of the Prosecutor, and one or more long-term projects of his or her own choosing as an integral component of the programme.

Minimum experience required. Given the nature and scope of their duties, successful Office of the Prosecutor interns would possess pertinent professional experience and/or advanced post-graduate qualifications (LL.M. equivalent or higher) in the relevant areas of law. Examples of suitable work experience include: junior teaching or research positions at law faculties; entry-level positions in prosecutorial, justice, defence, military and other governmental entities; up to two or three years of practice in criminal, international or human/civil rights law at law firms, public defender’s offices, or advocacy and other non-governmental and public interest organisations. Where appropriate, the Office of the Prosecutor might consider applicants undergoing mandatory judicial training in their respective jurisdictions. If accepted, arrangements would be made to facilitate such training.¹⁰

Designation. Should the Office of the Prosecutor elect to institute a programme along these parameters, calling it an ‘internship programme’ would not do justice to its vigour and prestige. It might instead be designated a ‘clerkship’ programme, ‘traineeship’ programme, ‘fellowship’

¹⁰ The ICTY Office of the Prosecutor has occasionally accepted training contracts for the Law Society of England and Wales, *Referendariat* for several German *Länder* and *stages* for the Canadian province of Québec. They were all made on an *ad hoc* basis and, in general, subject to the availability in-house of a lawyer authorised in the jurisdiction(s) concerned to provide the requisite supervision and evaluation.

programme, ‘associate’ programme, or ‘young researcher and practitioner’ programme.¹¹

32.2.3.2. Recruitment and Selection

In its communication with potential participants, the Office of the Prosecutor should clearly formulate the programme’s long-term goals and the level of mutual expectations envisaged (‘what we ask’ and ‘what we offer’), as well as the design that would enable them to materialise. It should be stressed that there would be no expectation whatsoever of employment upon completion of the programme.¹² (On the contrary, one important goal of the programme would be to encourage participants to contribute where they return to.) Honest and detailed descriptions assist potential candidates in forming a realistic set of expectations about the programme, making an informed decision whether to apply, and (should they decide to do so) preparing their application materials accordingly. Such an approach also helps reduce the number of grossly underqualified, overqualified or otherwise misguided applications.

In addition to posting advertisements on the ICC’s home page, efforts should be made to contact law faculties, bar associations, especially their students’ or young members’ sections (if any), public prosecutors’ offices, justice, defence and foreign ministries including armed services, NGO communities, editors and publishers of major law journals, and so on.

Participants might be selected not only on the basis of their background and career prospects, but also on the basis of their proposed activities while at the Office of the Prosecutor. For instance, the Office would announce in advance the research topic(s) likely to be commissioned to the incoming group of interns. Alternatively, candidates would be asked to specify in their application materials a particular area or areas they wish to research, or a particular set or sets of skills they wish to develop.

¹¹ At the ICTY, for example, the Legal Advisory Section of the Office of the Prosecutor administers a programme known as a ‘law clerkship’. It is so called, albeit unofficially, in recognition of the fact that some of its participants perform tasks that are considerably more substantive and rigorous than their counterparts do in ordinary ‘internship’ programmes.

¹² The ICTY strictly adheres to a rule whereby its interns (including law clerks) are barred from submitting applications for any paid positions at the Tribunal during their programme and for the six months immediately following the termination thereof.

Or both would be combined in the selection process. Once selected, the Office of the Prosecutor would contact each successful candidate with a view to reaching an agreement on his or her individual programme plan. (The manageable size of the programme would be crucial here.)

32.2.3.3. Implementation

In executing the programme, the Office of the Prosecutor must mobilise appropriate portions of its resources. Below are some indicators:

Examples of tangible resource mobilisation. First, interns require appropriate office and equipment. If it is junior to mid-level professional staff (for example, P-2 or P-3) were in a position to share their individual offices, the Office of the Prosecutor might consider rooming them with interns. The programme would also require at least one co-ordinator familiar with the Office's legal work.¹³ He or she should receive all necessary secretarial and logistical support.

Examples of intangible resource mobilisation. All Office of the Prosecutor staff should be thoroughly briefed and sensitised on the internship programme, including its long-term goals and the treatment of participants. In particular, those expected to place one or more participants under their direct care should be fully trained to devise, supervise and evaluate intern assignments. Others would receive proper direction to treat interns as their fully fledged professional colleagues. With a view to increasing the level of awareness about the programme and its participants, regular staff might be invited to take part in the selection process. Interns are to undergo intensive and comprehensive training at the beginning of their programme. Thereafter, they should be given full access to all training and other learning opportunities on a par with regular staffers. Finally, if its interns could not receive remuneration, the Office of the Prosecutor should at least endeavour to negotiate subsidies on their behalf (for example room and board, transport). It should endeavour to do so, if for nothing else, to show goodwill and concern for the welfare of its interns. Every assistance should be extended to those participants from developing countries in securing funding from neutral, third-party sources.

¹³ At the ICTY Office of the Prosecutor, one P-2 legal officer serves as clerkship co-ordinator. He or she officially dedicates 50 per cent of his or her time to administer the programme of up to 20 full-time law clerks.

32.3. Comparative Law in the Work of the International Criminal Court

32.3.1. Introduction

On numerous occasions since its establishment in 1993, the ICTY has pronounced itself upon the applicability of treaty provisions, the customary status of norms and the existence of general principles of law. In so doing, it frequently turned to the relevant rules of municipal legal systems. This is not surprising. Perhaps more than any other field of contemporary public international law, international criminal law is a discipline in the making. It primarily enforces international humanitarian law, a large body of rules – some highly elaborate and technical – that regulates the conduct of belligerents and provide for the protection of victims of war. Express penal provisions are small in number, however, and, where they exist, they tend to be general. In most cases, they merely designate certain conduct criminal rather than identify specific elements thereof. Moreover, neither the ICTY's Statute nor its Rules of Procedure and Evidence add any measure of certainty. Not written as a penal code, the Statute retains a high degree of generality in the description of offences and leaves it up to the judges to find and apply the law themselves.¹⁴ The Rules of Procedure and Evidence are little more than a hybrid of a procedural code *in statu nascendi* and an instrument of internal management.¹⁵

¹⁴ See United Nations, Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN doc. S/25704, 3 May 1993, paras. 29, 34–35, 37–38, 40–49. Articles 2–5 of the ICTY Statute incorporate existing treaty provisions largely unmodified: Article 2 of the ICTY Statute is drawn from Articles 50/51/130/147 of the 1949 Geneva Conventions; Article 3 from Articles 23(a), 23(e), 25 and 56 of the 1907 Hague Regulations as well as Article 6(b) of the Charter of the International Military Tribunal at Nuremberg, and Article II(1)(b) of Control Council Law No. 10; Article 4 from Articles II and III of the 1948 Genocide Convention; and Article 5 from Article 6(c) of the Charter of the International Military Tribunal at Nuremberg and Article II(1)(c) of Control Council Law No. 10. United Nations, Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, last amended 7 July 2009 by resolution 1877 ('ICTY Statute') (<http://www.legal-tools.org/doc/b4f63b/>).

¹⁵ Since its adoption in early 1994, the ICTY Rules of Procedure and Evidence has been amended 26 times in order to accommodate the Tribunal's rapidly evolving and widely varying needs as they arose. United Nations, ICTY, Rules of Procedure and Evidence, adopted on 11 February 1994, as amended 22 May 2013, IT/32/Rev.49 ('ICTY RPE') (<http://www.legal-tools.org/doc/950cb6/>).

If recourse to municipal law was a necessity for the ICTY, it would be a belated recognition for comparative lawyers. They have long suggested that a close link exists between comparative law and public international law.¹⁶ Admittedly, comparative law can play an important role in the treatment of sources of public international law. Comparative lawyers collect data from municipal jurisdictions, restate them in ‘functional’ terms and draw generalisations about their similarities and differences.¹⁷ Their findings could assist international lawyers in matters of state practice and general principles of law.¹⁸ Furthermore, to the extent that treaties

¹⁶ See Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3rd ed., Clarendon Press, Oxford, 1998, pp. 7–8; Rudolf B. Schlesinger, Hans W. Baade, Peter E. Herzog and Edward M. Wise, *Comparative Law: Cases, Text, Materials*, 6th ed., Foundation Press, New York, 1998, pp. 42–44.

¹⁷ See Zweigert and Kötz, 1998, pp. 34, 44, *supra* note 16:

The basic methodological principle of all comparative law is that of *functionality*. From this principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function. [...] The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one’s own legal system. [...] But when the process of comparison begins, each of the solutions must be freed from the context of its own system and, before evaluation can take place, set in the context of all the solutions from the other jurisdictions under investigation. Here too we must follow the principle of functionality: the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need.

¹⁸ Georg Schwarzenberger acknowledges that

the international lawyer must call for succour from his colleagues in the field of comparative law. They alone can provide him with authoritative studies on the scope and limits of the general principles recognised by civilised nations. Only on this basis will he then be able to determine which of these principles of public and private, adjective and substantive, law are applicable in the environment of present-day international society.

Georg Schwarzenberger, “Foreword” in Bin CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge, 1987, p. xii.

resemble contracts, international lawyers would do well to familiarise themselves with different municipal laws of contract.

One must bear in mind, however, that these links between the two disciplines are overshadowed by their differences.¹⁹ This contribution endeavours to highlight some of them and place them within the context of the ICC.²⁰

32.3.2. Comparative Law in Public International Law

For the purposes of our inquiry, a logical point of departure is the role of comparative law in general public international law. We shall consider three primary sources of public international law, namely treaties, custom and general principles of law.

32.3.2.1. Treaties

It is widely acknowledged that the law of treaties and the law of contract share many features. Thus, for instance, notions such as *pacta sunt servanda*,²¹ *rebus sic stantibus*²² and *pacta tertiis nec nocent prosunt*²³ appear in both bodies of law.

¹⁹ For instance, one fundamental distinction between comparative law and public international law lies in the nature and scope of their inquiry. International law is not only the name of the discipline, but also the name of the body of norms it studies. In contrast, comparative law is the name of the discipline yet there is no body of norms known as ‘comparative law’ in the sense that there is a body of norms known as ‘international law’. One commentator notes that comparative law is essentially a method. See Efstathios K. Banakas, “The Use of Comparative Law in Public International Law: Problems of Method”, in *Revue hellénique de droit international*, 1982/1983, vols. 35–36, p. 121. Also see Jean Pradel, *Droit pénal comparé*, Éditions Dalloz, Paris, 1995, pp. 3–4.

²⁰ Where relevant, this contribution refers to several leading ICTY cases. However, it is not intended to provide a comprehensive appraisal of the growing comparative law jurisprudence developed by the ICTY. While clearly pertinent, such an undertaking would require space and scope far beyond what is envisaged for this contribution.

²¹ See CHENG, 1987, pp. 112–14, *supra* note 18. This principle is now codified in Article 42 of the Vienna Convention on the Law of Treaties, 23 May 1969 (<http://www.legal-tools.org/doc/6bfcd4/>).

²² *Ibid.*, pp. 113, 118–19; now codified in Article 62 of the Vienna Convention on the Law of Treaties.

²³ See Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law*, 9th ed., Longman, London, 1992, p. 1260, §626, especially fn. 3; Schlesinger *et al.*, 1998, pp. 43–44, *supra* note 16; now codified in Articles 34–38 of the Vienna Convention on the Law of Treaties.

However, the law of treaties has a long history of its own. It has been the subject of extensive and detailed codification²⁴ and is undergoing a period of rapid development.²⁵ It is rare today that a survey of municipal laws of contract is necessary to elucidate a particular rule of the law of treaties or to fill a gap therein. Whether codifying custom or devising a new rule in this area, the International Law Commission has mostly focused on the conduct and transactions of states *inter se*.

32.3.2.2. Custom

A customary rule of public international law exists only if the relevant state practice is accompanied by the requisite *opinio juris*. The latter requires, in turn, the demonstration that states consider their practice to be a matter of law and not one of discretion, expediency, courtesy, habit and so on. Such a belief crucially separates custom from mere usage.²⁶

Arguably, the manner in which legislators and judges deal with a given issue may constitute the practice of their respective states. Insofar as this is the case, comparative law could lend itself to the determination of state practice. Comparative lawyers would know not only where to look but also what to make of their findings.

Could comparative law also help determine the existence or absence of *opinio juris*? Nothing in the discipline's methodology suggests that all inquiries must end where a particular solution – or no particular solution, as the case may be – is found in a legal system. On the contrary, in principle, comparative law seems fully prepared to go beyond the

²⁴ See, for example, the Vienna Convention on the Law of Treaties; United Nations, Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 21 March 1986 (<http://www.legal-tools.org/doc/760ef5/>); and United Nations, Vienna Convention on Succession of States in respect of Treaties, 23 August 1978 (<http://www.legal-tools.org/doc/bd50e3/>).

²⁵ In 1994 the International Law Commission began its work on reservations to treaties under the special rapporteur Alain Pellet.

²⁶ See, for example, Permanent Court of International Justice, The Case of the S.S. "Lotus", in Publications of the Permanent Court of International Justice, Series A, no. 10, 7 September 1927, p. 28; International Court of Justice, Asylum Case (Colombia/Peru), Reports of Judgments, Advisory Opinions and Orders, Judgment, 20 November 1950, p. 277; International Court of Justice, North Sea Continental Shelf (Federal Republic of Germany/Denmark/Netherlands), Reports of Judgments, Advisory Opinions and Orders, Judgment, 20 February 1969, p. 44; International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Reports of Judgments, Advisory Opinions and Orders, Judgment, 27 June 1986, p. 109.

whats and into the whys of the matter.²⁷ At the same time, however, the whys for comparative lawyers may not necessarily be the same as the whys for international lawyers concerned with the *opinio juris*. The latter involves the normative aspect of the reason for which a legal system adopts a particular solution to a particular problem. With its functional orientation, comparative law research would gravitate towards explanations that are not normative. It would ask, for example, whether the legal system considers a particular solution ‘suitable’, ‘effective’, ‘fair’ and so on – in other words, essentially a matter of prudence – rather than whether the system considers it a right or duty under international law. Alternatively, comparative law might explain a legal system’s choice of solutions anthropologically. The system’s choice may thus be a product of the legal tradition or family to which it belongs, or a consequence of some peculiar historical experience it has.

32.3.2.3. General Principles of Law

The expression “general principles of law recognised by civilised nations” was first inserted into Article 38 of the Statute of the Permanent Court of International Justice (‘PCIJ’). The drafting history reveals that its insertion was intended, *inter alia*, to minimise the prospect of *non liquet*.²⁸ This provision survived into Article 38(1)(c) of the Statute of the International Court of Justice (‘ICJ’), the PCIJ’s successor. In their rulings, the two Courts have relied only sparingly on general principles of law.²⁹ When they did rely on this source, they did so more on the strength of intuition or certain presuppositions about a legal order than on the basis of empirical research and analysis. Typically, those propositions declared to constitute general principles of law are broad and imprecise – for exam-

²⁷ See Zweigert and Kötz, 1998, pp. 35, 44, *supra* note 16:

It is only when one has roamed through the entire foreign legal system without avail, asking a local lawyer as a last resort, that one can safely conclude that it really does not have a solution to the problem. This hardly ever happens, but even if it does, that is no reason to terminate one’s comparative study. To ask *why* a foreign system has not felt the need to produce a legal solution for a particular problem may lead to interesting conclusions about it, or about one’s own law. [...] If we find that different countries meet the same need in different ways, we must ask why.

²⁸ See CHENG, 1987, pp. 1–22, *supra* note 18.

²⁹ See Jennings and Watts, 1992, pp. 37–38 §12, *supra* note 23.

ple, that “any breach of an engagement involves an obligation to make reparation”³⁰ – so much so that they border on being bland truisms.³¹

Comparative lawyers are aware of this problem. Some have sought to overcome it by suggesting that the expression “general principles of law” might be construed to mean “best practice”.³² Thus, international lawyers would sift through municipal solutions not only to find their similarities but also – and more importantly – to weigh their merits and select one that is superior to all others or otherwise most suitable as the rule of public international law on the matter. This is an interesting proposal. It is characteristic of comparative law, a programmatic discipline founded in its present form in 1900 to “unify” or “harmonise” the laws of different jurisdictions.³³ The best practice approach makes eminent sense to comparative lawyers anxious to share and learn from other systems’ experience. It may be doubted, however, whether this would be quite the same for international lawyers, at least as the treatment of general principles of law as a source of public international law is concerned.

Let us imagine here a team of one international lawyer and one comparative lawyer. Their task is to identify the general principle of law on a particular issue. They launch a survey of numerous municipal jurisdictions, constantly asking the question: is there any similarity or difference among these systems in the manner in which they approach the is-

³⁰ Permanent Court of International Justice, *Chorzów Factory*, in Publications of the Permanent Court of International Justice, Series A, no. 17, 13 September 1928, p. 29.

³¹ See CHENG, 1987, pp. 24–26, 397–99, *supra* note 18; Jennings and Watts, 1992, pp. 37–38 §12, see *supra* note 23.

³² See, for example, Zweigert and Kötz, 1998, p. 8, *supra* note 16:

Now one of the aims of comparative law is to discover which solution of a problem is the best, and perhaps one could include as a “general principle of law” the solution of a particular problem which emerges from a proper evaluation of the material under comparison as being the best. To do this would avoid reducing the valuable notion of “general principles of law” to a mere minimum standard, and could gradually lead us to accept progressive solutions as being examples of such general principles.

³³ *Ibid.*, pp. 2–4, 58–62. Other standard goals of contemporary comparative law include knowledge of other systems and better understanding of one’s own system, as well as practical purposes such as application of foreign law in one’s own jurisdiction and interpretation and modification of one’s own law. See Pradel, 1995, pp. 10–13, *supra* note 19; Zweigert and Kötz, 1998, pp. 15–31, *supra* note 16; Schlesinger *et al.*, 1998, pp. 2–52, *supra* note 16.

sue? Suppose now that the two researchers detect a noticeable pattern. To the comparative lawyer, this would mean that there is already some harmonisation or incidental convergence of solutions, that it is a solution worthy of consideration for adoption by those legal systems that have not done so. Of the same pattern, the international lawyer might say that it embodies the general principle of law and, accordingly, the rule of public international law, on the matter.

What if there is no such pattern or if there is one but that is weak? Undeterred, the comparative lawyer might very well go on to discuss the pros and cons of each solution, identify the best practice and advocate its adoption by the other systems. He or she might even devise a solution superior to all existing ones and advocate its adoption. In contrast, the international lawyer would simply conclude that there is no relevant general principle of law. It would be odd for him or her to say that the general principle of law, and hence the rule of public international law, consisted in the “best” of these disparate municipal solutions.³⁴

It may be that the question that guided their inquiry was poorly formulated to begin with. This would be the case, for instance, where the question is phrased in such a way that it compels dichotomic answers.³⁵ Instead, it might be formulated so that it absorbs specific differences and

³⁴ In this connection, see ICTY, *Prosecutor v. Dražen Erdemović*, Appeals Chamber, Joint Separate Opinion of Judge McDonald and Judge Vohrah, IT-96-22-A, 7 October 1997, paras. 32–90 (‘Erdemović Appeals Joint Separate Opinion’) (<http://www.legal-tools.org/doc/f91d89/>). One issue that confronted the *Erdemović* Appeals Chamber was whether, under international law, duress affords a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent persons. Having concluded that there was no rule of customary international law on the matter (see *ibid.*, para. 55), the Chamber’s majority examined, without success, a large number of municipal criminal justice systems in search of a general principle of law recognised by civilised nations (see *ibid.*, paras. 67, 72). The majority based its final decision partially on policy considerations (see *ibid.*, paras. 75–78). The ruling coincided with the pattern discernible among common law jurisdictions – namely, that duress is inadmissible as a justification for the killing of innocent persons. While the impression is inescapable that it was influenced by common law thinking (see *ibid.*, paras. 73–87), nowhere in the decision was it suggested that the majority ruled thus because the common law solution was somehow the “best” or “superior” to the civil law solution.

³⁵ For example, consider the question – does this legal system recognise duress as a complete defence to the killing of innocents? – yielding affirmative responses in 60 per cent and negative responses in 40 per cent of the municipal legal systems surveyed.

generates overall consensus.³⁶ Consequently, the comparative lawyer and the international lawyer might reach an agreement.

There are two problems, however, with this latter approach. One problem is for the international lawyer. With questions broad enough and answers uniform enough to produce a general principle of law, he or she would come full circle to where they started – namely, the principle being blandly truistic. The other is for the comparative lawyer. In effect, this type of inquiry would amount to comparing the largely similar end result that the different legal systems seek to achieve, rather than the particular means or “solutions” through which they seek to achieve it.³⁷

32.3.3. Comparative Law in International Criminal Law

It was noted earlier that international criminal law is still in an early stage of development. The resulting paucity of conventional and customary norms in this field means that, from time to time, international criminal law must look to general principles of law for the elucidation of its rules.³⁸ Yet criminal law and procedure are among those areas of municipal law that are heavily entrenched in the idiosyncrasies of the value system, history, institutional set-up and the like that lie underneath.³⁹ Seen as the last bastions of sovereignty, municipal criminal law and procedure have remained remarkably insular and resistant to convergent forces despite the proliferation of interstate judicial co-operation regimes regarding

³⁶ For example, consider the question – how does this legal system weigh the imminent threat to the life of the accused *vis-à-vis* the severity of the evil done? – yielding almost uniform responses that the more severe the evil, the less weighty the threat. Interestingly, the majority in the *Erdemović* Appeals Chamber did make a finding that “it is, in our view, a general principle of law recognised by civilised nations that an accused person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress. [...] This alleviation of blameworthiness is manifest in the different rules with differing content in the principal legal systems of the world as the above survey reveals”. *Erdemović Appeals Joint Separate Opinion*, para. 66, see *supra* note 34.

³⁷ See, for example, Zweigert and Kötz, 1998, pp. 34, 39, 40, 44, 45, *supra* note 16.

³⁸ The fact remains however that international criminal law is a branch of public international law. It seems unhelpful to suggest that international criminal law might have a set of sources distinct from that of public international law. See, for example, Margaret McAuliffe deGuzman, “Article 21: Applicable Law”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos, Baden-Baden, 1999, p. 438, margin 6.

³⁹ See Pradel, 1995, pp. 9–10, *supra* note 19.

transnational crimes.⁴⁰ Thus, in international criminal law, the aforementioned difficulties of comparative law research are bound to become all the more acute.

Certain human conduct such as unlawful homicide is so similar in its manifestation and so universal in its condemnation that little would differ from one legal system to another in the manner in which it is treated. The same would be true of certain precepts of criminal justice. Examples include the distinction between tortious and criminal acts, complete and inchoate crimes, and principal and accomplice liability; the interplay between offences and defences; and the principle that the penalty should reflect the gravity of the crime and the culpability of the offender. It is another matter, however, where the different legal systems actually draw these distinctions,⁴¹ how they determine the reach and scope of particular defences⁴² or in what way they stipulate penalties in relation to crimes.⁴³

Nor would the difficulties diminish in criminal procedure and evidence. Here, too, some basic principles of criminal justice, such as *habeas corpus* and the accused's fair trial rights,⁴⁴ would be acknowledged and incorporated in most legal systems. However, some of these principles are

⁴⁰ For instance, the double criminality requirement in the international law of extradition is markedly "functionalist". The standard requirement is only one of "substantial similarity" between the crime under the law of the state requesting extradition and the crime under the law of the state considering extradition. Similarly, a growing number of multilateral treaties are concluded whereby contracting parties undertake to criminalise certain conduct and prosecute or extradite suspects. In most cases, however, it is left to the discretion of each contracting party to decide the particular manner in which it is to define the offences and to discharge other duties. In other words, there are common interests to be protected under each criminal justice system, but the ways in which they are to be protected may differ. Europe may present a notable exception in this regard, thanks to the clarifying and harmonising influence of its Convention and Court of Human Rights. See John Hatchard, Barbara Huber and Richard Vogler (eds.), *Comparative Criminal Procedure*, British Institute of International and Comparative Law, London, 1996, pp. 1, 11.

⁴¹ For example, can participants in a collective criminal activity who do not perpetrate the discrete crimes themselves be held as principals, or are they always accomplices?

⁴² For example, is duress a complete defence where the crime in question involves the killing of innocent persons? As noted earlier, this issue, at least under international criminal law, was decided in the negative by the ICTY Appeals Chamber in *Erdemović*.

⁴³ For example, is the capital punishment available for certain grave offences?

⁴⁴ See, for example, United Nations, General Assembly, International Covenant on Civil and Political Rights, 19 December 1966, Articles 9 and 14 ('ICCPR') (<http://www.legal-tools.org/doc/2838f3/>).

notoriously open textured.⁴⁵ The specific parameters and functions of many institutional details would be determined differently in different criminal justice systems.⁴⁶

32.3.4. Comparative Law within the Framework of the International Criminal Court

In its work, the ICC is to be guided by the Statute, the Elements of Crimes, and the Rules of Procedure and Evidence. Together, these instruments set up a virtually self-contained system of criminal justice. Articles 5–8 of the Statute, supplemented by the Elements of Crimes, equip the Court with a veritable penal code of its own, while the remainder of the Statute and the Rules of Procedure and Evidence supply an autonomous code of criminal procedure and evidence.⁴⁷ Their provisions are highly detailed and precise. There is a clear hierarchy of sources.⁴⁸ First with the three instruments – all requiring formal amendment procedures including approval by the Assembly of States Parties⁴⁹ – followed by the traditional sources of public international law including general principles of law.

This arrangement reflects the imperative that the ICC ensures maximum certainty in the law it applies and reduces to a minimum the need

⁴⁵ For example, a detention of what duration constitutes a “delay” within the meaning of Article 9(4) of the ICCPR? See, for example, Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* N.P. Engel, Kehl, 1993, p. 175, margin 37–180, 46.

⁴⁶ For example, it would be difficult to postulate a “general principle of law” on the prosecution’s duty to disclose exculpatory materials. This is a matter of great importance in adversarial systems, whereas the concept of disclosure in criminal proceedings would be foreign to some inquisitorial systems where *dossiers* (files) are used instead. It would likewise be difficult to postulate a “general principle of law” on the judges’ discretion to intervene during criminal proceedings.

⁴⁷ See Alain Pellet, “Applicable Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 1054–55.

⁴⁸ It has been suggested, however, that the manner in which Article 21 of the ICC Statute lists the applicable law lacks clarity; see *ibid.*, pp. 1051–84, and especially 1067–82. This lack of clarity may account for the confusion in some commentaries on the matter. See, for example, deGuzman, 1999, p. 439, margin 8–444, 20, *supra* note 38. ICC, Rome Statute of the International Criminal Court, 17 July 1998 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

⁴⁹ ICC Statute, Articles 121–122 for the Statute itself; Article 9 for the Elements of Crimes; and Article 51 for the Rules of Procedure and Evidence, see *supra* note 48.

for points of reference external to its immediate legal framework. One could agree that, in principle, such an imperative is only proper for any fair and credible administration of criminal justice.⁵⁰

Insofar as the ICC Statute is a multilateral treaty and the Rules of Procedure and Evidence a derivative instrument thereof, the law of treaties will apply in full to the Statute and *mutatis mutandis* to the Rules of Procedure and Evidence. Thus, in many cases, matters arising under the Statute and the Rules of Procedure and Evidence may be resolved essentially within the existing canons of treaty interpretation. (It is still possible that, once a particular conclusion has been reached, the Court will seek to confirm it by examining select legal systems where comparable provisions exist.⁵¹)

Significantly, the Statute already spells out in some detail many of the general principles of law which would have been suitable for elucidation with the help of comparative law.⁵² This inevitably diminishes the role of comparative law within the ICC framework, except where the

⁵⁰ This observation is to be contrasted with that of Pellet, 2002, pp. 1056–65, *supra* note 47. Pellet argues that the ICC Statute mirrors the mistrust among certain states (notably the United States) of the judges and the desire to curtail their discretion. In his view, however, judges at the ICTY have adapted precisely to the type of operational setting feared by these states. Moreover, according to Pellet, the particular rendition of *nullum crimen sine lege* that gave rise to the high degree of detail in the ICC Statute is at odds with the unique features of public international law. Pellet might be correct overall. However, both at the ICTY and the International Criminal Tribunal for Rwanda, criminal law judges have ruled or otherwise expressed their concerns that certain war crimes and crimes against humanity are impermissibly vague. See, for example, ICTY, *Prosecutor v. Mitar Vasiljević*, Trial Chamber, Judgment, IT-98-32-T, 29 November 2002, paras. 193–204 (<http://www.legal-tools.org/doc/8035f9/>); ICTY, *Prosecutor v. Milomir Stakić*, Trial Chamber, Decision on Rule 98bis Motion for Judgement of Acquittal, IT-97-24-T, 31 October 2002, para. 131 (‘Stakić Rule 98bis Decision’) (<http://www.legal-tools.org/doc/e8206e/>); ICTR, *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Trial Chamber, Judgment and Sentence, ICTR-96-10 and ICTR-96-17-T 21 February 2003, paras. 860–61 (<http://www.legal-tools.org/doc/9a9031/>). In the absence of clear guidance under international law, some ICTY judges sought to resolve perceived uncertainties by reference to policy considerations (see, for example, Erdemović Joint Separate Opinion, paras. 75–78, *supra* note 34), whereas others brought their own national perspectives into the ICTY jurisprudence (see, for example, Stakić Rule 98bis Decision, paras. 58 ff. *idem.*).

⁵¹ ICC Statute, Article 21(1)(c) states that the Court may apply, “as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime”, see *supra* note 48. See Pellet, 2002, p. 1075, *supra* note 47.

⁵² See, for example, ICC Statute, Articles 20, 22–33, 55, 66–67 and 101 as well as their elaboration in the relevant provisions of the RPE, *supra* note 48.

Statute contains residual provisions⁵³ or specifically envisages reliance on external authorities.⁵⁴ Furthermore, to this restricted environment one must add the discipline's methodological limits in international criminal law. In spite of the foregoing, it is likely that comparative law will gain currency at least in two circumstances. Thanks to its "best practice" and programmatic approach, comparative law will play a pivotal role when considering formal amendments to the Statute, the Elements of Crimes or the Rules of Procedure and Evidence and devising expedient solutions for situations not envisaged in the latter.⁵⁵

⁵³ See, for example, "other inhumane acts" as a crime against humanity under *ibid.*, Article 7(1)(k).

⁵⁴ See, for example, defences not enumerated under *ibid.*, Article 31(3).

⁵⁵ See *ibid.*, Article 51(3).

International Law Expertise

Susan R. Lamb*

33.1. Introduction

The prosecutor of the International Criminal Court ('ICC'), pursuant to Article 42 of the ICC Statute, has statutory authority over the management and administration of all resources of the Office of the Prosecutor. The management and administration of an office as complex and multi-faceted as the Office of the Prosecutor is doubtless a daunting and immense responsibility, due both to the sheer scale of the institution-building entailed and the lofty ideals and hopes which have been invested in these structures. Nevertheless, the plenary power set forth in Article 42 also confers upon the first ICC prosecutor an unparalleled and historic opportunity. As I hope to elaborate in these submissions, there is much to be gained from careful strategic planning at the outset of the Office of the Prosecutor's operation, given that the structures and ethos inculcated in these early phases of the Office's existence will to a large extent set indelible patterns for the duration of the institution's life. Thus, vision, creativity, energy and patient planning in this early phase will reap rich rewards in terms of setting in place an institutional culture of excellence, establishing virtuous and mutually reinforcing cycles of smooth functioning, success and legitimacy.

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Such features, always desirable in any complex international institution, are of even greater pertinence for the ICC, which is envisaged as a permanent feature of the international juridical landscape.

By way of background, I am, within the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia ('ICTY'), presently a P-4 legal adviser in international law for the Legal Advisory Section – a body which, for the most part, corresponds in function to that of the Legal Advisory and Policy Section as described in the budget for the first financial period of the Office of the Prosecutor at the ICC. Originally from New Zealand, I have served within the ICTY Legal Advisory Section since March 2000. Prior to joining the ICTY, my background was principally as an academic international lawyer (with post-graduate training at Oxford University). I have been associated with the ICTY since 1997 in various capacities: in the earlier years by way of an Office of the Prosecutor internship, field experience (exhumations in Bosnia and Herzegovina) and a year as an associate legal officer to Judge Antonio Cassese in Chambers. The observations in this memorandum are limited to those of relevance to the structure and functioning of the nascent ICC Office of the Prosecutor rather than any other organ of the Court.

The request for my input on general ICC Office of the Prosecutor issues suggested that I give particular focus in these submissions to the “legal training of staff, the monitoring of coherence in legal submissions and the requirements of expertise in international law”. I am delighted to do so. I will also address a number of other issues, principally concerning prosecutorial policy and strategy. These observations emanate both from the particular perspectives granted by my doctrinal foundation within public international law and my experiences of practice within the rather unique environment in which I work.

I am also a member of the informal expert consultative group on state co-operation, established by the ICC director of Common Services in January 2003, which has been requested to provide recommendations to the ICC prosecutor on means of enhancing state co-operation and augmenting early ICC Office of the Prosecutor investigative capacities. Due to my ongoing role in this group, these comments on general ICC Office of the Prosecutor questions will not, in the main, address in detail the myriad issues raised by this important area of ICC practice.

I have structured this response so as to highlight and elaborate issues that can be loosely grouped under the following categories:

1. Subject areas where international law expertise is indispensable for the ICC Office of the Prosecutor (that is, where the tasks in question could either not be accomplished at all or where the absence of such specialist input may result in deleterious outcomes for the Office).
2. Subject areas where the input of international lawyers would lead to greater coherence and efficiency within the ICC Office of the Prosecutor or where the input of international lawyers is useful for the unique perspective it offers.
3. General issues of policy and strategy which appear to me to be of crucial significance for particular consideration by the ICC prosecutor in the early phases of the ICC Office of the Prosecutor's evolution.

Several ICTY filings are referenced in this submission and are appended to it by way of annexes. These are designed to be illustrative rather than representative of the types of issues encompassed by the above categories. They are provided purely for reference: being prepared within the particular institutional setting of the ICTY, these documents in any case reflect the substantive law and constitutional structure of the ICTY which, while similar in certain respects to the ICC, are not identical. They are, nevertheless, examples of key international law issues that may arise also in the course of the ICC Office of the Prosecutor's work and whose resolution may require specialist international law expertise.

33.2. The Need for International Law Expertise within the ICC Office of the Prosecutor

The subject matter jurisdiction of the ICC, which is substantially similar to that of the ICTY, comprises offences that are generally unfamiliar to most national prosecutorial systems. Genocide, crimes against humanity and war crimes (punishable under Articles 6–8 of the ICC Statute), as well as certain modes of criminal responsibility and general principles of law in the ICC Statute, have their genesis within treaty and/or customary international law. Moreover, the ICC itself was created via a multilateral treaty, and complex interrelationships between it and other international organisations (in particular the United Nations Security Council) are envisaged in its Statute.

Given this foundation, the interpretation of the scope of the ICC's competence and elucidation of the elements and scope its subject matter

jurisdiction will require personnel familiar with the content of the relevant fields of international law. International law in this context refers to a range of disciplines and sub-specialties, including general international law, international humanitarian law, the law of international organisations and comparative law.

Aside from knowledge of the content of this corpus of law, familiarity with the processes and methodologies which underlie the functioning of the international legal order will also be a key element (see in particular the enumerated sources of law under Article 21 of the ICC Statute). Although the particular example it embodies (namely the customary international law status and scope of application – and hence chargeability – of the prohibition against attacks on civilians under the Protocols Additional to the four Geneva Conventions under the ICTY Statute) does not arise in the context of the ICC Statute (as Article 8(2)(b)(i) and Article 8(2)(e)(i) expressly enumerate this prohibition in both international and non-international armed conflicts respectively), Annex 8 (the prosecution’s interlocutory appeal response on jurisdiction, *Prosecutor v. Strugar*) provides an example of the type of analysis that will, in practice, require its drafters to be well-versed in the above concepts and processes unique to general international law.

Expertise in international law will be most vital for the nascent ICC Office of the Prosecutor with regard to jurisdictional matters, elucidation of elements of crime (from the charging level through to appellate submissions) and in ascertaining the scope of powers of the organisation. The Legal Advisory and Policy Section can and should be expected to give independent specialist legal advice and to undertake legal drafting in relation to the following matters, among others.

33.2.1. Jurisdictional Matters

From the seminal *Tadić (Jurisdiction)* decision and beyond, the ICTY’s Legal Advisory Section was indispensable in articulating the Office of the Prosecutor’s institutional position on matters involving complex and difficult issues of international law that go to the heart of the powers possessed by the prosecutor and the ICTY as a whole. The experience of the *ad hoc* tribunals thus underlines the importance of these functions and illustrates that there must be appropriate expertise to execute them from the outset of the work of the ICC Office of the Prosecutor, when precedents on jurisdiction will be set and internal standards will be established for the

prosecutor's action under, for example Articles 15(1)–(3), 17–19, 53 and 54. Although these functions are clearly most pressing in the early phases of the ICC Office of the Prosecutor's operation, challenges to jurisdiction have also frequently arisen during later phases of the ICTY's existence (see further, for example, Annex 8 and Annex 12).

Under the ICC Statute, in situations of referral, the litigation function in the early stages is limited to certain pre-trial questions, in particular admissibility proceedings, which should be closely co-ordinated with the Legal Advisory and Policy Section. If there is no referral, the emphasis is on the determination under Article 15(3) whether a reasonable basis exists to proceed with an investigation and subsequent admissibility proceedings. In both phases, the Prosecution Section should be assisted by the Legal Advisory and Policy Section.

The experience of the ICTY Office of the Prosecutor indicates the need for a systematic and structured approach to both preliminary examinations and investigations. Early ICTY investigations were frequently commenced in the Office of the Prosecutor without any articulated criteria for, or sophisticated analysis of, the requirements of proof for potential charges, appropriateness of particular targets, or criteria to delineate whether the facts at issue were of sufficient magnitude to justify the application of international criminal adjudication in the first place.

This approach may not pass muster within the context of admissibility proceedings under the ICC Statute and may create serious institutional consequences in a setting where the ICC Office of the Prosecutor can confidently expect to receive large quantities of information pertaining to various situations that may potentially form the basis for further examination. In general, the credibility of the Court will be built on the quality of its work from the outset of its existence. It must exercise due diligence within the parameters of Article 15 and avoid being seen as inoperative in the face of complaints. At the same time, it must set high standards in its dealings with sources of information relevant to Article 15(2) and the Trial Chamber, and create structures that are adequate to evaluate the appropriateness or otherwise of potential investigative scenarios.

A role which the ICC Legal Advisory and Policy Section should perform is guidance as to all required elements of proof for particular (potential) charges which appear to be *prima facie* indicated by the information available, which may then be used: 1) to guide preliminary examinations; and 2) to assist investigators and analysts in structuring subse-

quent investigations, and to ensure that collection plans and investigative strategies are orientated toward answering a key requirement of proof for an element of a charge. An example of an investigative outline, and a systematic breakdown of core questions that would need to be resolved in the context of a conduct of hostilities case, is provided in Annex 9 (*Prosecutor v. Strugar*).

The early feedback I have had from ICTY Office of the Prosecutor analysts and investigators indicates that this investigative template, while not in common usage within the Office, provided indispensable guidance to them in structuring investigations, creating investigative plans, identifying existing gaps and prioritising investigative efforts. The experience of the ICTY demonstrates the pressing need to ensure that all preliminary examinations and investigations, from the outset, be structured, focused and analytically driven. The experience of the ICTY Office of the Prosecutor provides many examples of the consequences of their lack. These include, but are not limited to, the selection by the ICTY of inappropriate targets for prosecution (or key accused not indicted at all), duplicative or overlapping trials, a failure to systematically exploit various sources of information simultaneously (for example, witness testimony in isolation from contemporaneously generated documents) leading to skewed perceptions of the truth, and subsequent flawed investigations and prosecutions and infelicitous charging strategies leading to misdirected investigations.

33.2.2. Scope of Powers of the Prosecutor and the International Criminal Court Generally

Like the ICTY Statute, the ICC Statute also stands in a particular relationship to the United Nations Security Council. For example, Article 13(b) provides that particular situations may be referred to the prosecutor by the Security Council acting under Chapter VII of the UN Charter; Article 16 of the ICC Statute contemplates Security Council requests for deferrals of investigations or prosecutions also pursuant to its enforcement powers. Within the ICTY Office of the Prosecutor context, too, the precise scope and effects of Security Council Chapter VII powers have also arisen, for example in the *Tadić (Jurisdiction)* decision and more recently in *Prosecutor v. Ojdanić*, where the defence sought to contest the ICTY's jurisdiction over the crimes in question (committed in Kosovo) on grounds that at the time they were committed, Kosovo was not a state and the Security Council accordingly lacked competence under Chapter VII in relation to it

(see Annex 12). Although it is unclear whether any such Security Council referrals or requests for deferrals will occur within the first budgetary period of the ICC, the evaluation of the scope and effect of such resolutions will almost certainly in time be required. Resolution of these and similar issues will require the specialist competence of the Legal Advisory and Policy Section.

Another example of crucial Legal Advisory and Policy Section involvement *vis-à-vis* the scope and powers of the ICC Office of the Prosecutor and ICC concerns the nature and scope state obligations under the ICC Statute (for example, concerning the transfer of persons to the Court) and the scope of its enforcement capacities, whether pre-existing under the ICC Statute or developed subsequently. In addition, the effects of the exercise by the ICC of its jurisdiction over persons alleged to have been brought before the ICC via an irregular process may also in time require resolution. For similar examples from the ICTY context, see Annex 3 (preliminary motions concerning the scope of the obligation of States to transfer indictees to The Hague, *Prosecutor v. Bobetko*) and Annex 11 (interlocutory appeal concerning the legality of arrest, the scope of powers of peacekeeping forces effecting it and the effects of alleged prior violations of the accused's rights, *Prosecutor v. Nikolić*).

33.2.3. Elements of Offences

A further core function of the Legal Advisory and Policy Section should be the elucidation of elements of offences, both at the charging phase (as highlighted above), through trial and pre-trial submissions and eventual appeals. Within the ICTY Office of the Prosecutor, Legal Advisory Section members have frequently authored briefs on substantive points of international law at the pre-trial, trial and appellate stages of proceedings and have provided supporting oral advocacy where required (see, for example, Annex 2, excerpt from Office of the Prosecutor respondent brief on appeal in *Prosecutor v. Blaškić*, crimes against humanity).

Within the ICTY Office of the Prosecutor, the Legal Advisory Section has also been responsible for creating and maintaining a comprehensive analysis of the elements of all substantive offences within the ICTY's subject matter jurisdiction, which serves as a useful guide to all legal staff in the Prosecutions Division. It is recommended that this practice be adopted by the ICC Legal Advisory and Policy Section and that this be

enhanced to include a comprehensive database on all pertinent legal sources, including analysis of Rules of Procedure and Evidence.

33.2.4. Specialist Subject Areas

A number of elements of offences will be familiar to domestic prosecutors; however, there is a particular subset of elements that will be completely alien to lawyers whose expertise is within domestic prosecutions. An example of this is the requirement that an armed conflict be of an international character, in other words that the armed conflict in question took place between two or more states (a requirement for the prosecution of grave breaches under Article 8(2)(a) of the ICC Statute and for the other offences enumerated in Article 8(2)(b)). Experience has shown that a determination of as to whether or not an entity meets the criteria of statehood, especially in the context of the break-up of states or attempts at secession, or the question of when a conflict which is *prima facie* internal in character may be said to have become internationalised due to the involvement of another state, are complex issues of international law, requiring specialist input. (See, for example, Annex 10 (analysis of the date at which the Republic of Croatia can be said to have acquired international legal personality, *Prosecutor v. Milošević*)).

33.2.3. Harmonisation and Standard Setting

Another key role of the Legal Advisory and Policy Section is in terms of standard setting and harmonisation of legal submissions. It is a task that it can perform due to its overview of all ongoing cases and investigations and due to its distance from the minutiae of day-to-day issues that arise in particular cases.

Moreover, certain legal positions ought, from the outset, be harmonised and made the subject of standard-form submissions (consistently updated and modified, naturally, to reflect jurisprudential developments). This enables the ICC Office of the Prosecutor to ensure consistency in legal submissions, a uniform quality of drafting, efficiency and rapid familiarisation for newly arriving staff. (For an illustration of template-style legal submissions, see Annex 1.)

Although this function can most readily be performed in relation to the legal submissions section of pre-trial and closing briefs, it is in principle of utility to many different functions in the ICC Office of the Prosecu-

tor. It would be desirable, for instance, were the Legal Advisory and Policy Section to produce many other types of documents to ensure that they were in place prior to the commencement of the ICC's first investigation or prosecution, such as guidelines and policies relevant to the operation of the Office of the Prosecutor, such as codes of conduct, admissibility submissions, and templates and policies governing practices such as arrests, transfers, searches and seizures. (For examples of templates used in the ICTY context for arrests and searches and seizures, see Annex 7).

33.2.5. Policy Input

The practice of the ICTY demonstrates that Legal Advisory and Policy Section staff are useful – and occasionally invaluable – sources of policy advice, whether on macro-issues pertaining to jurisdiction and admissibility issues (above) or concerning the prosecutor's exercise of duties in discrete cases. The prosecutor and other senior staff must, in the course of their duties, also exercise many ancillary functions such as speeches to governmental and inter-governmental bodies. By virtue of their training and independence from the day-to-day demands of particular trials or investigations, international lawyers are often well placed to evaluate overall institutional interests and adept at these tasks, and generally approach the functions of the Office of the Prosecutor from a systematic and process-based perspective. (For two examples of specific policy advice requested by the ICTY prosecutor and a speech prepared for her, see Annexes 5 and 6).

33.2.6. Training

The Legal Advisory and Policy Section should also assist in meeting the responsibility for the training of all new members of the ICC Office of the Prosecutor, and, to this end, may be entrusted with the establishment and maintenance of an electronic legal decisions and submissions database from the commencement of the Office of the Prosecutor's operations. The Legal Advisory Section may also oversee the professional development of junior international lawyers, through a structured and well-managed internship programme.

In-house legal training increases overall institutional knowledge and ensures a baseline competence on international law issues for all incumbent Office of the Prosecutor staff. The Legal Advisory and Policy Sec-

tion's role in training so as to ensure baseline competence does not, of course, dilute the need for specialist competence, particularly in relation to the above issues requiring particular international law expertise. An example of a handout used in ICTY Office of the Prosecutor legal training is contained in Annex 4 (PowerPoint presentation on command responsibility).

33.2.7. Structure of International Law Input within the ICC Office of the Prosecutor

Institutionally, it is possible to envisage many different means of structuring international law input within the ICC Office of the Prosecutor. However, the establishment of separate Legal Advisory and Policy Section, as opposed, for example, to the diffusion of international lawyers across many different investigations and trials, is in my view the preferable approach. First, this leads to efficiencies through the creation of economies of scale, leading to the cross-fertilisation of ideas among the Legal Advisory and Policy Section staff, which in turn facilitates its co-ordination role, particularly on cross-cutting issues. Second, it preserves the independence of the advice given, by making it easier for international lawyers to resist the subtle pressures that arise within particular trials or investigations which may demand that may unduly distort analytical work toward a prevailing investigative or prosecutorial theory.

The experience of the ICTY demonstrates that it is important for the ICC prosecutor to reflect the distinctiveness of the Legal Advisory and Policy Section's international law function and to provide clear institutional support for it (for instance, by ensuring that the Prosecution Division consults with it on issues within its core competence and by ensuring that staffing levels over time remain at a level which enables it to carry out these core tasks).

33.3. Conclusion

The role of international lawyers, particularly in the early days of the ICC Office of the Prosecutor's operation, will be essential. Jurisdictional questions that are likely to arise in this initial phase, such as initial admissibility proceedings, will have a critical impact in delineating the scope of the prosecutor's powers and will set key parameters for future action. International law input, and a sufficient number of qualified and experienced

staff able to provide it, is thus essential in order to ensure appropriate international law positions are adopted and maintained.

International lawyers will also be indispensable in identifying criteria to guide *proprio motu* investigations by the prosecutor under Article 15(1)–(3) and standard setting with regard to all investigations, as well as the standardising of all legal submissions that can confidently be expected to become routine parts of the ICC Office of the Prosecutor’s work, such as the legal submissions section of pre-trial and closing briefs, and criteria for determining admissibility. International lawyers can also provide legal training for incumbent lawyers and non-legal staff, thus providing baseline competence of all staff on these core issues from the outset. Comprehensive electronic databases of all official ICC Office of the Prosecutor documentation, filings and memoranda should be developed and maintained from the outset.

More generally, the ICTY Office of the Prosecutor provides in significant respects an indispensable source of early lessons for the prosecution of serious violations of international humanitarian law, for the benefit of the ICC Office of the Prosecutor. As is likely to confront the ICC Office of the Prosecutor, the fledgling ICTY Office of the Prosecutor commenced its early investigations within an ongoing armed conflict, with limited autonomous enforcement capacities and a world community largely sceptical of its prospects of success. To some extent, and in the early phases at least, setbacks and reverses were perhaps inevitable. It is to the ICTY’s credit that these challenges were confronted head-on, and its institutional capacities gradually extended through the forging of *ad hoc* arrangements with bodies willing and able to take on core enforcement functions, and a willingness of the Office of the Prosecutor itself to robustly reinforce these initiatives in its legal submissions. Many of these features may be adapted for use by the ICC Office of the Prosecutor with regard to its early investigative steps: a subject developed more fully during the ongoing expert consultations on state co-operation referenced earlier.

At the same time, the experience of the ICTY Office of the Prosecutor contains many cautionary tales for the new ICC Office of the Prosecutor, particularly given its expectations of permanence and (in aspiration at least) universal jurisdictional reach. Early pressures upon the ICTY Office of the Prosecutor to achieve visible results were too readily acceded to, resulting in misguided decisions on initial target selection and investiga-

tive strategies. This set in train certain core investigative features which account for much of the organisation's present staffing levels and hierarchical organisation: an undue focus upon primary fact-gathering (at the expense of the organisation, synthesis and evaluation of the vast swathes of material collected), the uneven or non-existent identification and pursuit of potential linkage evidence, and insufficient attention to the development of a viable target selection strategy. The cost of early lack of attention to early investigative and prosecutorial strategies can be counted in cost over-runs, demoralisation and attrition of dedicated staff, protracted prosecutions and, in a few cases, weak jurisprudential outcomes. It has also been to the detriment of the ICTY Office of the Prosecutor's overall institutional legitimacy and may erode the core historical legacy left by the ICTY. In any event, the ICC, which will be expected to simultaneously conduct multiple investigations within vastly different contexts and countries, and whose most precious asset (particularly in its early years) will be its institutional legitimacy, will instead have to develop plausible models to enable a rapid assessment of the viability of several competing potential investigations, in the first instance, and efficient means of case preparation thereafter. Although the ICC Office of the Prosecutor cannot afford to appear inactive when faced with complaints, it is still more vitally important, for the long-term viability of the process of international criminal adjudication, for the ICC Office of the Prosecutor's early choices to be wise ones.

In addition, the inner workings of the ICTY Office of the Prosecutor often resisted institutional change as early structures ceased to serve the organisation as its needs became more complex and variegated. Many of these failings emanated from an absence of vision from the outset and the organisation appeared to be permeated by a spirit of *ad hoc*-ism. This manifested itself in a whole host of matters, from data management to the lack of co-ordinated and focused investigations to duplicative and unwieldy prosecutions. Structures established (in particular those pertaining to data management), while inefficient, nevertheless became embedded, ensuring that large numbers of personnel were continually necessary to shore them up. Institutional self-criticisms by way of lessons learned were slow to evolve. Entering its so-called completion strategy, there is a perception, at least among a small cadre of ICTY staff interested in the broader process of international criminal adjudication, that structured, properly planned and organised prosecutions and investigations are im-

perative, but that existing ICTY Office of the Prosecutor structures are too unwieldy and unresponsive to bring this about. This may have been mitigated by the inculcation, at the outset, of agreed, transparent investigative criteria, obligations of consultation across a broad basis of expertise prior to decisions being taken, widely disseminated and understood standard operating procedures, and an institutional culture of excellence and accountability. Nine years into its operations, with entrenched structures and the inexorable momentum created by a heavy caseload, this task is rendered immensely more difficult. Therein lies both the challenge for the ICC Office of the Prosecutor in its early days, but also an immense opportunity to revolutionise the practice of international criminal prosecution.

Ideally, the nascent ICC Office of the Prosecutor will capitalise on the ICTY's successes and learn from its failures, thus distilling best practices and avoiding the institutional shortcomings of its predecessor. These observations, based on six years of institutional affiliation with the ICTY, are offered in a constructive spirit. I hope that in a modest way they can be of assistance to the incumbent ICC prosecutor within the immense and exceptionally important tasks that lie ahead.

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- Annex 6* Policy advice: commentary on state co-operation legislation; advice with regard to the exercise of primacy by the ICTY.
- Annex 7* Arrest warrant and search warrant templates.

* These annexes are not reproduced in this volume.

- Annex 8* Interlocutory appeal response on jurisdiction (customary international law status of the Additional Protocols to the Geneva Conventions) (*Prosecutor v. Strugar*).
- Annex 9* Strategic (investigative) plan and elements chart (*Prosecutor v. Strugar*).
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The Establishment and Operation of the Office of the Prosecutor

Sir Geoffrey Nice*

At the International Criminal Tribunal for the former Yugoslavia ('ICTY'), staff members in the Prosecutor's office from specific backgrounds (for example, analysts, researchers and so on) were put into cadres along with people with similar expertise. I believe this concept has to be challenged. The prosecutor should focus on the creation of multidisciplinary teams under strong leadership. Thus, the authority (chain of command) should run 'vertically' within teams rather than within sections. And those teams should themselves be component parts of an overall office responding 'vertically' to top management so that a comprehensive and coherent conception of the history of and actions within the conflict could form, be challenged and adjusted over time. To an extent that happened in the earlier days of the ICTY where, under the leadership of Louise Arbour, important issues such as the issuing of indictments were subject to office-wide and internally open review.

The International Criminal Court ('ICC'), just like the ICTY, will experience problems in recruiting the right people for the type of work required. There is no pool of international criminal lawyers or investigators that can be drawn upon. This fact stresses the importance of the willingness to reconsider a decision to hire somebody as soon as it becomes ap-

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parent that he or she is not suitable for the job, that is, it will be harmful if the notion exists that a job with ICC is a job for life! Better that new recruits should have to *prove* that they were correctly identified as good team members and that they may have to be let go if they are not absolutely first class. It must be crucial to create a strong team spirit of appropriately motivated and directed individuals at this early stage. From this the new culture of the ICC Office of the Prosecutor will develop.

Further to the previous point, it should be highlighted to prospective applicants for legal positions within the Office of the Prosecutor that classic advocacy will only be a minor part of their job – the role advocacy plays in international settings is even less significant than in domestic proceedings. Applicants have to be prepared to undertake other tasks, such as legal research, investigations, management and other in-house types of work.

It is of utmost importance to take the profit aspect out of field missions. Rather than providing daily subsistence allowance, investigators should be reimbursed on a receipt basis. This will prevent waste of money and personal resources, and lead to missions being planned more carefully and focused on the most important issues. An illustration of the problems encountered in this respect at the ICTY is the fact that 1,300 witness statements were taken in relation to the Kosovo conflict, a number that no one could realistically expect to be used in Court. Where a mission is planned because of the profit it may bring to investigators, the waste is enormous. First, there are the costs of an unnecessary mission itself; then the costs of those on mission not being available to do other more pressing work; and finally, the unnecessary mission generates material (to justify the mission at all) that has to be worked on – a further waste of resources.

At the outset of an investigation, or even at a preliminary examination, the Office of the Prosecutor should strive to get in touch with friendly intelligence services and academic experts specialised in the region and conflict, with a view to finding out what really occurred and, just as importantly, to giving the investigators an idea of the right approaches to take during an investigation. This would save resources and guide investigators in their task.

A policy of full disclosure would be desirable. One way to implement it would be the establishment of a comprehensive *dossier* – provided

that the judges read and review it themselves and supervise its maintenance and updating.

Thoughts on the Organisation of the ICC Office of the Prosecutor

James K. Stewart*

35.1. Mandate

This chapter is not an exercise in statutory interpretation, so no attempt is made to analyse the jurisdiction of the International Criminal Court ('ICC') or to examine the particular provisions of the Statute or the Rules of Procedure and Evidence as they relate to the mandate of the Office of the Prosecutor. However, in order for any observations about the organisation of a prosecution office to have relevance, there should be some acknowledgement of the mandate that the organisation and staffing of the office must serve. In significant ways, this mandate and the procedural features pertaining to its accomplishment are more complex at the ICC than those found in the *ad hoc* tribunals, namely the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR').

Expressed in the simplest terms, the mandate of the Office of the Prosecutor is to *investigate* and *prosecute*. However, the provisions of the ICC Statute appear to contemplate that this work will be accomplished in three phases: 1) a determination whether there is a basis to open an investigation; 2) the investigation; and 3) the prosecution. At various stages of this three-step process there is provision for judicial involvement, for example, at the point where the prosecutor determines that there is a basis to commence an investigation. In addition, there are potentially complex issues of jurisdiction, which the prosecutor will have to deal with, since

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cases can come to the Office of the Prosecutor in several ways, for example, at the initiative of the prosecutor or by referral from a state party or from the Security Council. The Office of the Prosecutor would have to be organised and staffed to deal with these complex processes competently, efficiently, and in a manner than enhances the prosecutor's reputation for independence and fairness.

The Office of the Prosecutor will also have to be organised and staffed in order to manage a complex set of relationships. The ICC Statute appears to contemplate that the prosecutor will enter into relationships with states in order to facilitate investigations on the territories of states. The ICC, and thus necessarily the Office of the Prosecutor, will have a relationship with the United Nations Security Council. Within the ICC, there will be a constant interaction between the judiciary and the Office of the Prosecutor, given the necessary involvement of the judiciary, whether a single judge, Pre-Trial Chamber or Trial Chamber, at the investigation and prosecution stages. The Office of the Prosecutor will have an important relationship with the Registry on a multitude of administrative and policy issues. Good public relations and clear communications with the wider world will also serve to facilitate Office of the Prosecutor operations and enhance the reputation of the ICC itself. Thus, a complex set of diplomatic, judicial, prosecutorial, administrative and communications relationships will have to be effectively handled, and the list is far from exhaustive.

It is with the mandate briefly described above and the complex relationships just evoked in mind that the observations below, concerning the organisation of the Office of the Prosecutor, are made.

35.2. Key Characteristics of the Organisation

In my view, the essence of the organisation of the ICC Office of the Prosecutor can be expressed in three words: *strength*, *flexibility* and *continuity*. It is with these three key concepts in mind that the approach to the organisation of the Office of the Prosecutor should be made.

Strength comprehends the competence of staff, the depth of personnel to perform varied functions, independence and credibility.

Flexibility encompasses the ability to meet different challenges, to operate in varied environments, to think outside the box and to adopt innovative ways of operating on the ground and in court.

Continuity means clear lines of command and responsibility, accountability, the establishment of methods of operation and the need to inculcate them, the control of evidence collection and storage, and the maintenance of user-friendly databases.

The concepts just described cover a wide spectrum of activities and relationships. In relation to any given task, the prosecutor should have confidence that he or she has staff who are competent to handle the matter in a fair and independent way; who have the ability to adapt to specific operational challenges, and to resolve issues in an imaginative, effective way; and who understand their responsibilities and to whom they are accountable. Structures should be simple, clear, logical, and exist to enhance the ability of staff to achieve their objectives. Responsibilities should be clearly defined and goals plainly set. Staff must be accountable for their work and reporting lines should be obvious.

35.3. Basic Units

The fundamental organisational units of the Office of the Prosecutor are the *investigation* and *prosecution* teams. While these units may figure on an organisational chart of the Office of the Prosecutor, they are, in reality, informal units, flexibly formed, in order to meet the particular exigencies of a case. They may have the appearance of permanence, given the length of time and sustained effort necessary to conduct an investigation and prosecution, but the individual elements composing an investigation or prosecution team can be reallocated or reorganised, as different matters arise to engage the prosecutor's jurisdiction.

A trial team, for example, is a multidisciplinary unit, composed of counsel skilled in courtroom advocacy and the management and preparation of complex cases, interpreters, investigative support staff, logistical support staff and other services. Within the investigative support elements, to choose but one example, there will be different skill sets, for instance, military analysis, criminal analysis or field investigative expertise. Investigation teams will have a multidisciplinary character too.

Should the basic Office of the Prosecutor units, namely the investigation and trial teams, be the only units, for organisational and management purposes, within the Office of the Prosecutor? In my view, they should not. Indeed, there is no reason for them to be. As fundamental and powerful a role as the investigation and trial teams play within the Office

of the Prosecutor, and as tightly knit and cohesive as they may become, given the intensity of their undertakings, they are created to achieve specific objectives, namely the investigation of allegations of criminal conduct or the prosecution of persons accused of crimes. There are other organisational or management functions to be served in the Office of the Prosecutor. However, even these functions should be designed to enhance the ability of the teams to accomplish their objectives. An explanation follows below.

35.4. Professional Development, Performance Evaluation, and the Concept of the ‘Home Room’

While the prosecution teams or investigation teams are focused upon their tasks, the individuals making up those teams have other concerns. What training, to enhance their professional development, will they receive? Who will evaluate their performance? Is there any forum in which they can discuss, with professionals of similar disciplines, issues they encounter in their work? Not all of these concerns can be met within the context of a trial team or investigation team created to deal with a particular case.

Performance evaluation should be done by managers, who have the professional background to enable them to evaluate the competencies of the particular staff member whose performance they are assessing. Thus, a manager with investigative experience should be evaluating the performance of investigators. Managers with legal experience should be evaluating the performance of legal professionals. This will enhance confidence in the performance evaluation system and will ensure a fair and accurate assessment of staff performance.

Training can, and should, be interdisciplinary, but some training must be focused on the particular skill sets that staff members ought to have. In other words, while investigators may play a role in advocacy training, by taking the part of witnesses during advocacy exercises, the focus of the skill training is on advocacy and it has counsel as its primary beneficiaries. Managers, who understand the professional development needs of the staff members for whom they are responsible, are in the best position to design or develop training programmes suited to those needs.

All of this comes down to the concept of the ‘home room’, for lack of a better label. This is the notion of grouping staff members of similar professional background into sections or units under competent manage-

ment. Such a disposition makes the most sense in relation to the areas of special expertise, for example, military or political analysis, or the law of armed conflict, where specialists in the field easily find common ground. Such a method of organisation can apply to any of the groups from which the investigative or trial teams are drawn. From the home room, therefore, individual staff members go out to work on particular teams. They then return to the home room for the purposes of professional development, discussion of common issues and performance evaluation.

The organisational concept described above worked, more or less, in the *ad hoc* tribunals, and it can be adapted to the particular needs of other prosecution services for core international crimes. To take a single example: suppose the lawyers, having as their expertise, variously, international law, the law of armed conflict, comparative criminal law, or the law relating to sexual and gender violence and violence against children, were all grouped into one section under a manager. The manager would be accountable to those above him or her in the chain of command, with respect to performance evaluation of the members of the unit (always with input from others with experience of the staff member's performance), and for their professional development. The manager would also have to deal with the investigation or trial team leaders, in order to allocate resources from the unit where they were most needed. The unit would undertake research and other tasks of benefit to the Office of the Prosecutor as a whole, but individual members would also be assigned to particular investigation or trial teams, as the need arises. In this way, an international lawyer, for example, would find him- or herself involved actively in investigations or prosecutions, even in an advocacy role, as an integral part of a particular team. He or she would remain, however, part of a unit comprising professionals with a similar background, for the purposes of dealing with issues common to the whole office, or training, or performance evaluation.

35.5. Chains of Command and Reporting Lines

In the simplest terms, there would be two chains of command, or reporting lines, within the Office of the Prosecutor organisational structure. The first would link the leaders of the teams, responsible for investigations or prosecutions, to the management hierarchy in the Office, at the pinnacle of which stood the prosecutor. The second would link the various units or sections, grouping together professional or support staff of similar func-

tion or expertise, through the leaders of these units or sections to the same hierarchy. If any conflict arose, for instance with respect to the allocation of resources between the leader of a prosecution team and the manager responsible for one of the units or sections, then it would be up to senior management to resolve it. The functions attaching to each of the reporting lines would have to be clearly defined. It would also have to be recognised that the various units existed in order to support the work of the investigation and trial teams. Investigation and trial teams are the engines driving the operations of the Office of the Prosecutor.

In any case, one of the initial tasks will be to determine whether there is a basis for opening an investigation. This will not be the only initial task, since other issues relating primarily to jurisdiction may have to be resolved too. Once these initial questions are determined, however, and the decision is taken to proceed with an investigation, the next stage of the work will be to collect the evidence and identify potential accused. The point is that, in the early phases of the Office of the Prosecutor's work, the focus is upon investigations. If one goes by the experience of the ICTY and ICTR, the possibility exists that Office of the Prosecutor operations will be investigations-driven, and the most senior management staff, at least in the early development of the Office, may tend to be drawn from the ranks of investigators, rather than from among legal professionals. This is not inevitable, and the point made about the experience at the ICTY and ICTR is an oversimplification that is perhaps unfair. Nonetheless, a decision has to be taken early on about where the critical responsibilities for decision-making will lie. At the ICTY there was lately a shift from a focus on investigations to a focus on prosecutions, with a corresponding displacement of management responsibility from senior investigators to senior prosecutors. Again, this is an oversimplification that may distort the true picture. However, it is, at least in part, a reflection of the *perception* that ensued from organisational changes effected by the current prosecutor. There must always be a strong, competent and innovative investigative capacity within the Office of the Prosecutor. The importance of shaping cases, as a function of the legal issues that affect them, and ultimately of what must be proven in court, however, leads me to the conclusion that it is best to fix management responsibility for both investigations and prosecutions in a legal professional, whatever his or her title, be it senior trial attorney or principal trial attorney. Clearly, a senior advocate must lead a trial team in the presentation of a case before the Trial Cham-

ber. However, there is much to be said for assigning responsibility for investigations to a senior lawyer as well. This should ensure continuity in the development of the case. It should also ensure that the case presented in court is legally strong, in the sense that not only is the crime base and the context of events clearly established, but the connection of the accused to the crime is plainly established.

For the reasons given earlier, investigative staff will need to be grouped together for the purposes of professional development and training, the discussion of common issues and performance evaluation. Performance evaluation would have to be carried out by senior managers who are competent to assess the work of investigators. Investigations management, however, will have to be responsive to the demands of the counsel, who are assigned responsibility for leading the investigation and prosecution teams. Once again, it will be the responsibility of the most senior levels of management to resolve any conflicts that arise, for example, in relation to the allocation of resources among the various teams.

In the end, what is necessary is the establishment of clear lines of responsibility and accountability. This will allow the prosecutor to communicate his or her strategies to the investigation and prosecution teams, and for those teams to keep the prosecutor, as well as senior management, well informed about developments on the ground or in court. If responsibilities are not clearly focused and accountability is blurred, then the achievement of strategic or tactical objectives becomes more difficult. Initiative is discouraged. Morale is damaged. If organisational structures are established at the beginning, then those who come to the Office of the Prosecutor, no matter from what background, will conform to them and make them work.

35.6. Complex Organisation

The legislative regime governing the ICC appears to permit great flexibility in the organisation of the Office of the Prosecutor. Apart from the appointment of the prosecutor and a sufficient number of deputy prosecutors, for which provision is made, the organisational structure of the Office is left up to the prosecutor. That organisational structure will have to contend with a potentially far more complex environment than that encountered at the ICTY or ICTR, since cases coming to the prosecutor may arise out of different conflicts in various parts of the world. Each set of cases, pertaining to violations of international criminal law coming within

the scope of the ICC's jurisdiction, will tend to draw the Office of the Prosecutor staff into its own exclusive domain. Yet some issues will be universal, for example, matters of law, the handling of evidence, disclosure mechanisms, court procedures and so on. There must, therefore, be a flow of communication and a sharing of experience *across* the different domains. This will be vital to the maintenance of a sense of solidarity and shared mission across the board within the Office of the Prosecutor.

Staff organisation will have to take into account the challenge of handling different conflicts. (It will be as if the ICTY and ICTR were fully integrated, with new matters added.) Some units, for example a section grouping lawyers with expertise in the law of armed conflict or military analysts, will have functions common to all domains. Investigation and trial teams will necessarily focus upon the particular conflicts of concern to them. Members of individual teams, of course, may have a broader vision, given their appurtenance to their home unit or section. There will always be a dynamic and creative tension between the horizontal view of the units or sections, in which staff are placed by reason of common function or expertise, and the vertical vision, so to speak, of the investigation or trial team, which focuses in depth upon particular crimes. The organisational structure described above, set up along the dual reporting lines indicated, may serve to maintain this tension in a productive way.

The chains of command or reporting lines will link the prosecutor, possibly through deputy prosecutors, to senior managers responsible for the operations of the individual investigation and trial teams, within particular domains, as well as to senior managers responsible for the professional development and performance appraisal of staff. It is important to resist too great a fragmentation of the organisation of the Office of the Prosecutor, along the natural fault lines that can arise, dividing one domain from another (for example, to choose conflicts that have given rise to current tribunals, former Yugoslavia, from Rwanda, from Cambodia, from Sierra Leone). While a degree of specialisation, particularly in relation to the investigation and prosecution teams, is inevitable, there must be an effort to preserve common ground among staff, so that the experiences in one domain are able to inform the approach in other domains. In practice, the only challenge I see to the practical implementation of this idea exists at the very top level of management, namely at the deputy prosecutor level. If, for example, the head of the section providing international law expertise to the Office of the Prosecutor has got to answer to

several deputy prosecutors, as well as deal with the senior counsel leading different investigation and prosecution teams, in different domains, this might create a problem. A deputy prosecutor could be appointed, however, as the top level of senior management next to the prosecutor, responsible for the various home rooms designed to accommodate the need for professional development and performance evaluation. Other deputy prosecutors could be responsible for individual domains of conflict.

In my view, the Office of the Prosecutor could be organised, in order to meet the need to achieve investigative and prosecutorial objectives, as well as to enhance staff development and ensure effective performance evaluation, along the lines that I have suggested above.

35.7. Training

Although the prosecutor will hire staff with a high level of competence and experience, training will be a constant requirement. Training, primarily in-house, will contribute to the creation of a common investigative and legal culture, suited to the needs of the ICC Office of the Prosecutor. It will serve as an induction of new staff. It will inculcate common operating procedures. It will permit the exchange of information and experience. Training will create a strong sense of solidarity and mission, as well as enhancing the confidence of staff in the performance of their assigned functions. Training is also a safe ground for experimentation. In my view, training is one of the most important internal functions that the Office of the Prosecutor must ensure, and it has to occur at all levels of staff.

Before lawyers, investigators, interpreters and support staff venture into the field to investigate, or enter into the courtroom to prosecute, they must have a clear idea of how they are going to go about their work, and what is expected of them. The clear definition of goals and objectives, and the assignment of responsibilities, is vital. So is training. A dry run at witness interviewing, for investigative purposes, or examination-in-chief, for the purpose of presenting evidence in court, will ensure continuity and coherence in approach. Training in database searches, and in organising searches, will enhance the ability of trial teams to make timely disclosure. The examples are legion and touch every area of office operations. Individual initiative in organising training sessions is to be welcomed; however, the ultimate responsibility for ensuring that it is done must be that of the section or unit managers, who will work in conjunction with the senior counsel leading the investigation and trial teams, and senior management.

35.8. Evidence Collection and Storage and Databases

Here I am straying outside my real area of competence, but I simply wish to underscore the importance of establishing, at the beginning, standard operating procedures that apply across the board to cover evidence collection and storage. Lawyers and investigators will arrive at the ICC Office of the Prosecutor, each with their own experience and ideas about how to deal with these issues. They must, however, conform to the standard operating procedures in force at the Office of the Prosecutor. If systems are developed and applied in a consistent way, then the integrity of evidence, as well as the continuity of its handling from its provenance through to its production in court, will be preserved.

Similarly, databases have to be constructed in a user-friendly way, in order to facilitate the search for and retrieval of information. I am not competent to give advice on the technical aspect of the creation and maintenance of databases, or how they should be accessed or used, but I do suggest that simple, easily accessible systems will only enhance the strength and flexibility of the teams needing to use them.

Some areas of the database may have to be held secure, by reason of the conditions under which information was provided to the Office of the Prosecutor, or because of its highly sensitive nature (for example, the identity of a confidential informant). Even here, however, while recognising the need to make security systems impenetrable, simplicity should be the watchword.

35.9. Recruitment

In my own experience with recruitment at the ICTY, we looked for candidates, taking into account the particular post to be filled, who had a high level of professional competence, experience that was relevant (for example, familiarity with the region and the conflict, experience dealing with complex cases, international work and so forth), and flexibility of mind. This last quality was sought in order to try to ensure that staff who were recruited could adapt quickly and effectively to a new environment, and had the flexibility of mind to adapt to new ways of thinking and doing. These qualities, I suggest, will be important to staff in the ICC Office of the Prosecutor. In addition, the ICC Statute requires that recruitment takes into account other factors, many of which were also important in my experience at the ICTY. Looking at the case of lawyers only, as an example,

drawing on candidates of different backgrounds and from different systems ensured that a stimulating and creative environment was maintained, with a view to developing a legal culture suited to the needs of the tribunal. Similar concerns will apply in the ICC Office of the Prosecutor.

There is perhaps a point to be made about investigations. Investigations carried out by the ICC Office of the Prosecutor will have complex and varied aspects. As well as requiring the competence to employ every sort of forensic technique, the Office of the Prosecutor will also have to be able to operate effectively on the ground, collecting evidence in frequently difficult circumstances. In addition, Office of the Prosecutor investigators are going to have to be able to move in the corridors of power, dealing with senior diplomats, military officers, civil servants and politicians. There will be a need for a level sophistication that is perhaps unusual in the context of the investigation of crimes in national jurisdictions. It is beyond my competence to comment upon the recruitment of investigative staff, but I do suggest that these varied requirements will have to be kept in mind. Similar considerations will apply to the recruitment of legal staff.

35.10. Other Considerations

There are many other facets of the organisation of the ICC Office of the Prosecutor that I will not touch upon. For example, I have not addressed the need for a skilful public relations staff, nor for political and diplomatic advisers to assist the prosecutor in his or her dealings with governments, the United Nations, non-governmental organisations, and other agencies and individuals. Indeed, even in the areas that I have considered, I have kept my observations at a general level. I have, nonetheless, focused on two key *functions*, namely the investigative and prosecutorial function that is fundamental to Office of the Prosecutor operations, and the professional development and performance evaluation function that is necessary to effective internal management of resources. I recognise, however, that other needs must be met.

One question that arises in my mind, to which I do not know the answer, is this: how large and varied a staff can the ICC Office of the Prosecutor maintain before it becomes actively involved in the investigation and prosecution of matters within the Court's jurisdiction? Maintaining a large staff is expensive. It may be that the emphasis in the early days must be on staff who can develop standard operating procedures, examine ju-

risdictional issues and set up the basic structures of the Office. A core of competent staff will be necessary to deal with every imaginable legal and investigative issue. However, as cases come for investigation and prosecution, this staff may have to expand in order to meet the challenge. How flexible such arrangements will be is difficult to predict. Will a senior counsel come in to lead an investigation or prosecution in a particular case, and then return to his or her own jurisdiction? Or will a permanent staff always be maintained that is capable of carrying out these functions? It is, I suppose, partly a matter of budget, but also an issue about commitment, and the strength, flexibility and continuity of staff. The danger of people coming and going, so to speak, is that it will be difficult to create a common legal culture, or to ensure a consistent approach to investigations and prosecutions. However, with proper training and induction of staff, whether permanent or temporary, it may be possible to eliminate these difficulties. If a strong Office of the Prosecutor culture, in every sense of the word, is developed, then individual staff members can be imbued with that culture – ‘the way we do things here’ – so that they perform in coherent and consistent ways.

There must be mechanisms for dealing effectively with the Registry and the judiciary, the other principal branches of the ICC. Close collaboration with the Registry on a host of administrative and court management matters is necessary, and will be, within the Office of the Prosecutor, the responsibility of senior management. However, the Office of the Prosecutor’s relationship with the judiciary, apart from individual cases, is important too. Once again, senior management within the Office of the Prosecutor will have to be involved. The Office should be consulted on matters of scheduling and should have an active role, along with the defence, in planning the judicial calendar.

The attitude of the Office of the Prosecutor, at every level, towards the defence should be one of respect and fairness. It is vital to the smooth running of trials for there to be a relationship of trust between prosecutors and defence counsel. In my view, the Office of the Prosecutor should always take the initiative to develop this trust. While there will be individual cases of behaviour that require sanctions, prosecutors should endeavour to focus on the issues, not the personalities, in a way that assists the Trial Chamber to carry out its functions fairly and efficiently.

Trial Team Organisation, Legal Research, and Training

Daryl A. Mundis*

36.1. Trial Team Organisation

Introduction. One of the distinguishing factors of prosecutions for serious violations of international humanitarian law before international courts and tribunals is the use of trial teams, comprising trial attorneys, international humanitarian law specialists, trial support staff and investigators. This model, which has been employed at the *ad hoc* international criminal tribunals, is sound and the lessons learned and the approaches taken in structuring trial teams will be of use as the Office of the Prosecutor at the International Criminal Court ('ICC') expands. The purpose of this chapter is to set forth some observations regarding the structure and organisation of ICC trial teams, based on the International Criminal Tribunal for the former Yugoslavia's ('ICTY') experience.

Recommendations. As the ICC expands, consideration should be given to structuring the trial teams, to include investigation resources, under the direction of the P-5 senior trial attorneys. These senior trial attorneys should be physically co-located with the teams that they are supervising in order to facilitate communication and to build the teamwork necessary to successfully prosecute these types of cases.

ICTY historical context. Before focusing on this issue, a few comments on the ICTY structure are necessary in order to put the following information in context. Until recently, the practice at the ICTY had been

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for the Investigation Division to be structured into a number of teams, each of which focused on a particular geographic area and a specific target group of perpetrators within that area. Each team, which was led by a team leader who was an investigator, was assigned a number of P-4 team attorneys who assisted and directed the investigation process and were responsible for drafting indictments. The teams were clustered and placed under the authority of one of a number of P-5 investigation commanders, who in turn answered to the chief of investigations.

Once the accused was in custody, the P-4 team attorneys would be redesignated as trial attorneys and would assist the senior trial attorneys in presenting the case in court. The senior trial attorneys, as experienced litigators who spend the bulk of their time in court prosecuting cases, relied on the P-4 trial attorneys as being much more familiar with the facts and evidence in the case, since they had worked on the case through the investigation and indictment stages. A P-2 (later reclassified as P-3) attorney, who typically did much of the pre-trial and trial-related legal drafting, also assisted each of the senior trial attorneys. Throughout the entire process, experienced international humanitarian law attorney-advisers, from the Office of the Prosecutor Legal Advisory Section, provided important input to the trial team.

The non-lawyer component of the team typically included one case manager, one trial support assistant (and/or trial support clerk), and anywhere from two to four investigators, who would remain working on the case throughout the trial to assist with witness proofing, follow up on any leads that arose during the course of the trial, and during the defence case, investigate the defence assertions and provide information concerning defence witnesses for purposes of cross-examination.

As a result of this structure, therefore, at trial each team would generally consist of one senior trial attorney, two or three P-4 trial attorneys, one P-3 attorney, one international humanitarian adviser, two or three trial support personnel, and two to four investigators. Typically, once the prosecution concluded its case, one or two P-4 trial attorneys, one trial support staff member and two of the investigators would be redeployed, on the grounds that fewer Office of the Prosecutor staff resources are required to assist during the defence case.

Changes in the ICTY structure. Over the past several years, as the number of trials at the ICTY multiplied, it has become obvious that attorneys needed to be more engaged in the investigation and indictment stag-

es. Consequently, the ICTY prosecutor undertook a realignment of her office, making the senior trial attorneys responsible for overseeing the conduct of the investigation and indictment preparation, as well as the eventual litigation of the case. This was an important step, since prior to this change, the senior trial attorneys generally did not have much involvement with a case until the accused was in custody and they were assigned to prosecute the case.

Notwithstanding this change, however, the senior trial attorneys and investigation teams are only linked for specific cases. This represents a lost opportunity to ‘permanently’ link the senior trial attorneys to specific trial teams and harness the advantages that such linkages offer. At the ICTY, there are currently 11 investigative teams and 14 senior trial attorney posts. Thus, each senior trial attorney could be assigned to an investigative team, with three senior trial attorneys ‘floating’ between teams to cover those instances when one team has more than one ongoing case, thus requiring the full-time attention of more than one senior trial attorney.

Proposal for ICC Office of the Prosecutor. Obviously, until the ICC Office of the Prosecutor is fully staffed and operating, it will have far fewer trial teams than the ICTY, and the few teams that it does hire in the next few years will most likely be focusing on more than one conflict and region. This is all the more reason to ensure that the teams are fully integrated and under the supervision of the senior trial attorneys. As the person most responsible for prosecuting cases on a day-to-day basis, the senior trial attorney must be entrusted with overseeing the case from start to finish.

This type of integrated structure will take advantage of several important considerations. First, by focusing the teams – including the attorneys – on specific regions and conflicts, extensive knowledge of the background of the conflict can be developed. Although not as serious a problem as the ICC may eventually face, the ICTY has suffered problems when senior trial attorneys who were intimately familiar with the conflict in Bosnia, for example, are suddenly forced to deal with crimes committed in Croatia or Kosovo. This problem is exacerbated when the senior trial attorneys have only a short amount of time to prepare a case for trial, given the short lead times between trials.

Second, by linking the lawyers and the investigators in a more or less permanent structure, it will be possible for the two components to interact properly prior to the commencement of the trial. Although it may be

possible to hire lawyers and investigators who are familiar with prosecuting serious violations of international humanitarian law, it is likely that certain key players of the ICC Office of the Prosecutor staff may not have had this type of experience. Each senior trial attorney is likely to present cases in slightly different ways, based on their experience and style. The time to integrate and initiate the investigators to these variations in style is early on in this process. The adoption of this proposal will also ensure that the investigators are obtaining precisely the type of evidence that the senior trial attorney needs to prove the case in court, since the level of interaction between the attorneys and investigators will be maximised.

Third, as the person most responsible for the successful prosecution of the case, the senior trial attorney must be held accountable for the entire preparation and prosecution of the case. This is only possible if the senior trial attorney is given the necessary resources to accomplish this task. An integral part of this process is to make the investigators assigned to a case ultimately responsible to the senior trial attorney. An inescapable fact is that the lawyers must run the cases. In order to ensure that the cases are successfully prosecuted, the ICC Office of the Prosecutor must hire the best possible people, provide them with a high degree of ongoing training and sufficient resources to let them put the cases together. A fully integrated approach is the best way to do this.

Composition of trial teams. This raises the next question: what precisely should the trial teams look like? Obviously, the senior trial attorney is at the top of the apex. The organigram of the ICC Office of the Prosecutor (Annex I.B of ICC-ASP/1/3, the Court's first budget) reflects this fact and indicates that in the first budget period the Prosecution Section will be headed by a P-5 with four trial attorneys (two at the P-4 and two at the P-3 levels). This is the right number of trial attorneys for the average case.

These lawyers should be recruited from both the common and civil law systems. Based on the ICTY experience, the filling of these posts is likely to be a politically sensitive issue. In my opinion, the common law-trained lawyers tend to be slightly better equipped for the more adversarial-type system in use at the *ad hoc* international criminal tribunals and this is likely to remain the case for the ICC as well. At the same time, the civil law-trained lawyers are more comfortable than their common law colleagues in the investigation and indictment phase of the cases. An integrated team approach, as described in this chapter, can take advantage of

this reality, by carefully mixing the teams and ensuring that the right lawyers are assigned to those tasks which best fit their experience.

For example, imagine two trial teams. Team A is headed by a common law-trained senior trial attorney and has one P-4 and two P-3 trial attorneys from civil law jurisdictions (and one P-4 trial attorney from a common law jurisdiction). Team B has a civil law-trained senior trial attorney with two P-4 common law-trained trial attorneys, with one P-3 trial attorney from each of the legal traditions. The civil law attorneys in Team A may be given greater responsibility for the investigation and indictment phase of cases assigned to that team, and play a slightly diminished role during the actual presentation of the case. The Team B approach, however, may be for the senior trial attorney to assume a greater role over the investigation and indictment phases, giving a greater role to the P-4 trial attorneys once the case goes to trial. Regardless of how the trial teams are eventually assembled, the differences in training and experience between common law-trained and civil law-trained prosecutors must not be overlooked. Of course, with time, these differences may be alleviated, once the trial team members receive additional in-house training and all team members familiarise themselves with the practice at the Court.

It is also important to keep in mind that most prosecutors will not be experienced in prosecuting cases involving serious violations of international humanitarian law and it will be crucial to rely on the input from the Legal Advisory and Policy Section. The ICTY Legal Advisory Section is composed primarily of international lawyers with one comparative lawyer in the section. Perhaps the biggest downside of this structure is that the Legal Advisory Section lacks proceduralists (for this, the ICTY trial teams must rely on the attorneys from the Appeals Unit). The ICC Office of the Prosecutor Legal Advisory and Policy Section would be well advised to strive for a combination of substantive law and procedural law specialists, as discussed below.

Incidentally, thought should also be given to physically structuring the layout of the ICC Office of the Prosecutor facilities to reflect this team-based approach. The ICTY Office of the Prosecutor is laid out in such a way that the senior trial attorneys are all on the same corridor as the prosecutor. The teams, however, are spread throughout the building on different floors, resulting in the team being physically separated and forcing team members to spend a significant amount of time walking to and from meetings with the senior trial attorneys. It may prove more sensible

to co-locate the senior trial attorneys with the teams that they are supervising, facilitating communication, and cutting down on the amount of time spent transiting between offices, often carrying large case files and binders. This can also impact positively upon the team cohesion, morale and a sense of purpose.

Conclusions. A cursory glance at the organigram of the ICC Office of the Prosecutor during the first budget period indicates that the Office – as currently structured – is not conducive to the proposals set forth in this chapter. That is not necessarily a problem, as the structure described herein need only be implemented once the office is fully staffed and operating. Moreover, there will still be a need for investigators to be focusing their work on situations that may not give rise to comprehensive investigations and thus there will remain the need for an Investigations Division per the organigram.

One thing is certain: the structure as set forth looks very similar to the structure initially adopted for the ICTY Office of the Prosecutor. It took the ICTY prosecutor eight years to develop a more workable system. Based on that experience, consideration should be given to reorganising the structure of the ICC Office of the Prosecutor in tandem with the inevitable growth during the first few years the ICC is in operation. The thoughts set forth in this chapter reflect, to a certain extent, the experience of the ICTY and may be of assistance as this period of expansion occurs.

36.2. Legal Advisory and Policy Section

Introduction. The Legal Advisory and Policy Section will provide the ICC Office of the Prosecutor with independent specialist legal advice and legal drafting, provide training, and will assist with the drafting of relevant guidelines and policies.¹ Special expertise in the areas of sexual and gender violence and violence against children is specifically mentioned in the first budget as being among the areas of expertise which it is expected that the Legal Advisory and Policy Section will provide. The functions performed by this section will be crucial to the success of the Office of the Prosecutor and, consequently, it will be important for the members of this section to be carefully recruited.

¹ See International Criminal Court, Assembly of States Parties to the Rome Statute, Budget for the First Financial Period of the Court, UN doc. ICC-ASP/1/3, para. 61.

Issues. Most of the individuals applying for legal positions in the Office of the Prosecutor will have either international law experience or criminal law experience, and unfortunately there is not a large pool of experienced international criminal lawyers. As a result, the trial lawyers will require the assistance of the Legal Advisory and Policy Section to provide regular training, to answer queries and to assist with legal submissions.

Given the high degree of expertise that will be expected from members of the Legal Advisory and Policy Section, the natural source of recruitment for positions in this section will be the academic community. While there is nothing necessarily wrong with actively recruiting academics for posts, one should do so with the understanding that academic international lawyers and practising criminal lawyers typically approach issues differently and are accustomed to different working styles.

Problems may arise when these two categories of specialists – who bring with them different approaches to legal issues – fail to appreciate their specific roles in the process of criminal prosecutions. This problem may be aggravated once the Court is handling a substantial number of cases and time pressures on the Office intensify. For example, during periods of intense activity, trial teams will need rapid responses to highly complex issues. While an academic approach certainly has merit, the information that the trial teams are likely to need must be rendered quickly, succinctly and in a manner that is useful to the Trial Chamber, while being confined to the contested issues of a specific trial. International lawyers from academia, who are used to dealing with highly complex and technical matters, may not fully understand that trial teams require straightforward answers reduced to the bare minimum. Moreover, international lawyers used to working in an academic-style setting, where time is often not of the essence, may not fully appreciate the time demands required of litigation.

For their part, criminal lawyers tend to lack a full understanding of the sources of international law, and particularly sources of international humanitarian law. Based on my experience at the ICTY, many of the trial lawyers are likely to be frustrated with their perception that the international lawyers cannot reduce these complex issues to one paragraph (or even one sentence) summaries.

Proposed solutions. These potential problems may be minimised by taking several steps. First, as envisaged by the first budget of the ICC, extensive training of all attorneys on a wide range of legal issues must be

conducted.² Second, to the greatest extent possible, staff recruited for the Legal Advisory and Policy Section should have some litigation experience to better understand the demands placed on litigators and the type of material litigators require.³ Third, one post within the Legal Advisory and Policy Section should be dedicated to a position characterised herein as a trial practice manager to oversee electronic databases and all procedural issues.

Other than one post dedicated to procedural matters and expertise on sexual and gender crimes and crimes against children, the Legal Advisory and Policy Section should seek to recruit international law generalists, with the eventual goal of training such generalists into specialists on the subject matter jurisdiction of the Court.⁴

36.3. Legal Research Tools for Prosecutors and Trial Practice Manager

Introduction. The creation of databases to quickly obtain accurate and up-to-date legal information will be a high concern to members of the ICC Office of the Prosecutor staff.⁵ In addition, in order to promote the highest degree of consistency in the Office of the Prosecutor pleadings, the use of templates will be necessary. These templates will need to be regularly reviewed and updated to capture the jurisprudence of the Court. The following is based on the experience of the ICTY in dealing with many of these issues and seeks to address:

- why this issue is important;
- the scope of what is needed;

² Ultimately, the training of staff should be the main function of the Legal Advisory and Policy Section.

³ Although not impossible, as noted above, the pool of true international criminal lawyers is very small. Nevertheless, there are a few individuals at the *ad hoc* international criminal tribunals, with special courts (such as those prosecuting offences in Sierra Leone) and in those courts where international prosecutors and judges are working, such as Kosovo and East Timor. It may be possible to identify and recruit individuals for the LAPS with the requisite knowledge and experience both in international humanitarian law and with litigation experience.

⁴ For example, there should be one expert on genocide, one on crimes against humanity and one with an extensive knowledge of war crimes and in particular, cases involving the conduct of hostilities.

⁵ See paragraph 61 of the Budget for the First Financial Period of the Court, ICC-ASP/1/3 and footnote 18 therein.

- some ideas on how to do this; and
- a proposal for the best way of accomplishing this.

Justification. There are several reasons why this task is of great importance. First, it will make ICC Office of the Prosecutor staff more productive, by making available to them up-to-date information on procedural and substantive law. Second, it will permit the Office of the Prosecutor to avoid numerous pleading approaches, thus making the work of the Office more consistent. Third, as a result of these reasons, it will contribute to the professionalism of the Office, in that the Chambers will come to rely on pleadings as being accurate and consistent.

What is required. The goal should be the production of a series of complementary tools that meet the needs of the staff. This can best be accomplished through interrelated tools, covering research tools, analytical tools and templates. Staff will need the ability to conduct research across cases, based on legal issues, particularly as the jurisprudence of the ICC expands. But it is simply not resource efficient to read, for example, every decision on protective measures. Such decisions must be reduced to bare principles and analysed. These analyses must be in a searchable electronic format if they are to be useful. Based on these analyses of the various issues that recur with frequency, templates must be produced to allow for quick, accurate, current and uniform pleadings. But producing this material is not enough. Within a relatively short period of time, the ICC Chambers will be producing a number of written decisions and orders and the in-house Office of the Prosecutor database will have to be constantly updated to reflect these decisions. The goal should be an integrated system containing electronic links to the various components. That is, the user should be able to research an issue, then point the mouse at links to the cases, analysis and templates, without having to go to a variety of different formats and software programs.

Ideas. This system can be produced by assigning it either in total or piecemeal to existing sections, by *ad hoc* committees or groups of individuals or by individuals who are specifically tasked with producing part of the system. However, unless all of these individuals are fully briefed on what the others are doing there is the risk of repetition or worse, and components could fall through the cracks. This has been the experience at the ICTY, where efforts to create such databases – particularly with respect to procedural law – have been woefully inadequate. Consequently, the de-

velopment and management of this system should be entrusted to the ICC Office of the Prosecutor Legal Advisory and Policy Section. In order to accomplish this, it will be necessary for the Legal Advisory and Policy Section to have proceduralists, in addition to experts on substantive law. (Incidentally, the ICTY Legal Advisory Section, which comprises almost exclusively international humanitarian law experts, has produced an excellent elements project, which lacks only the hyperlinks to make it a truly integrated system for legal research.) I would strongly advise that within the Legal Advisory and Policy Section one of the proposed P-4 legal adviser positions be designated as the trial practice manager, with specific tasks related to overseeing the procedural aspects of this project. It will be very important for this person to have experience as a trial attorney to better understand the issues faced by the trial teams and to identify the issues to be addressed by the proposed database.

Trial practice manager proposal. The trial practice manager should be responsible for developing, overseeing and maintaining the ICC Office of the Prosecutor trial practice package of tools. This position obviously would not entail any supervisory functions with respect to the senior trial attorneys, but would rather be the clearing point for all procedural and trial practice matters and would answer directly to the section chief of the Legal Advisory and Policy Section. The trial practice manager would be responsible for the following tasks (in no particular order):

- ensuring the trial practice database is maintained and updated;
- liaising with the Registry and Chambers with respect to any databases created by the other organs of the ICC;
- co-ordinating and chairing the meetings of any committees established relating to trial practice, such as a pleadings committee;
- ensuring that all templates are updated to reflect the precise status of the law;
- producing summaries of each decision and order of the Chambers relating to procedural matters and ensuring that these head notes are in an easy to search electronic database;
- reviewing all Office of the Prosecutor filings to ensure that approaches taken by the various trial teams are consistent with ICC policy and the latest law;

- providing quick and accurate responses to procedural questions on the latest law to senior trial attorneys and trial teams;
- assisting with the development and maintenance of other trial practice aids, such as disclosure guidelines, ethical regulations and prosecutors' regulations;
- monitoring legal developments at the *ad hoc* international criminal tribunals for jurisprudence that may be applicable to practice before the ICC.

Why this approach. The most important lessons learned from the ICTY is that such a project is immensely valuable, but that many of the tasks listed above have been done haphazardly or by different individuals or sections over the course of the ICTY's existence. No one person has been assigned to perform these tasks. Often, they have been attempted through the use of committees, which meet infrequently (at best) and for which no single person may be held accountable. By placing the responsibility for these tasks in one person, who answers directly to the section chief of the Legal Advisory and Policy Section, accountability will be ensured and the inevitable requests for assistance in completing these tasks during the inevitable crunch periods will be met. The amount of time that will be required to do this job properly should not be underestimated. It is simply not possible to dole this work out and expect to have an integrated product. This issue needs to be taken seriously, and the best way to do so is to make the commitment to get a trial practice manager in place right from the outset of the ICC Office of the Prosecutor.

36.4. Training and Career Development for Staff

Introduction. Because there is not a large cadre of international criminal practitioners, the ICC Office of the Prosecutor will virtually have to create one. In order to develop staff to a high level of competence, training will thus be an essential part of the Office mission, and this function properly belongs in the Legal Advisory and Policy Section. The goal of this training should be the creation of generalists who are capable of performing a wide range of functions within the office. An important component of developing generalists should be a policy or rotating staff through various sections when time permits.

Aspects of training. The training programme must include all aspects of a criminal prosecution office, be intellectually challenging, but

also include hands-on exercises. Because this training must be mandatory for all staff, and since the staff will be recruited from a wide range of legal cultures, it should include training in all of the following areas, to ensure minimum professional standards:

- substantive law of the ICC;
- procedural law of the ICC;
- law of evidence before the ICC;
- general criminal law, including theories of liability;
- general international law;
- trial advocacy (including written and oral advocacy);
- appellate advocacy (including written and oral advocacy).

Each of these subjects should be taught at the basic and advanced levels, and outside experts should be brought in to conduct training in subject areas for which such expertise is lacking among Legal Advisory and Policy Section staff. This training should be offered on a regular and recurring basis.

In order to accomplish the goal of ensuring minimum basic professional competence of all ICC Office of the Prosecutor staff, a system of qualifications should be adopted. That is, staff members should be required to attend this training on a regular basis and their performance monitored. Upon satisfactory completion of the various modules, the staff member could then be certified to perform specific functions, such as being certified as a legal adviser (international law), trial attorney or appeals counsel.⁶ Such certifications would have no effect on the post to which the staff member is assigned, but would simply indicate those areas within the competence of the staff member. To ensure that staff members remain familiar with developments in the law and emerging legal concepts, such certification could be done annually or perhaps every two years. This certification process could be in addition to other periodic training.⁷

⁶ Staff members initially hired on one post, such as trial attorney, could be certified as an appeals counsel, which would not necessarily mean that they were transferred to the Appeals Unit, but simply that they were qualified to handle appeals in the event an interlocutory appeal arose during the course of their trial or that they could be temporarily assigned to the Appeals Unit during particularly busy times.

⁷ The entire certification process may require several months to attain, with courses held periodically over the course of several months. For example, to be certified as a trial attorney

As a further means of developing staff, consideration should be given to permitting and encouraging staff to rotate among the various sections of the Office of the Prosecutor. For example, an international legal adviser should spend several months working exclusively in the Trial or Appeals Section, while trial attorneys or appeals counsel could spend a similar period in the Legal Advisory and Policy Section. This would greatly facilitate staff training and would also permit the trial teams to be more productive and responsive to the Trial Chambers. For example, if the Court were to undergo substantial growth, each trial team would be expected to prosecute more cases in a more timely manner. Pending the hiring and training of additional staff, it is imperative that each team is equipped with personnel capable of handling basic international law issues as well as interlocutory appeals. This is best anticipated by ensuring that as many members of each trial team are trained and experienced as possible.

36.5. Agreements with the United Nations

Introduction. Given the treaty-based nature of the ICC,⁸ one of the most interesting tests that the Court will face as an independent judicial institution will be its evolving relationship with the United Nations. The ICC-UN Agreement “defines the terms on which the United Nations and the Court shall be brought into relationship”,⁹ and seeks to anticipate many of the potential problems that may arise in this relationship.¹⁰ Care must be

ney, the staff member would have to complete courses on the substantive law of the ICC; procedural law of the ICC; law of evidence before the ICC; general criminal law, including theories of liability; and trial advocacy.

- ⁸ In contrast to the ICTY and the International Criminal Tribunal for Rwanda, which were created by, and function as subsidiary organs of, the Security Council.
- ⁹ Official Records of the First Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 3–10 September 2002, UN doc. ICC-ASP/1/3 (2002) (‘ASP Report’); Draft Relationship Agreement between the Court and the United Nations, ASP Report, Part II.G., 7 March 2001, Article 1, pp. 243–51 (‘ICC-UN Agreement’) (<http://www.legal-tools.org/doc/1395e8/>). See also ICC, Rome Statute of the International Criminal Court, 17 July 1998, Article 2 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).
- ¹⁰ At this stage of the Court’s nascent development, it is interesting that these negotiations occurred not between the Court and the ICC, but between a multilateral forum (the Assembly of State Parties) and the UN. Notwithstanding the adoption of the ICC-UN Agreement, a final resolution of many of these issues must wait until the Court’s principal organs have been elected and final negotiations between the *Court* and the UN have been concluded.

exercised in negotiating the final version of this agreement as there are certain issues that must be clarified in order to avoid problems during the investigation and trial phases of future cases.

The underlying principle in the ICC-UN Agreement, as one would expect, is mutual respect with the UN recognising the Court as “an independent permanent judicial institution” while the Court recognises the “responsibilities of the United Nations under the Charter”.¹¹ The ICC-UN Agreement seeks to elaborate upon these general principles, with the parties (the UN and the ICC) agreeing to co-operate and to “consult each other on matters of mutual interest”.¹² The most important provisions relate to co-operation and judicial assistance and are governed by Part III of the ICC-UN Agreement.¹³

Scenarios likely to arise. The most likely scenario under which these provisions may be seriously strained relates to prosecutions of the crime of aggression, arguably one of the most serious offences for which the Court will ultimately have jurisdiction. As the primary organ responsible for international peace and security, the Security Council has a major role in identifying aggression, notwithstanding the fact that it rarely did so in the past due to the Cold War. Once the crime of aggression has been defined¹⁴ and the ICC is seized of a case concerning that crime, it is possible that the Security Council may invoke Article 16 of the ICC Statute,¹⁵ thus forcing the Court to defer for a period of 12 months.

Other situations, however, may also test these principles. For example, the Security Council may be seized of a particular conflict in which the ICC is investigating the leadership of one of the parties to that conflict. It is not inconceivable that if the Security Council were discussing

¹¹ ICC-UN Agreement, Article 2, see *supra* note 9.

¹² *Ibid.*, Article 3.

¹³ *Ibid.*, Articles 15–20.

¹⁴ ICC Statute, Article 5(2), see *supra* note 9, provides that the Court will not exercise jurisdiction over the crime of aggression until the crime has been defined in a manner that is consistent with the relevant provisions of the UN Charter.

¹⁵ *Ibid.*, Article 16, specifically allows the Security Council to halt an investigation or prosecution for renewable 12-month periods through the adoption of a resolution requesting the Court to do so. See also United Nations, Security Council, resolution 1422, UN doc. S/RES/1422 (2002) (<http://www.legal-tools.org/doc/91718b/>) in which the Security Council, acting pursuant to its Chapter VII authority, invoked ICC Statute Article 16 with respect to all UN-established or authorised operations in order to protect from the reach of the Court “current or former officials or personnel” from non-states parties to the ICC Statute.

its options with respect to the issue that it may not want the Court to indict that leadership for fear that its efforts to resolve the conflict may be hindered.¹⁶ This situation could also lead the Security Council to trigger the mechanism set forth in Article 16 of the ICC Statute and no provision of the ICC-UN Agreement will prevail in the event that the Security Council requests such a deferral. Notwithstanding this provision, however, it will be interesting to see how the Court and the UN resolve the potential conflicts that will undoubtedly occur in this situation, and how the exercise of that option by the Security Council affects the independence and integrity of the Court, whether real or perceived.

Co-operation. The UN has agreed to co-operate with the Court by providing information or documents,¹⁷ and the parties agreed to make every effort to achieve maximum co-operation to avoid “undesirable duplication in the collection, analysis, publication and dissemination of information relating to matters of mutual interest”.¹⁸ This co-operation includes facilitating the testimony of officials of the UN and its programmes and agencies.¹⁹ In order to give this provision effect and to permit its officials to testify, the UN has agreed to waive the obligation of confidentiality of that official if necessary, having due regard for the responsibilities and competence of the UN under the Charter.²⁰ Similar issues often arise in the context of the *ad hoc* international criminal tribunals, and typically UN officials provide statements (and/or documents) pursuant to Rule 70 of the ICTY or ICTR Rules of Procedure and Evidence.²¹ In order to use such evidence, the *ad hoc* international criminal tribunals must seek the

¹⁶ Similar concerns were expressed when the ICTY indicted Slobodan Milošević during the Kosovo conflict in 1999.

¹⁷ ICC-UN Agreement, Article 15(1), see *supra* note 9. This provision is based on Article 87(6) of the ICC Statute, see *supra* note 9, which permits the Court to enter into agreements with “any intergovernmental organization to provide information or documents” that may assist the Court with the investigation and prosecution of crimes within the Court’s jurisdiction.

¹⁸ ICC-UN Agreement, Article 15(2), see *supra* note 9. This article goes on to provide that the parties “shall strive, where appropriate, to combine their efforts to secure the greatest possible usefulness and utilization of such information”.

¹⁹ *Ibid.*, Article 16(1).

²⁰ *Ibid.*

²¹ United Nations, ICTY, Rules of Procedure and Evidence, adopted on 11 February 1994, as amended 22 May 2013, IT/32/Rev.49 (‘ICTY, RPE’) (<http://www.legal-tools.org/doc/950cb6/>); United Nations, ICTR, Rules of Procedure and Evidence, adopted 29 June 1995 (‘ICTR, RPE’) (<http://www.legal-tools.org/doc/c6a7c6/>).

permission of the UN on a case-by-case witness-by-witness basis, a process that can be time-consuming. Thus, shifting the presumption in favour of waiver through the use of a standing waiver of confidentiality under Article 16(1) of the ICC-UN Agreement is likely to expedite investigations and proceedings before the Court.

Communication. The secretary-general is entrusted with several communication functions under the ICC-UN Agreement. For example, in those instances where the Security Council refers a case to the ICC prosecutor under Article 13(b) of the ICC Statute, the secretary-general will forward a copy of the Security Council's decision, with any documents that the Security Council considered in reaching that decision, to the prosecutor.²² Similarly, when the Security Council adopts a Chapter VII resolution requesting the Court not to proceed with an investigation or prosecution, the secretary-general is tasked with transmitting that request to the Court.²³ Finally, if the Court decides to refer a matter to the Security Council or to report a state for failure to co-operate with its requests, the registrar of the Court will so inform the secretary-general so that the matter may be brought to the attention of the Security Council.²⁴ For its part, the Court has agreed to provide the UN with information and documents related to its cases,²⁵ and specifically when requested to do so by the International Court of Justice²⁶ or when a case involves crimes against UN personnel.²⁷

Institutional relations. The ICC-UN Agreement also covers "institutional relations".²⁸ For example, there are provisions providing for reciprocal representation, whereby either party may attend proceedings of the other, subject to the rules and practice of the bodies concerned, when matters relating to the other party arise.²⁹ The parties may exchange information concerning matters of mutual concern and may co-ordinate

²² ICC-UN Agreement, Article 17(1), see *supra* note 9.

²³ *Ibid.*, Article 17(2).

²⁴ *Ibid.*, Article 17(3). See also ICC Statute, Article 87(5) and Article 87(7), see *supra* note 9.

²⁵ ICC-UN Agreement, Article 5(1)(b)(i), see *supra* note 9.

²⁶ *Ibid.*, Article 5(1)(b)(ii).

²⁷ *Ibid.*, Article 5(1)(c).

²⁸ *Ibid.*, Part II, Articles 4–14.

²⁹ *Ibid.*, Article 4. In the case of Security Council meetings related to the Court's activities, that organ may invite the president or Prosecutor of the ICC to address the Council concerning matters within the jurisdiction of the Court. *Ibid.*, Article 4(2).

their activities to avoid unnecessary collection and dissemination of information relating to matters of mutual concern.³⁰ Moreover, the Court may submit reports on its activities to the UN if it deems it appropriate to do so,³¹ and may suggest items for consideration to be placed on the agenda of the General Assembly, Security Council or other UN body.³² Finally, there are a number of areas in which the parties have agreed to co-operate in personnel, administrative and financial matters.³³

Potential problems. Several of these issues, although seemingly innocuous, may prove problematic in the context of criminal prosecutions. For example, one of the matters of mutual concern to both the Court and the UN is to ensure that any accused brought before the Court receives a fair trial. The ICC prosecutor (unlike the prosecutor at the ICTY and ICTR)³⁴ has an affirmative duty to “investigate incriminating and exonerating evidence equally”.³⁵ This means that the ICC prosecutor will have an affirmative duty to search, *inter alia*, UN archives for information that may be inculpatory or exculpatory. On the basis of Article 5 of the ICC-UN Agreement, the UN is obliged not only to permit such searches but also to share such documents with the prosecutor. These documents would obviously be made available to the defence pursuant to Rule 77 of the Rules of Procedure and Evidence. This could have a chilling effect on both UN officials in the field who regularly report information back to UN headquarters³⁶ and on the states, intergovernmental organisations or other international organisations that may be hesitant to provide information to the UN in the future for fear of disclosure.

³⁰ *Ibid.*, Article 5.

³¹ *Ibid.*, Article 6.

³² *Ibid.*, Article 7.

³³ See, for example, *ibid.*, Article 8 (regarding personnel co-operation); *ibid.*, Article 9 (general administrative co-operation); *ibid.*, Article 10 (co-operation concerning translation and interpretation services); and *ibid.*, Article 13 (financial matters).

³⁴ Pursuant to United Nations, Statute of the International Criminal Tribunal for Rwanda, adopted by resolution 955 (1994), 8 November 1994, Article 15(3) (<http://www.legal-tools.org/doc/8732d6/>), the *ad hoc* international criminal tribunals share a common prosecutor.

³⁵ ICC Statute, Article 54(1)(a), see *supra* note 9.

³⁶ Nothing in the paragraphs that follow are meant to suggest that the UN or its officials would seek to thwart any potential ICC prosecution through withholding documents or other information in the possession of the UN.

Confidentiality issues. Regarding information supplied to the UN by states, intergovernmental organisations or other international organisations, Article 20 of the ICC-UN Agreement sets forth certain confidentiality provisions. If the state, intergovernmental organisation or international organisation provided the information to the UN in confidence, the UN shall seek the consent of the originator to disclose the information to the Court.³⁷ If the originator declines to give its consent, one of two procedures will be employed. If the originator is a state party to the ICC, the UN will notify the Court that the state has refused to give its consent for disclosure and the Court and the state concerned can resolve the dispute pursuant to the terms of the ICC Statute.³⁸ If the originator is not a state party (including intergovernmental organisations and international organisations), the UN will not disclose the information and will inform the Court that it is unable to do so due to a pre-existing obligation of confidentiality.³⁹ The ICC-UN Agreement is silent as to the potentially large collection of archival material that the UN currently possesses, much of which was probably provided without any specific confidentiality conditions.⁴⁰

Issues concerning privilege. There are no general provisions that would permit the UN to assert a broad privilege for information created and submitted by its field officers or agents. However, Article 15(3) of the ICC-UN Agreement permits the UN to request “appropriate measures of protection” from the Court with respect to information or documents provided by the UN that would “endanger the safety or security of current or former personnel of the United Nations or otherwise prejudice the security or proper conduct of any operation or activity of the United Nations”.⁴¹ Although this provision would seem to allow a limited degree of protection for UN information or documents, the Court will necessarily have to interpret this clause narrowly in order to guarantee the accused a fair trial. This effectively means that all UN documents could eventually be made

³⁷ ICC-UN Agreement, Article 20, see *supra* note 9.

³⁸ *Ibid.*, Article 20. See ICC Statute, Part 9, Articles 86–102 and Article 72, see *supra* note 9, concerning international co-operation and the protection of national security information, respectively.

³⁹ ICC-UN Agreement, Article 20, see *supra* note 9.

⁴⁰ Of course, given that the ICC has prospective jurisdiction from 1 July 2002 *only*, the UN archives may be of only marginal value to either the prosecution or the defence. The fact remains, however, that these archives will be one source of information that is subject to thorough scrutiny by the prosecutor.

⁴¹ See also ICC-UN Agreement, Article 18(4), *supra* note 9.

public through the Court, since neither the ICC Statute nor the Rules of Procedure and Evidence expressly provide for the UN to be afforded any type of privilege with respect to documents it provides to the Court. The ICC-UN Agreement is silent as to any privileges on behalf of information controlled by the UN. Article 69(5) of the ICC Statute merely states that the Court shall observe any privileges set forth in the Rules of Procedure and Evidence.⁴² Rule 73 sets forth the provisions concerning privileged information and contains no provisions covering information in the possession or control of the UN.⁴³

Additional agreements. However, possibly to close this gap, the ICC-UN Agreement anticipates that additional agreements between the ICC prosecutor and the UN may be necessary in the future. For example, with respect to investigations, ICC-UN Agreement Article 18(3) specifically provides for future agreements between the UN and the ICC prosecutor and states:

The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.⁴⁴

This article, when read in conjunction with other provisions of the ICC-UN Agreement, raises several potential problems. First, if such an agreement is negotiated in the future, care must be taken to avoid infringing upon the prosecutor's obligations under Article 54(1)(a) of the ICC Stat-

⁴² See also ICC Statute, Article 64(6)(c) (concerning protection of confidential information) and Article 68(6), which permits states to make applications for necessary measures to protect "confidential or sensitive information", see *supra* note 9.

⁴³ In this respect, it is interesting to note that ICC, Rules of Procedure and Evidence, 9 September 2002, ICC-ASP/1/3, Rule 73(4)-(6) ('ICC, RPE') (<http://www.legal-tools.org/doc/8bcf6f/>) specifically provides for a privilege relating to information under the control of the International Committee of the Red Cross. Presumably, the drafters of the Rules of Procedure and Evidence could have inserted a similar clause granting privileged status to UN documents, but chose not to do so.

⁴⁴ ICC-UN Agreement, Article 18(3), see *supra* note 9. See also ICC, RPE, Article 18(4), *supra* note 43, which reiterates, *inter alia*, that the UN and ICC prosecutor may enter into an agreement to protect the confidentiality of information.

ute. The disclosure obligations of the prosecution under the ICC Statute⁴⁵ are fairly broad and care must be taken to avoid even the appearance of running afoul of these carefully crafted disclosure rules.

Second, this provision is closely related to Rule 70(B) of the Rules of Procedure and Evidence of the ICTY and ICTR.⁴⁶ It is not uncommon in the practice of the *ad hoc* international criminal tribunals for the prosecution to seek the approval of the originator for the disclosure (and even the use in court) of information provided pursuant to Rule 70(B) of the ICTY or ICTR Rules of Procedure and Evidence.⁴⁷ The issue becomes more difficult when a “Rule 70 document”⁴⁸ contains information that may otherwise be discoverable under Rule 68 of the ICTY or ICTR Rules of Procedure and Evidence,⁴⁹ but for which the originator refuses to provide its consent for disclosure. In this circumstance, the prosecution is faced with three choices: 1) it may petition the Trial Chamber for an *ex parte in camera* hearing under Rule 66 of the ICTY or ICTR Rules of Procedure and Evidence; 2) it may violate its confidentiality agreement with the information provider; or 3) if the “Rule 70 information” is the sole information in its possession, it may seek to dismiss the charges. The

⁴⁵ ICC, RPE, Chapter 4, Section II, Rules 76–84, see *supra* note 43.

⁴⁶ ICTY, RPE, Rule 70(B) and ICTR, RPE, Rule 70(B), see *supra* note 21. The text of these rules, which are identical, state: “If the Prosecutor is in possession of information which has been *provided* to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused”.

⁴⁷ *Ibid.* This notwithstanding the clause limiting the use of such documents to “generating new evidence”. This may be the case for several reasons. For example, the trial attorneys on a case may re-evaluate the information and determine that it is important for the prosecution of the case. In other cases, the originator of the information may have originally taken a restrictive view of the information, but was subsequently persuaded that “Rule 70 protection” was not required.

⁴⁸ *Ibid.* This rule also pertains to witness statements, such as when a (past or present) senior government official provides information in the form of a signed statement for investigative leads.

⁴⁹ *Ibid.*, Rule 68(A). These rules are identical and provide:

The Prosecutor shall, as soon as practicable, disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecution evidence.

ICC may face this same dilemma when confronted with information provided by the UN pursuant to Article 18(3) of ICC-UN Agreement.

Third, any agreement between the ICC prosecutor and UN that purports to establish a privilege for UN documents under the cover of “confidentiality” may be *ultra vires* the ICC Statute and Rules of Procedure and Evidence. This would be the case since neither the ICC Statute nor the Rules of Procedure and Evidence expressly provide for such a privilege and because an agreement between the UN and the ICC prosecutor clearly cannot be used to amend either the ICC Statute or the Rules of Procedure and Evidence to create such a privilege.

Fourth, the result of co-operation agreements between the UN and the Court (or the prosecutor) may not be a good idea on policy grounds. Leaving aside any potential problems relating to confidentiality and privileges, what such agreements have the potential to do is make the entire UN system a ‘long-arm investigator’ of the prosecutor. This could have negative consequences for UN peacekeeping and other functions. It is extremely unlikely that a party to a conflict would willingly accept UN personnel, peacekeepers or observers on its territory if such persons were likely to be called as witnesses before the trial chambers of the ICC. Moreover, the parties (not to mention the UN personnel themselves) may be hesitant to provide documentation or reports to the UN for fear that such information is later presented in evidence at trial.

Inequality of arms issues. Finally, the higher the degree of co-operation between the Court and the UN, the greater the appearance that there will be an ‘inequality of arms’ between the prosecution and the defence at trial. Once the Court is up and running, the ICC prosecution will have enormous resources at its disposal. By effectively making the entire UN system potentially a ‘long-arm investigator’ of the Court, complete with confidentiality agreements whereby the UN and its programmes provide information to the prosecutor, the perception may arise that the defence cannot compete fairly given the resources available to the Court from the entire UN system and its programmes.

The final provision of the ICC-UN Agreement worth mentioning is Article 19, which stipulates that the UN will take “all necessary measures to allow the Court to exercise its jurisdiction” including waiving its staff

members' privileges and immunities in the event the Court seeks to exercise jurisdiction over such persons.⁵⁰

Conclusions. The ability of the Court and the ICC Office of the Prosecutor to enter into agreements with the United Nations is a positive development, since many advantages will accrue to the Court as a result of such agreements. However, care must be taken to ensure that such agreements do not hinder the Office of the Prosecutor, or result in situations that may be prejudicial to the accused. The issues highlighted in this chapter should be of assistance in identifying and avoiding problems concerned with the finalisation of agreements between the Court and its organs and the UN.

⁵⁰ ICC-UN Agreement, Article 20, see *supra* note 9.

Remarks on Caseload and Disclosure

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These observations are based primarily on the experience that I have gained as a member of the legal staff of the prosecutor of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), where I am assigned to deal both with cases before the ICTY and the International Criminal Tribunal for Rwanda ('ICTR'). The observations below are based entirely on my own views, and are not intended as criticisms of existing ICTY or ICTR practices and policies.

I joined the Office of the Prosecutor of the ICTY almost five years ago, starting as a legal adviser (international law) with the ICTY's Legal Advisory Section. I was soon asked to work on cases on appeal before both the ICTY's Appeals Chamber and the ICTR's Appeals Chamber. I am now spending a great deal of my time on appeals litigation. In my capacity as legal adviser and appeals counsel, I have witnessed the qualitative and quantitative changes the ICTY and ICTR caseloads have undergone since the establishment of these *ad hoc* tribunals. While I do not wish to oversimplify the evolution of the nature of legal work at the *ad hoc* tribunals, the general trend should be clear to anyone who compares the nature of contemporary caseloads with the type of cases that the *ad hoc* tribunals had before them in the first five years of their existence.

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37.1. Three Stages in the Evolutionary Process

Personally, I have noticed that this evolution has taken place in three stages. At first, both tribunals were confronted with novel legal questions relating not only to their capacity to exercise jurisdiction (*Kompetenz-Kompetenz*), but also in respect of the substantive law these tribunals could apply. A great deal of legal advisers' initial energy has been devoted to fleshing out fundamental questions relating to the jurisdictional and substantive elements of crimes. This often required extensive research in international law, spanning not only the laws of armed conflict but also human rights law as well as national law. The ICTY's *Tadić* (*Jurisdiction*) decision of 1995, the *Tadić* appeal judgment of 1999, the ICTY's *Čelebići* judgment of 1998 and the ICTR's *Akayesu* trial judgment of 1998 can be cited as prime examples of judgments that reflect the early stages of the challenges facing the *ad hoc* tribunals. This was the period in which the Appeals Chamber in the ICTY and the ICTR was quite willing to deal with interesting and fundamental legal issues regardless of whether they were decisive for the particular case at hand. In other words, the ICTY and ICTR Appeals Chambers did not shirk away from rendering 'advisory' opinions.

In the second phase of their existence, both Chambers and the Office of the Prosecutor became more alert to the need to develop the *procedural rights the accused were entitled to*. The Barayagwiza saga at the ICTR (the late disclosure of the content of charges), the *Todorović* arrest case at the ICTY (potential unlawful arrest), the ICTY's *Kupreškić* trial judgment (cumulative charges) typify this second stage. I regard this as a period in which the jurisprudence of both tribunals seemed to devote much more attention to the procedural rights of the accused. Compared to the first phase of the tribunals' existence, this second phase has marked a definitive shift in emphasis from the *international* (law) aspect to the *criminal* (law) aspect of the tribunals. On the level of the Appeals Chamber, it became quite clear that the judges were no longer eager to take up fundamental questions of international criminal law, the resolution of which did not have any effect on the particular case at hand. The cases in which 'advisory' opinions were issued became rarer.

I believe that at both the ICTY and the ICTR we are now witnessing a third stage of the evolutionary process. The instances in which fundamental questions of substantive or procedural nature arise have become

even rarer. The body of jurisprudence on substantive legal questions has become vast, and while not every pending question has been answered, the occasions when legal advisers need to research fundamental questions from the bottom up have become much more infrequent. As for the procedural aspects of our work, many of the procedural issues have been addressed by successive changes to the Rules of Procedure and Evidence. There is, in other words, an impressive body of jurisprudence and rules covering both substantive and procedural criminal law applied by both *ad hoc* tribunals. This established body of law provides more legal certainty than was the case, say, five years ago.

37.2. Fundamental Change in the Nature of the Caseload

While the legal process has become more stable and predictable, the nature of the caseload, before both the Trial Chambers and the Appeals Chamber, has changed dramatically. Most of the pending cases are factually extremely complex. This is, I believe, due in part to a deliberate shift in the prosecution's strategy: to aim primarily at higher-level accused, who are allegedly responsible for a wide range of crimes both in terms of time span and localities.

In addition, years of investigation into high-profile incidents with many potential perpetrators have led the prosecution to bring successive indictments relating in part to the same incidents, but which are primarily aimed at other accused. Examples include the many cases at the ICTY relating to incidents in the Lašva Valley in central Bosnia. A few of these cases have been entirely finished (*Aleksovski, Furundžija*) or are in the final stages (*Kupreškić*); in addition, however, complex appeals are pending in a number of cases (*Blaškić, Kordić*); other accused in relation to the Lašva Valley are awaiting trial (*Hadžihasanović et al., Ljubičić*), or awaiting judgment (*Tuta and Štela*). All these cases are interrelated and most accused or convicted persons have requested and obtained access to most of the material produced in relation to the other Lašva Valley cases. In addition, the judges and the parties in many of these cases have been faced or are still struggling to come to terms with the belated discovery or release of sizeable archives of material held by former belligerent states involved in the conflicts.

Considering the already onerous disclosure obligations which hold sway in the ICTY, the Office of the Prosecutor in the first instance and the Chambers' and Registry's legal staff in the second instance are having to

spend considerable time reviewing voluminous archives of material, assessing whether this material should be allowed into the appeals process for the first time, dealing with motions for access from various accused to material produced in other cases, assessing whether some of this material is or should be kept confidential, and so on.

This type of exercise has to be repeated every single time another accused is brought before the tribunal for crimes also covered by other cases. The entire case record has to be scrutinised with the request of the newly accused in mind. New protective measures may have to be considered in order to protect the confidentiality of certain parts of the case record, or to deal with new security concerns.

In addition, the ICTY's staff are acutely aware that there are some very high-profile accused currently being prosecuted while none of the parties has been able to obtain access to invaluable state archives. It can be easily foreseen that belated access to such archives may have a considerable impact on the course of the procedure – either at the trial level stage or at the stage of the appeals. It is important to note that neither the ICTY nor ICTR Statutes and Rules of Procedure and Evidence were drafted with this hypothesis in mind.

For instance, whereas allowance has been made for introduction of (some) new evidence on appeal, current procedures are inadequate for dealing with belated discoveries of entire state archives. There is at least one case, which is currently pending on appeal, where the ICTY Appeals Chamber is seriously giving thought to ordering a partial or complete retrial in view of the belated discovery of important and voluminous archival material. Such an event has a profound impact on the nature of the proceedings: whereas the *ad hoc* tribunals were set up with only one instance of fact in mind (at the trial level), reopening a case after the belated discovery of archival material will inevitably lead to a complete or partial retrial, on grounds not foreseen by the drafters of the Statutes.

37.3. Lessons to Be Learned

With this background in mind, I believe that a number of lessons can be learned. First, over the years the legal adviser's tasks at the International Criminal Court ('ICC') are likely to undergo fundamental changes. Although the ICC is starting off with a detailed Statute, and has been endowed with tools such as the ICC Elements of Crimes, it would be overly

naive to believe that this will settle most of the fundamental legal obstacles that will be faced in the early cases. Based on what I can detect thus far, I do not believe that the ICC will make the same mistake (if it can be called thus) in minimising the human rights of the accused. So there may be no second stage in which the ICC will suddenly awaken to the fact that it is not only an international tribunal but also a criminal tribunal.

Sooner or later, the ICC will be able to benefit from a firm body of substantive and procedural law that in the long run will create less need for fundamental legal research. It would be prudent to already take this scenario into account at this early stage: eventually there will be less need for pure legal research while the need for staff with more litigation skills will increase.

Judging from my own professional experience at the ICTY, there will be staff who can make this transition rather easily, as they will gradually develop the necessary skills to function in whatever professional setting they end up in. However, other staff may be less flexible in that respect; they will have to receive special training or be offered tasks that will become more esoteric as the life of the ICC goes on. If the ICC wishes to invest in its staff, and use and develop the human capital it has, it will have to make a serious and sustained effort at staff development. Maybe a mentorship programme could be an option. Upon entry into the job each staff member's professional strengths and weaknesses should be assessed; tailor-made individual training programmes could be developed to address these; and perhaps even a system of job rotation could be developed (at least within the Office of the Prosecutor). Why not have a legal adviser spend a few months doing investigations, spend time in the pre-trial, trial and appeals sections? At the moment, job rotation at the ICTY and ICTR is non-existent. Job rotation could assist staff with becoming more a fully rounded Office of the Prosecutor legal advisers.

37.4. Disclosure Unit

Apart from (continuing) legal training, I believe that structurally it would be prudent for the ICC to ensure to the maximum extent possible that legal advisers are given the freedom (intellectually and otherwise) to do what they are best at: giving legal advice. At the moment, and in spite of chronic complaints, many legal staff in the Office of the Prosecutor at the ICTY are spending inordinate amounts of time at performing tasks that could – with some institutional effort – be done mechanically or at least in

a more automated manner. For example, to avoid having to assign highly qualified legal staff to review search results of in-house legal material – which are, as I am told, considered successful if they have a hit rate of 5 per cent – an independent disclosure unit should be established whose remit it would be to:

1. perform automatic and regular searches throughout the entire legal life of a case of all incoming evidence material for all ongoing cases (the frequency of which could be subject to a court ruling or *inter partes* discussion);
2. work with search parameters provided by both parties and approved by the Chamber dealing with a particular case;
3. take into account the need for confidentiality of certain material;
4. deal with motions for access by accused in similar cases.

37.5. Successive Cases Relating to the Same Incidents

Apart from the above suggestions, the ICC should in my view develop a vision of the type of cases it wishes to pursue. Taking the ICTY and ICTR cases as an example, one should query whether it makes sense, from an international criminal law perspective, to keep ‘digging’ for suspects for similar crimes. When the same incidents are being pursued in successive indictments, spread over several years, more time will inevitably have to be devoted to ploughing through the same evidence and trial records for inculpatory and exculpatory purposes, and in order to properly respond to motions for access to pre-trial, trial and appeals records. This burden is exacerbated when suspects are tried separately in relation to the same incidents, and when cases start at different times. While the desire to prosecute all possible perpetrators in relation to particularly notorious incidents is understandable, sooner or later a trade-off between that desire and the need to move on to other cases will need to be made. Here, I believe, there may be a need to spend more time thinking through investigative priorities. The ICTY and the ICTR experience shows that while it may be easier from an institutional perspective to continue to investigate the same incidents and to widen the circle of potential accused, the implications of such a strategy for the pre-trial, trial and appeal stages need to be carefully considered.

Will the ICC go for a Nuremberg-style targeting approach, which implies aiming at a selected number of suspects in relation to similar inci-

dents – preferably brought before the Court roughly at the same time – or will the ICC aim at targeting all possible perpetrators, regardless of when they are surrendered? The *ad hoc* tribunals' experience shows that these are fundamental questions, the effect of which on the nature of the legal adviser's work has been underestimated thus far.

Nine Comments

Richard J. Goldstone*

The first prosecutor of the International Criminal Court ('ICC') will, in many ways, find herself or himself in a position comparable to that in which I found myself in August 1994. With regard to that situation, I have the following comments:

1. It is crucial to build, as quickly as possible, the credibility of the new institution. In 1994, the scepticism relating to the International Criminal Tribunal for the former Yugoslavia ('ICTY') was just about universal. The ICC is obviously in a more advantageous position and its lack of credibility is limited to the few countries that strongly oppose its existence. It is in respect of those countries that attention must be given. In that context, the relationship between the prosecutor and the media is crucial. It must be made plain that the institution is a professional and serious one. The philosophy of the prosecutor must be set out and become the subject of wide debate. I need hardly stress that it must be made plain that decisions will be taken on a professional and not a political basis. It is advisable to hold regular press conferences in order to explain what is happening in the Office of the Prosecutor. I found journalists to be understanding and sympathetic to the non-disclosure of information

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- that could embarrass the Office of the Prosecutor or which related to current investigations.
2. It is essential that the prosecutor pay personal visits to leading political and government leaders in relevant countries. I attracted criticism from the Secretary-General of the United Nations for the amount of time I spent away from The Hague on missions to important government officials. I have no doubt that without such visits it would not have been possible to have established efficient mechanisms for our investigators to interview witnesses and other people in many countries around the world.
 3. It is not appropriate for officials of an international criminal court to travel to any country without the express or tacit knowledge and consent of the government of that country. Most governments did not insist on any formalities but that was the consequence of personal meetings.
 4. Creating a good *esprit de corps* in the Office of the Prosecutor is obviously essential. The Office is staffed by professionals, many of them with some years of experience. It is essential to make the staff feel confident that issues such as the philosophy and agenda of the Office of the Prosecutor are not only shared with them, but that they are made full partners in developing and articulating these issues.
 5. The relationship between the Office of the Prosecutor and the judges during the first few years of the life of the ICTY was a matter of sensitivity and complexity. The judges from common law countries accepted the need for the independence of the prosecutor. However, the civil law judges were used to giving directions to prosecutors. In the absence of indictments, the judges tended to vent some of their frustration on the Office of the Prosecutor and insisted on full reports being given to plenary meetings of the judges on the policies of the prosecutor and the progress of investigations. At times, I felt it necessary to protect the judges from themselves and withheld information in order not to make the judges privy to information that might embarrass them at the trial stage. I feared most of all an application by the prosecutor for the recusal of a judge on this ground in order not to be a party to an unfair trial.
 6. International and domestic non-governmental organisations have become more and more important in recent years and it is advisable

to keep contact with them. They can often be the source of useful evidence and other information. They are also relevant in building credibility for the Court. The role some of them have already played with regard to the ICC speaks for itself. They should be made to feel important partners in the whole endeavour.

7. I found it useful to build friendly relationships with the diplomatic corps in The Hague. They were often helpful in making efficient and speedy means of communication with their governments. Regular off-the-record briefings with them are a good idea. I hasten to add that I am not suggesting the disclosure of any information whose publication might cause embarrassment.
8. I was surprised at the amount of gender and racial discrimination that emerged in the Office of the Prosecutor – it may well be inevitable in an international office. This led to the appointment of a senior member of the staff of the Office with full authority to investigate any allegations on behalf of and with the full authority of the prosecutor. On a number of occasions, having a system in place was able to diffuse what might have otherwise become divisive issues.
9. It is important for the prosecutor to nurture a culture of human rights in the Office of the Prosecutor. This does not necessarily obtain in similar offices in domestic situations. In an international criminal tribunal, fair trials are more important than successful prosecutions. This approach calls for scrupulously fair procedures and openness with defence lawyers. This approach should be regularly re-evaluated and discussed in the Office of the Prosecutor.

Questions for the ICC Office of the Prosecutor

Mohamed C. Othman*

This chapter highlights issues that the International Criminal Court ('ICC') prosecutor would have to deal with, or which the Office of the Prosecutor may encounter, on questions of effective investigations and prosecutions. It pinpoints areas that may require policy decisions, the establishment of procedures or practice directives from the prosecutor. Although each new crisis or conflict situation occasioning international humanitarian law violations is unique, and circumstances, including parties and participants, are different, there are nonetheless a few common denominators, which if foreseen and acted upon could enhance the effectiveness of accountability.

39.1. Early Initiatives

It is often the case that United Nations ('UN') bodies, and in particular the UN Security Council and UN High Commissioner for Human Rights ('UNHCHR'), would have been seized of a situation after 1 July 2002 in which serious human rights and international humanitarian law violations have been committed. It is the usual practice for the UNHCHR, acting within its mandate, to dispatch thematic special rapporteurs, and for the UN secretary-general, on the basis of recommendations of either the Security Council or the UNHCHR, to establish an international commission of inquiry to look into violations committed in a particular situation in which international humanitarian law violations have taken place, whose crimes are within the jurisdiction of an international tribunal or states. This trend will continue. It is thus essential for the ICC prosecutor to *con-*

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nect, early on, with these bodies in order to gain access to the information and evidence gathered, as well as to the findings of such bodies. Further, the special rapporteurs or members of expert commissions have been, and could be, potential expert witnesses for the prosecution. It is suggested that the ICC Office of the Prosecutor offers advice and guidance, especially in matters relating to the Court's jurisdiction, the elements of crimes, and other areas of prosecutorial interest to these bodies or entities. Although guidelines for human rights information gathering do exist,¹ the value of specific directives is invaluable to subsequent investigations and prosecutions.

Dealing with early actors on the scene, who invariably include national and international human rights organisations as well as the media, requires directions from the prosecutor. Among UN agencies that may intervene is the UNHCHR, which may also establish field investigation offices or receive evidentiary materials from human rights organisations. Human rights advocacy agencies and individuals collect and gather evidence, sometimes without the necessary judicial safeguards required by a court of law. The UNHCHR may also establish field investigation offices or may receive evidentiary materials from local human rights organisations. In Rwanda, immediately after the genocide, eight boxes of documents found in a house belonging to the brother of late President Juvénal Habyarimana, were destroyed out of ignorance of what they might contain. In another example, the original plan for the destruction of East Timor, drawn up by an Indonesian army general, was first discovered in Dili in early September 1999. It was handed over to a peacekeeping soldier and has never been recovered. Only unauthenticated copies of a copy now exchange hands. It was also the case that a UN peacekeeping force – of the enforcement kind, duly authorised by the Security Council under Chapter VII of the UN Charter – was dispatched to restore peace, law and order. It too gathers and collects information and evidence. The modalities of unfettered access by the prosecutor to such information gathered by UN peacekeeping forces, or contingent contributing states, will have to be worked out with the UN's Office of Legal Affairs by the ICC.

¹ For example, United Nations, Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN doc. E/ST/CSDHA/12, 1991; United Nations, Guidelines for the Conduct of United Nations Inquiries into Allegations of Massacres, Office of Legal Affairs, 1995; UN Commission of Experts for the former Yugoslavia, Guidelines for the Gathering of Information and the Conduct of Interviews, 1993.

The advice is that an ICC Office of the Prosecutor should be one of early initiatives. The gestation period for the admissibility of cases under Article 17 of the ICC Statute could be unnecessarily prolonged without forward arrangements and plans to jump-start investigations on the basis of a coherent prosecution strategy once decisions are made.

39.2. Politics of Core Crimes

The body politic of any given situation in which core crimes have been committed is crucial to investigations and to the formulation of a prosecution and investigation strategy. These crimes are best investigated and prosecuted if the socio-political and other dimensions of a conflict or a crisis (for example, history and culture) are appreciated. Considerations should be given to identifying expertise with authoritative knowledge of a particular conflict, and this should be factored into the planning phases of investigations and the formulation of realistic prosecutorial objectives. An appreciation of these issues assists the prosecutor in demonstrating that the crimes were or are part of a plan or policy – a required element of proof under the ICC Statute. Further, understanding of and deep insight into negotiated political settlements that have accountability implications for the ICC can also be garnered from information and commentaries by specialists.

39.3. Judicial Assessment Capacity

In order for the prosecutor to carry out the mandate defined under the ICC Statute effectively, the legal advisory team should not be composed exclusively of international humanitarian law experts. It should also include professionals capable of carrying out judicial assessment of national investigation and prosecution capabilities, and of due process and international standards of justice rendered by national courts. Capacity and procedures for the systematic monitoring of national investigations and prosecutions should be built into the Office of the Prosecutor. This would be of assistance in decision-making by the Prosecutor whether to initiate, undertake or continue investigations or prosecutions.

39.4. Prosecution Strategy, Investigations and Prosecution

The prosecution of persons with the ‘greatest responsibility’, however termed or defined in any given situation, will inevitably be a selective

process. Not all individuals criminally responsible will be held accountable by the ICC prosecutor. The timely articulation of a coherent prosecution strategy is often an indispensable tool for investigations, prosecutions as well as for state parties and the public, whose confidence in international justice ought to be considered. This capacity must be incorporated in the Office of the Prosecutor. Investigations and prosecutions remain the engine room of the Office and they are what its performance will be measured against. A number of considerations should be addressed and policies and directives given in the setting up of the Office of the Prosecutor. Here we emphasise a few.

The prosecutor would have to decide whether investigations would be prosecution-driven or investigation-driven. This would determine the responsibilities, internal office structure, interpersonal relations and the end product of the Office of the Prosecutor. Throughout the investigations process, it must be seen that there is a legal and judicial *encadrement* (supervision) of investigations. The propensity for investigations to steer of their own volition, set new targets, trigger arrests and frame the indictment agenda without clear reference to prosecution strategy has occurred, and may prove costly to the ICC prosecutor.

The standards required of prosecutions should be spelled out by the prosecutor to all investigators, trial attorneys and legal advisers. International criminal tribunals and national courts of law with criminal jurisdiction place probative value to the quality not quantity of evidence for guilt. The recording of 700 to 1,000 or more witness statements against an individual or a case by the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR') in some instances is a waste of investigative resources; and by that quantitative measurement alone, it cannot be considered diligent prosecution.

Staffing is a priority. Recent experiences have shown that there is an insufficient pool of experienced investigators for atrocity crimes within national police organisations. A serious deficit exists in locating qualified investigators for gender-based crimes. Adequate provisions should be allocated to orientation and staff training.

Documentary evidence. The processing of documentary evidence is critical to effective investigations and prosecutions, in particular to the whole chain of custody issue. It also has technological, digital, language and translation implications, and can be resource intensive.

Intra-office procedures. Consideration should be given to issues of confidentiality: access to evidence within the Office of the Prosecutor and adequate safeguards against undesired dissemination of information must be put in place. This should be balanced with the need to ensure the availability of information and evidence to and between all professional staff of the Office.

Forensic expertise. This is a required discipline, and due account must be taken of its importance. Given the technical, self-regulatory and costly nature of this expertise, it may be contracted out to recognised agencies or associations. The prosecutor should maintain a minimum coordinating and supervisory capacity in this field and should study the possibility of being the technical reference of state parties undertaking this activities in the fulfilment of their jurisdiction.

39.5. States as Litigants and Issues of State Co-operation

The most challenging, and perhaps controversial, part of the effective fulfilment of the prosecutor's mandate may be state co-operation, competition or even contestation. As the prosecutor and states are litigants before the ICC, the complexity of cases is real. This requires diligent court preparations, well-researched and drafted legal briefs and coherent positions. Further, enticing and enhancing state co-operation ought to be one of the prosecutor's priorities, however ill intended the state may be. In one instance, on the agreed basis of Rule 70(B) of the ICTY and ICTR Rules of Procedure and Evidence,² a state (Western, liberal and democratic) permitted the prosecutor to examine highly classified military intelligence information on condition that no notes were taken, that no use was made of the documents before prior consent of that state, and the co-operation extended be confidential and not subject to any public report. Examination by the prosecutor of the sensitive intelligence information provided re-

² United Nations, ICTY, Rules of Procedure and Evidence, adopted on 11 February 1994, as amended 22 May 2013, IT/32/Rev.49 (<http://www.legal-tools.org/doc/950cb6/>); United Nations, ICTR, Rules of Procedure and Evidence, adopted 29 June 1995 (<http://www.legal-tools.org/doc/c6a7c6/>). Rule 70(B) of both tribunals states: "If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, the initial information and its origin shall not be disclosed by the Prosecutor without the consent of the persons or entity providing the information and shall in any event not be given in evidence without prior disclosure to the accused".

vealed that the top secret *dossiers* were nothing but summaries of newspaper articles and radio broadcasts.

Another decision that needs to be made by the prosecutor is whether the Office intends to undertake any *technical assistance function* in relation to national investigations and prosecutions carried out by a state party under the Statute. There are advantages and disadvantages to being involved as well as remaining aloof of national processes and of the judicial models of accountability that may be established by concerned state parties in the fulfilment of their obligations under the ICC Statute.

The prosecutor might give consideration for the setting up of an *ad hoc* or informal group of experts to advise the Office on: 1) the implications of co-operation or partnership arrangements with states involved in investigations and prosecutions; 2) the negotiation process, contents and implications of political settlements and their accountability provisions; 3) the most effective ways and means of dealing with delinquent states. This internal and informal advice process would be supplementary to the official consultation process between ICC state parties and organs of the Court.

39.6. Victims Reparation and Compensation

Depending on its organisational set-up, the Office of the Prosecutor should support litigation aimed at reparations and compensation to victims and survivors. National laws on the enforcement of foreign judgments need to be revisited, and there is a clear need for national legislation to be compatible with state obligations assumed under the ICC Statute. Victim reparation litigation is bound to enhance the credibility of the Office of the Prosecutor.

39.7. Media Relations

This is also an area of professional interest, and the prosecutor and the Office must be its own spokesperson. The prosecutor ought to have audible, direct and regular media coverage, with well-chosen and focused dissemination targets.

Observations on Legal Culture, Legal Policy and the Management of Information

Christopher Staker*

40.1. Introduction

These observations on the Office of the Prosecutor of the International Criminal Court ('ICC') do not necessarily reflect the views of the United Nations or any of its organs, or of any other organisation. The comments below are of necessity general and brief in nature. The myriad of detailed issues of which I have had experience as a practitioner at the International Criminal Tribunal for the former Yugoslavia ('ICTY') are beyond the scope of a chapter of this nature. I would welcome any future opportunity to elaborate further on any of the points made below, or to comment on any other matter. My perspective is that of a practitioner of international criminal law on the prosecution side. My previous experience has been as a government lawyer in Australia, where I was counsel in cases involving constitutional law and public international law issues. I have also appeared as counsel before the International Court of Justice, and held the position of Principal Legal Secretary in the Registry of that Court for a period. The comments below are informed also to a degree by this earlier experience.

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40.2. Role of the Office of the Prosecutor in Achieving Certainty and Predictability of the Law

International standards require that the criminal law be, to the greatest extent possible, certain, transparent and predictable. International criminal law faces particular challenges in this respect. Although the Statute of the ICTY was framed to include only crimes “which are beyond any doubt part of customary law”,¹ in the absence of international criminal jurisprudence applying those norms, at the time of its adoption there was considerable uncertainty concerning the precise scope and elements of those crimes. Furthermore, as far as procedural law was concerned, the Rules of the ICTY, by their novelty and brevity, were uncertain on many fundamental issues.

The ICC is somewhat better placed in this respect than the ICTY. The ICC Statute and Rules of Procedure and Evidence are more detailed than those of the ICTY, and its Rules of Procedure and Evidence will no doubt be amended much less frequently. It will begin its work with a document setting out the Elements of Crimes. It will at the outset have the benefit of a number of commentaries on its Statute and Rules that already exist. It will have a body of jurisprudence of a number of other international courts and tribunals to draw upon, including the ICTY, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone. Nevertheless, there remain many fundamental questions that have yet to be answered, and the ICC Statute and Rules of Procedure and Evidence in any event differ in material respects from those of other international courts and tribunals that have preceded it. It is to be hoped that the law and procedure of the ICC, as a permanent institution, will as quickly as possible become as certain as that of a criminal justice system in a national jurisdiction. When that point is reached, although there will always be scope for argument in relation to specific issues, the prosecution, defence and the bench, as well as academic commentators, should have a common understanding and common expectations of all basic issues of substantive and procedural law.

The Office of the Prosecutor should play a leading role in this development. Pursuant to Article 40 of the ICC Statute, the judges are duty-

¹ United Nations, Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993, UN doc. S/25704, para. 34.

bound to act independently. Defence counsel have a duty to act in the best interests of their client in the particular case, and different defence counsel may advocate opposing arguments in different cases if the interests of their clients in those cases are different. In contrast, the Office of the Prosecutor is in a position to formulate principled positions on all major issues, and to present these positions consistently and coherently in every case before the Court. That is not to say that the Office of the Prosecutor's arguments will necessarily prevail, and the Office's position will no doubt evolve over time in response to developments in the case law of the Court. However, a consistent and principled Office of the Prosecutor position, in addition to ensuring transparency and equality of treatment of accused, would provide a coherent focus for arguments before the Court, and be conducive to the orderly development of the Court's legal system.

40.3. Establishment of Single Legal Culture

In order to achieve the kind of consistency referred to above, it is suggested that the establishment of a single organisational culture within the Office of the Prosecutor is a matter of considerable importance.

In this respect, an analogy can be drawn between international criminal law and, say, the law of the European Union ('EU'). When the European Communities were first established in the 1950s, the legal systems of those organisations did not yet exist. The lawyers who first practised in that legal system, and who were instrumental in its development, came from a variety of different national legal systems and from a variety of different areas of expertise, including international law, comparative law and commercial law. Today, the law of the European Union has developed into a highly sophisticated, self-contained legal system, with its own legal principles and concepts, and its own legal culture that is shared by specialist EU lawyers regardless of their country of origin.

It is to be expected, and is indeed essential, that international criminal law will undergo a similar development. When the ICTY was first established in the 1990s, there did not yet exist any international criminal justice system. The early practitioners in this field came from various national legal systems. They represented a number of different specialisations, including criminal law, international law and comparative law. Although there have been significant developments since then, my own view is that the stage has not yet been reached where there is a self-contained international criminal justice system, with a single legal culture shared by

all practitioners regardless of their country of origin. Even within the prosecution, my experience is that lawyers still have very different perspectives as a result of their varied backgrounds, and often an intuitive preference for the way issues are solved in their own national systems.²

Creating an international legal culture cannot just be a function of management, but depends upon all of the staff of the organisation being able to adopt an ‘internationalised’ outlook. Lawyers and investigators need to think intuitively in terms of the ICC Statute and Rules of Procedure and Evidence. When interpreting the Statute, they should think intuitively in terms of the principles of public international law, which provide the context to the Statute. Where it is necessary to refer by way of analogy to national legal systems, which should be increasingly less frequent as the international criminal justice system develops, staff should be able to consider and appreciate the solutions offered by all major legal systems, and to be genuinely critical of their own system. They need to be able to see beyond the technicalities of national legal systems and to understand the principles and values underlying them, and to consider how those principles and values can best be given effect within the framework of the ICC Statute and Rules of Procedure and Evidence. The tendency should be avoided of using technical legal concepts from national legal systems that are not part of the Statute or Rules of Procedure and Evidence. The same comment would apply to any of the Court’s staff who are recruited from other international courts or tribunals: they must be capable of thinking in terms of the ICC Statute and Rules of Procedure and Evidence, and avoid any intuitive preference for the way things were done in the international court or tribunal from which they were recruited.

A single legal culture would extend also to matters such as the style of language and terminology used in written pleadings and oral advocacy,

² As Louise Arbour, a former prosecutor of the ICTY has said: “The criminal lawyer in practice is focused on the detail of particular facts and of rules specific to that jurisdiction, and is likely to be unaccustomed to comparative law methodologies. [...] At present, few jurists would consider themselves as experts in both public international law and in their national criminal law, or as experts in the criminal law of more than one of the main legal systems. The lawyers working in my Office in The Hague or Kigali tend to come with a background in mainly one or the other. The practice of international criminal law, as a distinct legal specialisation, is still in the relatively early stages of its establishment”. Louise Arbour, “Foreword”, in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law*, vol. I: *Commentary*, Kluwer Law International, The Hague, 2000, p. x.

the format of written pleadings, the manner of dealings between prosecution and defence counsel, and so forth. Early adoption by the Office of the Prosecutor of a consistent house style in relation to such matters would do much to advance the development of a single legal culture.

The desirability of a single culture is not confined to lawyers. There should also be a single internationalised culture common to investigators, and indeed all other staff. The practical necessity for this is reflected further in the comments below.

One very important consideration in the development of a single legal culture is the need for that culture to be capable of effective application to situations anywhere in the world that the prosecutor of the ICC may come to investigate. The facts of the cases with which the ICC deals may involve remarkably diverse geographic, political, cultural and factual elements. The development of a single organisational culture in which investigators and lawyers are able to work effectively in such diverse situations, and deal with witnesses from such diverse backgrounds, will no doubt present a challenge. The degree of diversity in the staff that contributes to its development will in my view be an important factor in creating such a successful organisational culture.

40.4. Formulation of Legal Policy

The importance of consistency in Office of the Prosecutor positions has been referred to above. It is evident that different prosecution teams should not be taking inconsistent stances on a given issue in different cases at the same time. Equally, the prosecution should not take a position on appeal that is inconsistent with the position that it took at trial, or a position before the Trial Chamber that differs from that taken before a Pre-Trial Chamber. The Office of the Prosecutor should have positions formulated on all major legal issues, and should advance these positions consistently at all stages of the proceedings in all cases.

The formulation of Office of the Prosecutor policy on all major legal issues is not something that can be done overnight. Nor, it is suggested, is it something that can be done in the abstract. Practical and workable policies need to reflect actual experience as it is gained over time. Policies will continue to be formulated and refined as new issues present themselves. However, regardless of whether a new issue arises at the time of an investigation, or at the point when the indictment is drafted, or during

the trial proceedings, the position taken at that point should be one that the Office of the Prosecutor is willing to defend before the Appeals Chamber if necessary, and in all other cases before the Court. In short, the prosecution should be prepared for the appeal even before the indictment is drafted.

It is important that as policy decisions are taken, they are centrally recorded and made available to staff, so that any member of the Office of the Prosecutor can at any time know what that policy is. One possible means of achieving this would be to establish an Office policy manual as soon as the Office of the Prosecutor begins to function. It could begin as an empty document, to which a record is added, under an appropriate systematic heading, each time a policy decision is taken. Over time, such a policy manual would grow in size and detail as more policy decisions are taken, and as previous policy decisions are refined or amended. Where amendments are made to existing policies, the policy manual could indicate the previous policy or policies, the date of each amendment, and the reasons and circumstances of that change (for example, because of developments in the case law of the Court, or because of a need to make provision for unforeseen implications of the earlier policy). In this way, the history of the Office of the Prosecutor policy on any given issue should be easily accessible to any of its lawyers, who would be immediately in a position to state not only what is the Office policy on that issue, but to explain its evolution, and to justify the changes in policy over time.

40.5. Standard Operating Procedures

It would be my suggestion that the Office of the Prosecutor seek to establish, as quickly as possible, standard operating procedures not only for the conduct of investigations, but for all major aspects of legal practice before the Chambers. Part of the standard operating procedures would be a system for the keeping of case files, and for recording in a standardised way all significant decisions and steps taken by the lawyers on a case throughout the proceedings. There should also be a standardised way of keeping, for instance, lists of documents disclosed to the defence in a case.

Such standard operating procedures would not only promote consistency in the work of the Office of the Prosecutor. They would also enable cases to be dealt with efficiently and effectively by different staff at different times. From the time that an investigation is commenced until the time that the Trial Chamber gives judgment in a case, there may be

significant changes in the composition of the Office of the Prosecutor staff working on the case. An appeal may not be conducted by the same team that was responsible for the trial. Furthermore, revision proceedings brought under Article 84 of the ICC Statute may involve a case being reopened many years after the final judgment, when none of the lawyers who worked on the case are still working at the Court. In all of these situations, it is necessary for Office of the Prosecutor lawyers to be able to pick up a case file and to easily ascertain exactly what has previously transpired in the proceedings at a time when it was in the hands of other lawyers. Standardised procedures would enable this to occur.

Such standardised operating procedures would also promote transparency and accountability of Office of the Prosecutor staff. In the event that there were ever a question as to the propriety of the conduct of staff in a case, it would be possible for any person undertaking an internal inquiry to see quickly from the case file the detailed history of the case.

40.6. Management of Information

From my own experience, international criminal investigations and prosecutions involve the handling of, as well as the generation of, huge amounts of information. Information management is thus a key factor in determining the efficiency of the process. The types of information in question may be divided broadly into three categories.

The first category of information consists of the legal materials generated by the organisation itself. In order to be able to practise efficiently before the court, Office of the Prosecutor staff will need to have ready access to all relevant legal materials, including the ICC Statute, Rules and Regulations of the Court, all of the Court's case law, and all of the pleadings filed by all parties in all cases. Such materials are indispensable to legal practice in national jurisdictions, and ideally should be kept in fully searchable electronic databases similar to those found in certain national systems (for example, LexisNexis and Westlaw). There is no reason why the Office of the Prosecutor should itself be responsible for producing and maintaining such databases, given that most of this information will not be generated by the Office, and in view of the fact that it will be needed not only by the Office but equally by judges, the Registry, the defence, academic commentators and others. Provision of such a system would more logically be a function of the Registry. It is also possible that external publishers might provide such a service. However, given that

access to such materials is so vital to its work, the Office of the Prosecutor should take an interest in ensuring that an appropriate system is put in place as soon as the Court begins to function, and in ensuring that it meets all of the Office's requirements. The ICTY is in the regrettable position at the moment that it is generating large amounts of case law that is of importance to international law generally, but which is not readily accessible even to its own practitioners or its own judges, let alone the wider international legal community. Without a comprehensive, up-to-date system for making all relevant legal materials readily available to all, consistency and transparency in legal practice before the Court becomes seriously challenged.

The second category of information consists of the Office of the Prosecutor's internal work product. The need for consistency in the keeping of case files and recording of information has already been referred to above. In addition to case files, this category of information would include internal Office material that is not case specific, such as any policy manual of the kind referred to above, internal memoranda, minutes of meetings, briefing papers, research papers, legal opinions and so on. It is suggested that from the beginning systems should be put in place to capture all this material in a standardised and systematic way, in a format in which it can be readily searched and retrieved by staff. This would again promote not only consistency in the work of the Office of the Prosecutor but also efficiency, for instance, by avoiding research being done on an issue in ignorance of the fact that a major research paper was produced on the question by the Office sometime in the past.

The third category of information consists of evidence. Given the large amount of evidentiary material that can be collected in an international criminal investigation, standardised systems for keeping this material are necessary simply to enable an orderly analysis of it. Effective information management systems for the evidence are also necessary for efficient and proper disclosure of exculpatory material under Article 67, paragraph 2 of the ICC Statute.

Management of the evidence collection might be assisted in part by taking steps to prevent too much irrelevant material from being added to the collection in the first place. While it is undoubtedly true that it is not always possible to tell whether a particular item of evidence will ultimately prove to be relevant or not (and this is so particularly in the early stages of an investigation), the formulation of standard operating procedures for

investigations which keep investigations focused, and the evidence collection within manageable proportions, could contribute significantly to the efficiency not only of investigations but also to that of analysis, disclosure and prosecutions.

It is beyond the scope of these suggestions to comment on the details of an information management system for the Office of the Prosecutor evidence collection that might meet all of these needs. However, a few brief comments may be made. First, it is observed that a fully electronic system would have the advantage of allowing Office staff to access any of the information at any time, potentially from any location, of allowing multiple users to access the same information at the same time, and would allow a comprehensive electronic searching capability.

Second, it is suggested that a system should be set up at the beginning that has the ability to grow, as the Office of the Prosecutor and its information collection expands over time. Problems can arise when an existing information management system proves inadequate and needs to be replaced. This is particularly so when it proves impossible to incorporate immediately into the new system all of the existing material, with the result that two different systems are in operation for a period. It would be desirable for the system that is put in place at the beginning be capable of meeting anticipated future needs.

Third, it is suggested that all information relating to a particular item of evidence should be located centrally. For instance, an Office of the Prosecutor staff member looking at, say, a witness statement in the evidence collection should be able to see immediately details of all cases in which that witness was called to testify, details of all defence counsel in all cases to whom that witness statement has been disclosed, details of any protective measures ordered in relation to that witness, cross-references to any other statements given by that witness, and so forth.

Finally, it is suggested that keeping the information system up to date should always be a priority. It is a huge efficiency if Office of the Prosecutor staff can be confident that a single search of the information management system will provide them with all relevant material.

40.7. Legal Culture in General

Under the ICC Statute, the prosecutor is required to act independently. However, this does not require the prosecutor or Office of the Prosecutor

staff to avoid all contact with judges, defence counsel, academics and others. In national legal systems, law societies and bar associations, conferences and so on bring together all the various players in the criminal justice system. It is suggested that the international criminal justice system should be no different. In relation to matters of general policy that are not case specific, open and constructive dialogue between all of these players, with a view to achieving a common legal culture, is desirable.

40.8. Conclusion

When the ICTY was established, it attracted a huge amount of interest, being the first international tribunal for the prosecution of individuals for crimes under international law since the Nuremberg and Tokyo tribunals. Lawyers found work in the tribunal extremely challenging, as it involved dealing with many major legal issues that had never been addressed before. The ICC is likely to face similar challenges in its early days. However, it is in the interests of international criminal justice that the Court move beyond that stage as quickly as possible. Criminal justice should be certain and predictable, and contain few surprises. In my view, the most important challenge for the ICC will be to devise a system of working that can be applied coherently, consistently and transparently in the same way to situations in any part of the world. When that stage is reached, practice before the ICC should have an atmosphere of being relatively routine, in the same way as practice in any national criminal justice system.

Operational Training

William A. Stuebner*

Training. Some effort has been put into training of the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ('ICTY'). Regrettably, not enough has been done in this area by either the ICTY or the International Criminal Tribunal for Rwanda. Of course, this is understandable given the political demands that were put on the prosecutor from the very beginning to send investigators to the field whether or not they knew what they were doing.

Justice Richard Goldstone identified the lack of training, especially of the investigative staff, as one of the greatest single hindrances to the Office of the Prosecutor's professional operation. The International Investigator Course was later designed at his request to teach experienced investigators the additional skills they require to be successful in the field of international criminal justice. After completing the preparatory phase, the students travel to The Hague for an intensive two weeks of coursework that emphasises practical exercises. Half of the first week is consumed with the teaching of international humanitarian law, with the primary emphasis being on the International Criminal Court ('ICC') Statute, the Rules of Procedure and Evidence and the Elements of the Crimes. This is not an effort to turn investigators into lawyers, but rather to give sufficient legal grounding so they can focus on what it is they have to prove. The course also teaches the basics of statement writing, handling of witnesses, sources and evidence, case management, working with interpreters and legal/criminal analysis. The second week is taken up by military training

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with the Netherlands School for Peace Operations, practical exercises on processing a crime scene and a mass gravesite, an extensive lecture on forensics, a practical exercise in which students must take a witness statement through an interpreter, and an oral report in which the student must brief the ‘prosecutor’ on the status of their case and make recommendations for furthering the investigation. All the practical exercises are based on a scenario based on actual incidents both in the former Yugoslavia and in Rwanda.

New scenarios are being developed that will be more orientated toward Africa and Latin America, and we hope soon to prepare a French-language version of the course and manual. As for availability of student positions in the International Investigator Course, the needs of the ICC Office of the Prosecutor will always receive the highest priority.

Of course, the ICC Office of the Prosecutor will also need to conduct other professional training. All new personnel will have to be trained in the use of databases and on Office legal and investigative protocols. The Institute for International Criminal Investigations (‘IICI’) courses and protocols will be modified to reflect the procedures decided upon by the ICC Office of the Prosecutor so the training we conduct and fieldwork we carry out will be of maximum use and relevance to the Office.

Specialised training will also be necessary whenever the Office of the Prosecutor prepares its staff to work on a case in a specific region of the world. This will include region-specific cultural and historical training. Leiden University, through its Hugo Grotius School of Law, and the Dutch consortium of universities assists the IICI in this regard and would also make its resources available to the Office of the Prosecutor upon request. Furthermore, if the IICI has already been working in an area where the prosecutor begins to work, IICI personnel will be made available to the Office of the Prosecutor for briefings and training. Specialised training could also include forensics training, some of which could be provided by another IICI partner organisation, Physicians for Human Rights, or by organisations such as the Netherlands Forensic Institute in Rijswijk. Finally, the Netherlands School for Peace Operations in Amersfoort might be willing to provide ICC Office of the Prosecutor personnel with the same training they provide to Dutch citizens who are assigned to peace missions. This includes mine awareness, operation of 4x4 vehicles, weapons and equipment identification, checkpoint behaviour and many other useful

subjects. The IICI would be happy to assist the Office of the Prosecutor in procuring any specialised training it requires.

Co-operation between the ICC Office of the Prosecutor and non-governmental professional organisations. This is an area that, if properly managed, can be of great benefit to the ICC Office of the Prosecutor, but if neglected or mismanaged could prove disastrous. Given the delays built into the ICC Statute, it can be expected that many organisations will be working in regions of conflict long before, perhaps years before, the prosecutor is permitted to begin formal investigations. Many of these organisations have potential either to help or hurt the later work of the Office of the Prosecutor.

The IICI will be different from most professional non-governmental organisations (‘NGO’) involved in investigative activity in that its primary purpose is to assist the ICC in every way it can, and it will never engage in activities over the objection of the prosecutor. Furthermore, the IICI will not engage in any sort of investigative activity in an area that might become of interest to the Office of the Prosecutor without proper authority. The IICI will only engage in such investigative activity with the expressed request or approval of one or more members of the Assembly of States Parties. In this respect, it will be playing the role of the old commissions of inquiry and will engage with the prosecutor under Article 15, paragraph 2 of the ICC Statute as “a reliable source” in assisting the prosecution in making the decision whether to pursue an investigation via the Pre-Trial Chamber. In this role, the goal of the IICI will be to perform every investigative activity in exactly the same manner as the prosecutor is already engaged. That is, all work would be done according to the ICC Statute, Rules of Procedure and Evidence and protocols applicable to the Office of the Prosecutor, while at the same time ensuring that everyone who co-operates with the IICI knows it is not working with the authority of the Office of the Prosecutor but that all resulting physical evidence, statements and witness identity, and contact information will be turned over to the Office as soon as is appropriate. The model for this activity is the Omarska camp, Prijedor report of the United Nations Commission of Inquiry for the former Yugoslavia. This part of the Commission’s work was conducted in the most professional manner and in a manner most similar to the way a prosecutor would have worked; hence; it was of the greatest value to the ICTY Office of the Prosecutor.

Unlike most NGOs involved in human rights or justice work, the IICI will not be involved in advocacy, because it must stand ready to second its staff as individuals or teams to the ICC prosecutor at her or his request, provide staff as expert witnesses or perform any other service requested by the ICC prosecutor.

Other NGOs may not see themselves as servants of the ICC Office of the Prosecutor, but they can still be very useful to the prosecutor. NGOs like Human Rights Watch and Amnesty International and their national counterparts are often the first into a region of conflict, have tremendous contacts, behave professionally and are sympathetic to the prosecution of perpetrators of grave violations of international humanitarian law. It would be a mistake as well as a waste of breath to try to ‘order’ these NGOs to do anything or refrain from doing anything. NGOs and their personnel are not, by nature, herding animals. The best thing the Office of the Prosecutor could do is to try to win them over to voluntary cooperation. This worked well for the ICTY during the Kosovo crisis when it employed NGOs to run a questionnaire programme among refugees who fled to neighbouring countries. Also, the human rights NGOs are seriously looking into ways to make their reporting more valuable to prosecutors. The legal councillor of Human Rights Watch, Dinah PoKempner, was commissioned to write a book specifically on how her organisation could change its procedures to be more helpful. Finally, I would suggest that the ICC Office of the Prosecutor should consider assigning one person specifically to be an NGO liaison officer.

Reparations and the Prosecution

Linda A. Taylor*

The starting point in considering how victims' reparation function is being organised and managed within the Office of the Prosecutor is with the Statute of the International Criminal Court ('ICC'), the Rules of Procedure and Evidence and the victims' reparation function contemplated thereunder. There are two focal points for the victims' reparation function: the Court pursuant to Article 75 of the ICC Statute and the Trust Fund pursuant to Article 79.

I note that the Court is empowered to establish principles relating to, or in respect of, victims, including restitution, compensation and rehabilitation, and to determine the scope and extent of any damage, loss or injury to, or in respect of, victims. With respect to the latter function, the Court may appoint appropriate experts to assist it and to suggest options concerning appropriate types and modalities of reparations. Having regard to the principles it establishes, the representations of or on behalf of the convicted person, victims, other interested persons or interested states, and the determinations it makes as to the scope and extent of damage, loss or injury to, or in respect of, victims, the Court may make orders directly against convicted persons specifying appropriate reparations to, or in respect of, victims. Reparations may be awarded on an individualised basis

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or on a collective basis or both. Such awards will be made after one or more hearings before the Trial Chamber.

I further note that Article 79 of the ICC Statute contemplates the establishment of a Trust Fund by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. The Trust Fund is to be managed according to criteria to be determined by the Assembly of States Parties.

The Court may order that an award for reparations be made through the Trust Fund. This will be particularly likely where the number of the victims and the scope, forms and modalities of reparations make a collective award more appropriate. The Court may also order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organisation approved by the Trust Fund. The Court may order money and other property collected through fines and forfeiture to be transferred to the Trust Fund. The Court may also order that an award for reparations against a convicted person be deposited with the Trust Fund where, at the time of making the order, it is impossible or impracticable to make individual awards directly to each victim. Such award is to be kept separate from other resources of the Trust Fund and is to be forwarded to each victim as soon as possible. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of Article 79 of the ICC Statute.

One of the most important and interesting challenges will be the development of procedures for the resolution of large numbers of requests for reparations (that is, reparation claims). Another challenge will be the elaboration of the working relationship between the Court and the Trust Fund. There will have to be extensive consultations to avoid the creation of inconsistent and competing systems for reparations and to assure the effective management of the Trust Fund.

There is an enormous amount of work that must be done before the first reparation claims are filed with the registrar. This work, which necessarily will involve both the Court and the Trust Fund, includes the following:

- establishing categories of compensable losses, categories of claims and criteria for the admission of victims to each category;

- developing procedures and setting priorities for the processing of reparation claims, including expedited procedures and procedures for claims that do not meet formal requirements;
- drafting claim forms (by way of example, it took the United Nations Compensation Commission ('UNCC') five months to prepare claim forms for six categories of claims);
- drafting explanatory and instructional materials for victims, states parties, non-governmental organisations and others concerning reparations;
- creating outreach mechanisms to publicise the victims' reparations function and to contact victims;
- creating a relational database to capture data concerning claims, to profile claims, to process claims, to match claims and to manage and report on claims;
- setting priorities for the payment of awards for compensation (particularly in the event that the assets of the convicted person and/or the resources of the Trust Fund are insufficient to satisfy awards for reparations or other measures taken for the benefit of victims and their families);
- elaborating principles relating to, *inter alia*, standing, the onus of proof, evidentiary requirements and limitation periods (with respect to what will be required of victims to prove loss, damage or injury, the requirements should not be unduly rigid and onerous; UNCC's experience has been that claimants fleeing war zones do not stop to collect documents);
- researching legal issues relating to reparations, including principles of compensation, restitution, rehabilitation and other types of reparations;
- considering whether interim relief is appropriate and, if so, the mechanisms for implementation;
- identifying and consulting with appropriate experts as contemplated in the Rules (for example, UNCC retained the services of experts in general medicine, war and disaster medicine and psychiatry to develop guidelines for considering claims for serious personal injury, death and mental pain and anguish; an expert in labour law for claims for loss of salary; and an expert in mass claims processing

and sampling methodologies for developing mechanisms to process large numbers of humanitarian claims on an expedited basis with a maximum degree of transparency and fairness);

- creating procedures for the provision of financial assistance to and legal representation for victims;
- establishing mechanisms to avoid the duplication of claims; and
- establishing payment mechanisms.

The ICC Statute and Rules of Procedure and Evidence contemplate that the Registry will perform at least some of this work. I note that the Rules provide that the Registrar shall keep a database and other records, provide notice or notifications to victims or their legal representatives with respect to their participation in proceedings, transmit applications from victims to the Court, assist victims in obtaining legal advice, organising their legal representation and providing their legal representatives with adequate support, assist in the selection of a common legal representative(s), provide assistance (including financial assistance) to victims who lack the necessary means to pay for a common legal representative chosen by the Court and publicise the reparation proceedings to victims, interested persons and interested states.

I believe that it is neither appropriate nor practicable for the Office of the Prosecutor to organise and manage the victims' reparation function. The focus of the Office must be the investigation of alleged crimes falling within the jurisdiction of the Court and the prosecution of those accused of such crimes. The victims' reparation function will require an entirely different focus. Inevitably, if the Office of the Prosecutor would be called upon to manage the victims' reparation function in addition to investigating and prosecuting crimes, the former function would be subordinated to the latter within the Office and its importance undermined. Further, should the Office take on such a role, it could find itself in breach of its statutory obligations of independence and impartiality and in a conflict of interest with respect to its statutory obligations and responsibilities towards accused persons. Moreover, the ICC Statute and Rules of Procedure and Evidence do not support such a role for the Office of the Prosecutor.

The focus of the victims' reparation function must be the assessment of damage, loss and injury to, or in respect of, victims and the consideration of appropriate modes of redress. The principles of compensation, restitution, rehabilitation and other forms of reparations are not root-

ed in the criminal law. Those who organise and manage the victims' reparation function will require expertise in fields such as personal injury and other wrongs, claims processing and management, remedies, victims' rights, and banking and financial matters.

It is also likely that the systems developed to resolve victims' claims would not be familiar to prosecutors. I expect that in order to resolve large numbers of claims for reparations, it will be necessary to employ models other than, or in addition to, the traditional adversarial model. The onus of proof and evidentiary requirements will likely be different than in criminal proceedings.

As stated above, the ICC Statute and the Rules of Procedure and Evidence do not support a major role for the Office of the Prosecutor in the victims' reparation function. The primary constitutional mandate of the prosecutor and the Office of the Prosecutor is set out in Articles 15 and 42 of the ICC Statute. Neither provision refers to a reparations function. Nor is the Office of the Prosecutor expressly referenced in the main enabling provisions for the victims' reparations function of the Court. Further, the ICC Statute and the Rules do not contemplate a role for the Office of the Prosecutor at the reparations hearing(s). Once a reparations order has been made, Article 82(4) contemplates that only a legal representative of the victim, the convicted person or a *bona fide* owner of property adversely affected by a reparations order can bring an appeal. Finally, the Trust Fund provisions make no reference to the Office of the Prosecutor.

Regarding the competence relationship between the Office of the Prosecutor and a Reparations Unit in the Registry, and the related issue of the subordination of staff who work on the gathering and analysis of facts relevant to reparation claims, I note that Article 43(1) of the ICC Statute provides that the Registry shall be responsible for the "non-judicial" aspects of the administration and servicing of the Court, without prejudice to the function and powers of the prosecutor under Article 42. However, I am of the view that depending on how the victims' reparation function is set up, much of the technical work can be undertaken by the Registry (through a Reparations Unit, distinct from the Victims and Witnesses Unit) under the supervision of the Trial Chamber. Other aspects of the work could be undertaken the experts appointed by the Trial Chamber and by the Trust Fund. It does not follow that because the Registry is constrained in what it can do, the organisation and management of the victims' reparation function should be assumed by the Office of the Prosecu-

tor. Nor does it follow that the gathering and analysis of facts relevant to reparation claims must be carried out in the Office of the Prosecutor because of its duties and powers with respect to criminal investigations. It is clear from the ICC Statute that the purpose of an investigation is to elicit facts and evidence relevant to an assessment of criminal responsibility, not reparations. It is important to note that the ICC Statute and the Rules of Procedure and Evidence contemplate a significant role for legal representatives of victims in proceedings and it also would be incumbent upon them to gather and present facts relevant to claims.

There are, however, several areas of intersection between the Office of the Prosecutor and the victims' reparations function. Since the Office will be first on the ground and have the initial contact with potential victims and others, it will be well placed to participate in the dissemination of information concerning the reparations function of the Court and the evaluation of how widely it has been dispersed.

Further, the Office of the Prosecutor may apply to the relevant Chamber for the rejection of an application to participate in the proceedings on the basis that the applicant is not a victim or that the applicant's participation would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Office of the Prosecutor may also make representations concerning the proceedings and manner in which participation is considered appropriate. It is clear that these powers could affect the ability of applicants to seek reparations.

Moreover, the Office of the Prosecutor may apply to either the Pre-Trial Chamber or Trial Chamber for a determination of whether measures should be requested for the identification, tracing and freezing or seizure of proceeds, property and assets, and instrumentalities of crimes for the purpose of eventual forfeiture for the benefit of victims. The Office of the Prosecutor may also submit relevant evidence at any hearing to consider an order of forfeiture.

In conclusion, for the reasons stated above, I am of the view that the victims' reparation function should be organised and managed outside of the Office of the Prosecutor.

Part 2

Thematic Expert Consultation Processes

Measures Available to the International Criminal Court to Reduce the Length of Proceedings

Morten Bergsmo and Vladimir Tochilovsky*

43.1. Background and Mandate

The 2002–2003 preparatory team for the Office of the Prosecutor of the International Criminal Court ('ICC') considered that the length of future proceedings before the Court was going to be one of the main touchstones of its success. There was already then a sense in the broader international criminal justice community that the trials before the *ad hoc* tribunals for the ex-Yugoslavia and Rwanda were taking too long and costing too much. In these circumstances, the co-ordinator of the preparatory team¹ considered that it would be helpful to make a contribution towards critical self-reflection on this risk within the Court, from the very start of its operational work. He consulted with several leading thinkers in international criminal justice before convening an expert group in October 2002.

The group was composed of the following experts (with the title at the time indicated in parenthesis): late Judge Håkan Friman (Swedish

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¹ That is, Morten Bergsmo, co-author of this chapter.

Ministry of Justice), Dr. Fabricio Guariglia (ICTY), Professor Claus Kreß (University of Cologne), Professor John Spencer (Cambridge University), and Dr. Vladimir Tochilovsky (ICTY). The latter co-ordinated the internal work of the group. As Judge Friman played an enthusiastic role in this and other processes of the 2002–2003 preparatory team, and he passed away prematurely in 2016, this volume is dedicated to the memory of his fraternal co-operation.

Eleven additional experts were invited to comment on the draft report in January 2003, “to ensure that the final version of this document be as complete, exact and well-balanced as possible”.² The expert group received written input from Mr. Tor-Aksel Busch (Director General of Public Prosecutions, Norway) and Mr. Knut H. Kallerud (then Senior Public Prosecutor, Norway), late Professor Antonio Cassese (University of Florence), late Mr. Christopher Keith Hall (Amnesty International), Mr. Russell Hayman (Latham and Watkins, Los Angeles), Mr. Geoffrey Nice QC (ICTY), and Professor Thomas Weigend (University of Cologne).

The mandate of the group was to prepare reflections on “measures available to the International Criminal Court to reduce the length of proceedings”³ – “to ensure that its proceedings are both fair and expeditious”⁴ – for the benefit of the “high officials of the Court”, not limited to the ICC Prosecutor.⁵ Accordingly, the final report of the group (reproduced in Annex 1 to this chapter) was submitted by the co-ordinator of the preparatory team to the judges of the Court (through its President), the Registrar as well as to the Prosecutor in the spring of 2003.⁶

The first meeting of the expert group was hosted by the co-ordinator of the preparatory team at St. John’s College, Cambridge University. The group held several meetings and members communicated extensively via e-mail. The annexed report was the fourteenth draft developed by the group. This comprehensive work within the group was led by Dr. Tochilovsky, co-author of this chapter.

The report has 123 paragraphs (30 pages), and is structured in eight sections, including on experiences of the tribunals for the ex-Yugoslavia

² From a letter to Director-General Tor-Aksel Busch dated 17 January 2003.

³ See para. 3 of the report in Annex 1 to this chapter.

⁴ See *supra* note 2.

⁵ Annex 1, para. 3.

⁶ The report was also made available in French later in 2003.

and Rwanda, investigative strategy, seizure of documents, charging policy, pre-trial and preparation of trial, participation of victims, and reparations.

43.2. Trust Between the Prosecutor and Judges

Among the issues raised by the report is the importance of a “cooperative approach between the Prosecutor and all the Judges, with a view towards an early agreement on general standards for prosecution. This appears the preferable approach compared to leaving the task of discussing this matter with the Prosecutor to the President and the Vice-Presidents under Article 38(4) of the Statute”.⁷ During the term of the first ICC Prosecutor, much was said about the apparent distrust and even disrespect among judges towards the Prosecutor. During some periods, the Prosecutor was losing a very high percentage of his motions before the judges. The experts did not foresee this extent of the problem when they wrote the report in 2002–2003, but their advice would seem to be highly relevant to the situation which characterised proceedings before the Court over a period of several years.

43.3. Criteria for the Selection of Cases

The expert report raised the issue of case selection in unambiguous terms: “It is highly desirable to specify the general criteria guiding the selection of cases at the outset of the Court’s operation. A clear pronouncement of the prosecution policy, given in the abstract, could prevent the public from harbouring unrealistic expectations and also avoid any appearance of political bias in particular cases. An early declaration of the prosecution policy could also help preventing a backlog of non-priority suspects”.⁸ The ICC Office of the Prosecutor published a policy paper on selection criteria on 15 September 2016.⁹

⁷ Annex 1, para. 19.

⁸ *Ibid.*, para. 18, see also para. 20 which states that “[w]ith the length of trials in mind, it is important that the agreed standards set out clear priorities aimed at limiting the number of cases before the Court”.

⁹ The important document was released as one of the policy papers of the ICC, Office of the Prosecutor under the title “Policy Paper on Case Selection and Prioritisation”, 15 September 2016 (<http://www.legal-tools.org/doc/182205/>).

Almost eight years earlier, on 26 September 2008, the Centre for International Law Research and Policy's ('CILRAP') Forum for International Criminal and Humanitarian Law ('FICHL') department held a conference in Oslo on 'Criteria for Prioritizing and Selecting Core International Crimes Cases',¹⁰ and an anthology of conference papers with the same name was first published on 26 March 2009.¹¹ Both the conference and anthology were based on earlier work undertaken by the co-ordinator of the preparatory team, efforts which had led to the original input to the expert group at the start of its work, to a 2008 report for the Organisation for Security and Cooperation in Europe in Bosnia and Herzegovina,¹² and to the adoption by December 2008 of a National War Crimes Strategy by the Council of Ministers of Bosnia and Herzegovina which contained selection and prioritisation criteria.¹³ The idea of criteria for prioritisation also found its way into national discourses, such as in Colombia, shortly after the publication of the 2009 anthology *Criteria for Prioritizing and Selecting Core International Crimes Cases*.¹⁴ A third, considerably ex-

¹⁰ For the detailed concept note and programme of this event, see <https://www.ficHL.org/activities/criteria-for-prioritizing-and-selecting-core-international-crimes-cases/>.

¹¹ See Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, 2nd ed., Torkel Opsahl Academic EPublisher, Oslo, 2010, 284 pp. (ISBN 978-82-93081-06-7).

¹² An edited version of this report was published in 2009, see Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze and Gorana Žagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Torkel Opsahl Academic EPublisher, Oslo, 2010, 232 pp. (ISBN 978-82-93081-04-3) (first published on 17 September 2009). See, in particular, Chapter 5 ("Case Selection and Prioritization Criteria"). The co-author Ilia Utmelidze worked for the Organisation for Security and Cooperation in Europe ('OSCE') in Sarajevo at the time, and later became the Director of CILRAP's Case Matrix Network ('CMN') department, in which capacity he has implemented the book's approach to the effective management of open case files through services available in the CMN Knowledge Hub.

¹³ *Ibid.*, "Annex 2: National War Crimes Strategy Adopted by the Council of Ministers of Bosnia and Herzegovina on 28 December 2008", pp. 165–209, in particular pp. 206–7 ("Annex A" of the Strategy document).

¹⁴ See Morten Bergsmo and Maria Paula Saffon, "Perspectiva internacional: Enfrentando una fila de atrocidades pasadas: como seleccionar y priorizar casos de crímenes internacionales nucleares?", in Kai Ambos (ed.), *Selección y priorización como estrategia de persecución en los casos de crímenes internacionales*, Deutsche Gesellschaft für Internationale Zusammenarbeit, Bogota, 2011, pp. 23–112 (ISBN 978-958-8438-53-5); see also Maria Paula Saffon, "Problematic Selection and Lack of Clear Prioritization: The Colombian Experience", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, 2nd ed., Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 127–42.

panded edition of this anthology which will be published in conjunction with this present volume, includes an in-depth analysis of the policy paper on criteria by the ICC Office of the Prosecutor, showing the evolution of thinking in this area during the 14-year period since the ideas were presented to the Court in 2003.

However tempting, the present volume is not the place to assess whether it would have made a difference if the advice of the expert group had been heeded by the Court a decade earlier.

43.4. Proximity to Witnesses and Crime Scenes

The expert group drew the attention of the high officials of the ICC to “the possibility for a Chamber to exercise its functions at a place other than the seat” of the Court; “it should be explored whether this could provide for speedier proceedings (and other positive effects) due to, for example, closer proximity to witnesses and the scenes of crimes”.¹⁵ If intelligently implemented, such practice could also help overcome concerns in territorial states affected by crimes that international justice may be too remote when administered from The Hague.

After all, international criminal justice is about ordinary men and women – their victimisation or possible criminal responsibility – and very detailed factual propositions that require tedious substantiation through the criminal process. It is not about the responsibility of states – as in cases before the International Court of Justice or the European Court of Human Rights – where judges rely on factual submissions by the parties and hear legal arguments by some of the finest lawyers of the states concerned, in very concise proceedings. International criminal justice is an international justice that differs significantly from that of the International Court of Justice, much more so than the organisation of proceedings and current professional culture and incentive structures would suggest. Criminal justice for core international crimes should fit territorial and neighbouring states, perhaps more so than secluded palaces of justice in The Hague.

During his term, Justice Adrian Fulford tried and failed to persuade his fellow ICC judges to sit in Africa. It will be interesting to see whether

¹⁵ Annex 1, para. 15.

his efforts and the advice of the expert group on this point will be observed at some point in the future.

43.5. Role of the Judges in Ensuring Focused Charges

The expert group also addressed charging policy:

While the principle of *jura novit curia*, which allows the judges to freely classify the facts of a charge as a crime, may provide for fewer counts in the indictment (and a lesser risk of acquittals for mainly ‘technical’ reasons), other considerations might be thought to pull in the opposite direction. If the Chamber allows itself to re-classify offences from charges in the indictment to residual or ‘lesser-included’ charges, a power that the Statute does not preclude, charges can be avoided.¹⁶

This significant statement correctly presupposes that focused, clearly defined cases can lead to shorter, better-managed trials. National criminal justice confirms that the better prepared a criminal case is, the more focused its legal classifications can be. Ideally, the prosecution captures the essence of the criminal conduct or transaction through one principal charge, supported by one subsidiary charge. But the prosecution can only take the risk of such focused charges in jurisdictions where judges are not bound by the legal (as opposed to factual) classification in the charges document and do not enter technical acquittals only because the charges fail to list a legal classification. This is the situation in criminal justice systems that respect the principle of *iura novit curia*, such as the ICC, as confirmed by Regulation 55.¹⁷ And this is the main reason why the original suggestion to include Regulation 55 was made to those who initiated the work on the Regulations in 2003: to expressly empower the judges to give confidence to the Office of the Prosecutor to charge in a highly focused manner (not fearing technical acquittals due to the omission of classifications), and by that to gradually nurture high-quality case preparation by the Office of the Prosecutor, perhaps the single most important factor for judicial economy.

¹⁶ *Ibid.*, para. 42.

¹⁷ The Regulations of the Court were adopted on 26 May 2004, ICC-BD/01-02-07 (<http://www.legal-tools.org/doc/2988d1/>).

Whereas this was the original idea behind Regulation 55, it is another question whether the judges have used the Regulation to this end. And it is yet another question whether they have inadvertently come to undermine the interest Regulation 55 was made to serve. The Court's September 2015 Pre-Trial Practice Manual fully legitimises the practice of cumulative charges, the very anathema of focused charging.¹⁸ This reform is upheld in the Chambers Practice Manual dated February 2016.¹⁹ Although the Manual is not legally binding, this development does not seem compatible with a genuine development of Court practice towards more effective proceedings.

This advice of the expert group is also significant in that Professor John Spencer of Cambridge University, the leading common law expert on criminal procedure at the time, was among the members of the group. He could see beyond the narrow disputes between lawyers of civil law and common law jurisdictions, and the fact that the latter do not have *iura novit curia* in its pure form (and prosecutors in those systems therefore often use comprehensive cumulative charging as has been the practice at the ex-Yugoslavia and Rwanda tribunals). One of the other members of the group, late Judge Håkan Friman, worked particularly closely with delegates from common law jurisdictions such as Canada and the United Kingdom during the ICC negotiations, and often served as an articulator of common law reasoning and considerations when there were disagreements with civil law delegates. The co-ordinator of the preparatory team discussed the question of *iura novit curia* in detail with Judge Friman in the context of the expert group, and he supported wholeheartedly the formulations contained in paragraph 42 of the report in Annex 1. I never had a chance to ask him before he tragically passed away whether he thought that Regulation 55 had been sufficiently and prudently used by the judges of the ICC to ensure shorter and more economic proceedings. This is a question which will surely be posed to the judges and states parties.

43.6. Lessons from the *Ad Hoc* Tribunals

Various measures to expedite proceedings were introduced both in the practice and rules of procedure of the ex-Yugoslavia and Rwanda tribu-

¹⁸ See ICC, Pre-Trial Practice Manual, September 2015, Section VII(3) second paragraph, p. 18.

¹⁹ See ICC, Chambers Practice Manual, February 2016, p. 19.

nals. To this end, some civil law elements were incorporated into tribunal law²⁰ and found their way into the ICC Statute and Rules of Procedure and Evidence. The expert group elaborated on the practical application of the relevant legal provisions. In particular, the group addressed such matters as judicial control over the proceedings, including at the pre-trial stage, agreements on the facts of the case, and unsworn statements of the accused.

The group also considered aspects of tribunal practice that had been incorporated into ICC legal instruments. For example, concerning a ‘no case to answer’ procedure, the group noted that, although it is not explicitly provided for in the Statute or the Rules, “it would probably still be a possible tool for the Court to employ”.²¹ Indeed, in one of its cases, the ICC did recognise that, although the Statute and Rules “do not currently explicitly provide for ‘no case to answer’ motions”, their provisions “grant the Chamber the necessary authority to consider ‘no case to answer’ motions in appropriate circumstances”.²² The Court emphasised that “a ‘no case to answer’ motion has the potential to contribute to a shorter and more focused trial, thereby providing a means to achieve greater judicial economy”.²³

The group also shared some lessons learned from various practices of the ICTY Office of the Prosecutor. In particular, the report encouraged the ICC to have lawyers with trial experience involved in investigations from the very beginning. At the ex-Yugoslavia and Rwanda tribunals, such prosecutorial involvement helped to focus investigations and expedite the pre-trial process. Later, the ICC Office of the Prosecutor did adopt such a practice.

The group also made recommendations on how to avoid an overburdening of the prosecution with vast amounts of documents brought to

²⁰ See Vladimir Tochilovsky, “The Nature and Evolution of the Rules of Procedure and Evidence”, in Karim A.A. Khan, Caroline Buisman and Chris Gosnell (eds.), *Principles of Evidence in International Criminal Justice*, Oxford University Press, Oxford, 2010, pp. 163–65, 170.

²¹ Annex 1, para. 91.

²² ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ Motions), ICC-01/09-01/11, 3 June 2014, para. 15 (<http://www.legal-tools.org/doc/128ce5/>).

²³ *Ibid.*, para. 16.

the Office of the Prosecutor through field search and seizure. Such a practice at the ICTY did adversely affect the pace of trial preparation and disclosure.²⁴

Attention was also given to the principle of objectivity in investigations. The ICC Prosecutor has an obligation to investigate incriminating and exonerating circumstances equally. It was opined in the report that such objective investigation could contribute to the reduction of the length of the trials. At the same time, the group recognised that the question whether prosecution and defence activities ought to be co-ordinated is open. The practice of the ICC to date, demonstrates that some lawyers of Common Law background do not trust the prosecution with collecting evidence for them.

43.7. The “Credibility and Authority of the Institution”

This book is not the place for an assessment of how the ICC has handled the risk of too long and costly proceedings. Rather, this chapter simply confirms that this risk was clearly spelled out and shared in the form of this expert report with all the high officials of the Court before they commenced their work in 2003, some 14 years prior to the publication of this book. They were all advised of the harm too lengthy proceedings could do to the Court, and that this needed to be a priority consideration for the Court from the start. Some of the leading experts on criminal procedure in common law, from the ICC negotiations, and in the practice of the ex-Yugoslavia tribunal put their heads together to help the Court. The report represents an attempt to turn obvious stones to see how the length of ICC proceedings could be constrained, and an encouragement for such critical self-reflection to take place on an ongoing basis within the Court itself.

At the same time, it is a fact that criticism of the length and cost of proceedings before the Court have reached such proportions that the Court has had to respond in several ways. The ICC Assembly of States Parties has explicitly emphasised that “the effectiveness of proceedings of the Court is essential to the rights of victims and those of the accused, *the*

²⁴ See Vladimir Tochilovsky, *The Law and Jurisprudence of the International Criminal Tribunals and Courts: Procedure and Human Rights Aspects*, Intersentia Publishers, Cambridge, 2014, p. 114.

credibility and authority of the institution as well as the best possible use of its resources”.²⁵

A special plenary meeting had to be held at the ICC Assembly of States Parties Session on 24 November 2015 to reassure states parties that the Court was taking this challenge seriously. The ICC President, Judge Silvia Fernández de Gurmendi, stated that “a key aspect of the Court’s sustainability is the quality of justice that the Court is able to dispense”²⁶ and that it “is essential that the Court addresses the perception that our proceedings are too lengthy and not as efficient and effective as they should be”.²⁷ She assured delegates that “enhancing the Court’s efficiency and effectiveness remains [her] top priority”.²⁸ By linking both the sustainability of the Court and the assessment of her performance as President of the Court to efficient and effective proceedings in this way, Judge Fernández de Gurmendi has set a tall order. Among the high officials of the Court, she is the only one who was working at the Court in the first half of 2003, when the expert report in Annex 1 was made available, so she is indeed well-placed to understand the seriousness of the criticism made against the Court on this ground.

Several years after the expert report, other actors have produced further studies touching on the length of proceedings at the Court. The governments of both the United Kingdom and Switzerland have come to the aid of the Court. On 16 July 2014, the United Kingdom Foreign and Commonwealth Office published on its website a 14-page summary of discussions at a seminar on the procedures of the ICC that took place on 26 October 2012.²⁹ The Swiss Federal Department of Foreign Affairs released on its web site a Chair’s Summary³⁰ dated 15 October 2014 of a “Retreat on Strengthening the Proceedings at the International Criminal Court” hosted by the Department in Glion in Switzerland on 3–5 Septem-

²⁵ See ICC, Assembly of States Parties, Resolution ICC-ASP/14/Res.4: Strengthening the International Criminal Court and the Assembly of States Parties, adopted 26 November 2015 by consensus, para. 60 (<http://www.legal-tools.org/doc/6c935f/>) (emphasis added).

²⁶ ICC Press Release, “Enhancing the Court’s Efficiency and Effectiveness – A Top Priority for ICC Officials”, 24 November 2015.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ The summary was compiled by the International Criminal Justice Unit of the Human Rights Law Centre, University of Nottingham, on behalf of the Foreign and Commonwealth Office (on file with the authors).

³⁰ Also on file with the authors (and available online but without persistent URL).

ber 2014. Annex 1 (“Brief Summary of Discussions”) contains a useful (albeit only partial) overview of initiatives to enhance the effectiveness of ICC proceedings. It mentions, for example, reports by the International Bar Association Human Rights Institute³¹ and the Washington College of Law War Crimes Research Office.³²

More importantly, the Swiss government had sponsored the preparation of a background paper, “Expert Initiative on Promoting Effectiveness at the International Criminal Court”.³³ With no less than 194 recommendations, customised for the Court and other stakeholders, this 252-page report is the most comprehensive analysis to date on the length of ICC proceedings. During its launch at The Hague Institute of Global Justice on 3 December 2014, one of its seven expert authors, Dr. Guénaél Mettraux said that, “the court should start recruiting the right people, based on experience and competence and nothing else. On any level”.³⁴ He warned that “there is a need for pain at the International Criminal Court. What needs to be chopped has to be chopped now”. The report is very explicit indeed: “It is not recommended *at the present time* that the Statute should be amended to impose judicial oversight over investigations undertaken by the Prosecutor”,³⁵ but then gives some slack: “There are clear indications that the current Prosecutor has taken significant steps to improve the conduct and quality of investigations. Before any significant changes are made to the existing investigative framework this Prosecutor must be given a fair opportunity to demonstrate her capacity to improve the quality of investigations”.³⁶

³¹ International Bar Association Human Rights Institute, “Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress”, International Bar Association, London, January 2011.

³² American University Washington College of Law War Crimes Research Office, “Expediting Proceedings at the International Criminal Court”, June 2011.

³³ “Expert Initiative on Promoting Effectiveness at the International Criminal Court”, December 2014 (‘Expert Initiative’) (on file with the authors).

³⁴ See Sophie van Leeuwen, “Experts: Reorganize the ICC and Fire People”, Justice Hub, 3 December 2014 (<https://justicehub.org/article/experts-reorganize-icc-and-fire-people>).

³⁵ Expert Initiative, para. 8, see *supra* note 28.

³⁶ *Ibid.*, para. 36.

43.8. The High Officials of the Court Are Responsible for the Length of its Proceedings

The Court is fortunate to be assisted in these ways by experts, non-governmental organisations, and by states parties (directly or through mechanisms such as the Study Group on Governance within The Hague Working Group (of the Bureau of the ICC Assembly of States Parties)). Combined, these actors have produced several hundred pages of analysis and advice on how to reduce the length of proceedings before the Court. Individual experts have given of their precious time because they support the idea of the ICC. But at the end of the day, it is the Court itself that needs to provide quality justice in a manner that preserves trust in and support for the Court.³⁷ The performance of the Court can (and will) be measured by outside stakeholders who observe its proceedings. With time, the facts will speak for themselves. This is why the above-quoted statement by the ICC President, Judge Fernández de Gurmendi – that “enhancing the Court’s efficiency and effectiveness remains [her] top priority” – is reassuring. Only when the Court officials take personal responsibility in this way, is the Court likely to adopt the requisite measures. Put in another way, when the pressure on the Court becomes high enough, its high officials will do what is required. In the words of the December 2014 Expert Initiative report: “A system of ‘internal’ auditing [...] is essential to ensuring that the Court, of its own accord and initiative, conducts a diligent review of its internal functioning”.³⁸

This brings us back to the original purpose of the expert report in Annex 1 to this chapter. Its design, preparation and circulation within the Court, in particular to its high officials, sought to instil a sense of vigilance as regards the length of the Court’s proceedings, combined with a responsible and courageous will to turn every reasonable stone to ensure that the proceedings before the Court do not become too long and costly. From this perspective, the report may be as relevant in 2017 as it was in 2003. More than retreats and public statements on efficiency and effec-

³⁷ The late Professor Antonio Cassese wrote: “While the efficiency of a Court is one aspect of its overall impact, the true measure of a court is in the quality, and not the speed, of its judgements” (Report on the Special Court for Sierra Leone, submitted by the Independent Expert Antonio Cassese, 12 December 2006, para. 58). This is regrettably a distorted dichotomy. As regards the ICC, we simply cannot separate the length of proceedings from their quality.

³⁸ Expert Initiative, para. 7, p. 7, see *supra* note 28.

tiveness, the Court needs sober and intelligent internal reflection on the bottlenecks in its work processes and on the tools available in its legal infrastructure.

Annex 1: Expert Group Report on Measures Available to the International Criminal Court to Reduce the Length of Proceedings*

1. Introduction

[1.] Trials before the *ad hoc* Tribunals for the former Yugoslavia and Rwanda have proved to last long and involve considerable budgetary implications.

[2.] The ICC will benefit from the experience of the Tribunals. In some respects, however, the ICC's procedural framework deviates from the law of the Tribunals. It is thus likely that the ICC's and the Tribunal's procedural practice will not be identical.

[3.] In order to help face up to this problem, a consultative process among a small group of experts was initiated by the Director of Common Services of the ICC in October 2002. The group was invited to present the high officials of the Court, when they take up their work in March 2003, some reflection on measures available to the Court to reduce the length of trials as well as pre-trial and trial preparation stage.

[4.] The members of the group who have prepared this informal paper are as follows:

Former Judge *Håkan Friman*,
Swedish Ministry of Justice, formerly member of the Swedish
ICC delegation;

Mr. *Fabricio Guariglia*,
Appeals Counsel in the Office of the Prosecutor of the ICTY;
formerly member of the Argentine ICC delegation;

Dr. *Claus Kreß*,
University of Cologne, formerly member of the German ICC
delegation;

Professor *John Rason Spencer*,
Cambridge University; an expert on criminal procedures and
comparative law;

* The language of Annex 1 has been kept as it is in the original, including where it does not comply with the TOAEP Authors' and Formatting Manuals, except where typographical errors have been corrected.

Dr. Vladimir Tochilovsky,
Trial Attorney in the Office of the Prosecutor of the ICTY,
formerly representative of the ICTY to the Preparatory Com-
mission for the ICC.

[5.] This paper also incorporates comments on an earlier draft paper prepared by the members of the group given by the following experts:

Mr. Tor Aksel Busch,
Director General of Public Prosecutions, Norway;

Professor Antonio Cassese,
Professor at the University of Florence, former President of
the ICTY;

Mr. Christopher Keith Hall,
Head, International Justice Programme, Amnesty International;

Mr. Russell Hayman,
Latham and Watkins, Los Angeles, former Defence Counsel
for General Tihomir Blaškić before Trial Chamber I, ICTY;

Mr. Geoffrey Nice QC,
Principal Trial Attorney, ICTY;

Professor Thomas Weigend,
University of Cologne, expert in international criminal law
and procedure.

The following experts were invited to comment, but at the time of the finalisation of this paper, comments on the draft paper had not yet been received:

Judge Maureen Harding-Clark;^{*}

Professor Mireille Delmas-Marty,
University of Paris I (Panthéon-Sorbonne);

Judge David Hunt,
Judge of the Appeals Chamber of the ICTY;

* Judge Maureen Harding-Clark was elected Judge at the International Criminal Court after she had been contacted for comments. She has been in kind communication with the coordinator of the project.

Former Judge *Patricia Wald*,
Former Judge at the ICTY.

2. Lengthy international trials

[6.] There are, of course, many reasons in favour of expeditious trials. Quite apart from the general interest in providing quick reactions to crimes, the passage of time may result in evidence (both incriminatory and exculpatory) getting lost. Thus, public confidence as well as the rights of the accused and of victims could be affected by lengthy proceedings. For the accused, to be tried without undue delay is a matter of right both in the Statute (Article 67(1)(c)) as well as in all major international and regional human rights instruments. He or she should not for an unduly long period remain uncertain about his fate, while at the same time having to face various disabilities normally associated with criminal proceedings. The adverse effects are particularly pertinent if the accused is deprived of liberty or constrained by other restrictions. The Prosecutor is under an obligation to fully respect the rights of persons arising under the Statute (Article 54(1)(c)) and the Chambers are required, *inter alia*, to ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused (Article 64(2)). Consequently, providing for expeditious trials – both in the statutory regime and in practice – is of the utmost importance.

[7.] For an assessment of whether trials are adequately expeditious, some kind of objective yardstick is necessary. However, it is scarcely feasible to find one, since every trial is different and therefore must be assessed separately. While five years could be acceptable in one case, two years could be considered unduly lengthy in another. We have not attempted to establish any specific yardstick over and above a general conclusion that international criminal trials can reasonably be expected to last longer than most national trials. Thus, a comparison with what is considered acceptable in a national context is only of limited use as guidance. Irrespective of this, however, there is a need to ensure that the procedures are framed and applied in a way that enhances expeditiousness to the greatest extent possible without prejudicing or conflicting with other fundamental interests enshrined in the Statute.

3. General observations

3.1. Some objective factors affecting the length of trials in ICC

[8.] Due to the fact that international crimes typically involve atrocities committed on a massive scale, international criminal justice has to cope with cases which are more extensive and complex than most national cases. In particular, hundreds of witnesses will have to be interpreted and heard and volumes of documentary evidence will have to be translated and evaluated. The complexity will be multiplied whenever more than one conflict fall to be addressed concurrently.

[9.] Various differences that exist between the procedural law of the two Tribunals and the ICC may well affect the length of the proceedings before the ICC. Amongst those differences are, in particular, the extensive procedural rights to challenge the admissibility of the proceedings under the complementarity principle (Articles 17 to 19), the scope of investigation (Article 54(1)) and the confirmation hearing (Article 61), the participation of victims at the various stages of the proceedings (Article 68(3)), and the need to provide for reparation proceedings (Article 75).

[10.] The regime on the disqualification of judges (Article 41(2), Rule 34(1)) in combination with the rather rigid regime on the assignment of judges to Divisions (Article 39(3/4)) reduces the options available to the President to speed up proceedings. Additionally, there is a strict requirement for the presence of all judges of the Chamber at trial (Article 74(1)).

[11.] Given all these factors, it may take years to complete some trials if the cases before the Court are adjudicated without efficient procedures in place. Indeed, such lengthy trials are not unknown even in national legal systems where recent cases related to war crimes committed in World War II involved many of the same sort of practical issues as trials in the *ad hoc* Tribunals, complicated by the fact that the events took place decades ago.

3.2. Experiences of the *ad hoc* Tribunals

[12.] In the experiences of the Tribunals, especially at the initial phase of their functioning, certain procedures have proved to be particularly lengthy and cumbersome: long investigations, extensive amendments of the charges after confirmation of the indictment, a large number of preliminary and pre-trial motions, disclosure issues, questions of exclusion of

evidence notwithstanding a generally liberal regime based on a presumption that evidence should rather be weighed at trial than tested for admissibility, and long trials with extensive indictments and evidence. One basic reason underlying all this, and thus the delays, has been uncertainty as to how the procedural regime should operate. Another cause of delays – and concerns relating to fairness and accuracy – is the extensive need for and reliance upon translations and interpretations. Both uncertainty and language problems will also occur in the ICC process and should, to the extent possible, be remedied.

[13.] Various measures have been taken to expedite trials, such as measures to simplify cases (to reduce the number of offences, to reduce the number of witnesses, and to encourage co-operation) and to monitor the parties and the proceedings (to counteract dilatory tactics and non-cooperation and enhancing judicial control). Procedural measures of this kind have been taken into account when drafting this paper.

[14.] However, other practical limitations which affect the length of the trial, particularly in respect of human and other resources (for example the number of judges, court rooms, technical equipment, court management systems, research tools, travel budgets *et cetera*), fall beyond the scope of the paper. Organisational issues, such as the coordination between different organs of the court, have only been addressed insofar they are directly related to the issues at hand.

[15.] One measure that is available to the Tribunals but has not been used in practice is the possibility for a Chamber to exercise its functions at a place other than the seat of the Tribunal. In some cases the Court may also sit elsewhere than at its seat (Articles 3(3) and 62, and Rule 100) and it should be explored whether this could provide for speedier proceedings (and other positive effects) due to, for example, closer proximity to witnesses and the scenes of crimes.

4. Investigation stage

4.1. Investigative strategy

[16.] Given the limited investigative and prosecutorial resources of the Office of the Prosecutor (OTP) and the broad scope of investigations under Article 54(1)(a), the Prosecutor may not be able to investigate each and every incident arising from a single situation or to prosecute every

perpetrator. It is essential to review each potential new investigation by a set of rational standards that will allow the effective marshalling of OTP resources.

[17.] Under Article 53(1)(c), the Prosecutor may decide not to initiate an investigation where the latter would not serve the interests of justice. Under Article 53(3)(b) and in accordance with Rules 109 and 110, the Pre-Trial Chamber may, on its own initiative, review such a decision. This review power may create problems because the drafters of the Statute and the Rules have left the term “*interests of justice*” more or less undefined and have failed to define the respective fields of competences of Prosecutor and Pre-Trial Chamber with any real precision.

[18.] It is highly desirable to specify the general criteria guiding the selection of cases at the outset of the Court’s operation. A clear pronouncement of the prosecution policy, given in the abstract, could prevent the public from harbouring unrealistic expectations and also avoid any appearance of political bias in particular cases. An early declaration of the prosecution policy could also help preventing a backlog of non-priority suspects.

[19.] It is worth considering a cooperative approach between the Prosecutor and all the Judges, with a view towards an early agreement on general standards for prosecution. This appears the preferable approach compared to leaving the task of discussing this matter with the Prosecutor to the President and the Vice-Presidents under Article 38(4) of the Statute.

[20.] With the length of trials in mind, it is important that the agreed standards set out clear priorities aimed at limiting the number of cases before the Court. This could be achieved by, *inter alia*, a main focus on perpetrators in leadership positions (political, military, police, *etc.*) and suspects related to crimes of a particular gravity. The lower the threshold, the higher the number of suspects that will have to be investigated and, thus, the greater the effects on the Court’s limited resources. It should be borne in mind that material from ICC investigations related to other potential perpetrators can be made available for domestic investigations and prosecutions.

[21.] The translation of the abstract standards of the prosecution policy into the investigative strategy in concrete situations should be a matter for the Prosecutor to decide under Article 53(1)(c). If the judges decide to exercise a parallel power within the review mechanism under Article

53(3)(b), their impartiality could be perceived as compromised. Additionally, multiplicity of prosecutorial policies, stemming from different organs of the Court, could be self-defeating and lead to paralysis. The Pre-Trial Chamber should thus avoid excessive interference with the concrete investigative policy of the Prosecutor and should instead confine its task to ensure that this policy does not obviously fall outside the abstract standards and does not obviously suffer from inconsistencies.

4.2. Principle of objectivity

[22.] Pursuant to Article 54(1)(a), the Prosecutor has an obligation to investigate both incriminating and exonerating circumstances in order to assess whether there is criminal responsibility under the Statute. Although it introduces a significant burden for the prosecution, such an objective investigation does also have a potential for reducing the length of the trials.

[23.] From the outset, the Prosecutor may consider giving guidance as to how this principle of objectivity ought to operate. Properly operated, an objective investigation with some type of defence involvement has a potential for narrowing the scope of the prosecution case, reducing the number of charges and, subsequently, the length of the trial. Instead of being limited to the choice between dropping or amending charges later in the proceedings, this could be done also before any charges are filed. Hence, the Prosecutor and the suspect could have a common interest in communicating fairly early in the process.

[24.] Coordination of the defence investigation with the investigation conducted by the Prosecutor may, to some extent, reduce the contrast between “prosecution and defence cases” prepared at the investigation stage. This could, in turn, contribute to a less contradictory – and thus less time-consuming – presentation of the evidence at the trial stage.

[25.] Perhaps such coordination could also encourage agreements as to evidence under Article 69 and, in some cases, even a “common proposal” under Article 65(5).

[26.] The informed participation of the defence might, in appropriate cases, justify the “transport” of evidence taken at the investigative stage to the trial stage in accordance with Rule 68(a) (see also Rule 112(4)). The coordination envisaged here would involve the presence of both the prosecution and the suspect/defence during certain investigative measures, the

Prosecutor's compliance with requests by the suspect/defence to take investigative measures, and the seeking of the Prosecutor's view in cases envisaged in Rule 116(2).

[27.] In this context, thought might also be given to granting the suspect/defence the opportunity to inspect the investigative dossier or part of it before the disclosure stage, where this does not endanger the success of the investigation, does not concern confidential information and is not outweighed by interests of witnesses and victims as protected by Article 68 of the Statute. While such access to information is not provided for in the Statute or the Rules, it may assist in obtaining cooperation and shortening the time for preparations by the parties. Whether to grant such access or not will accordingly have to be decided by the Prosecutor on a case-by-case basis and a pre-established, principled approach would assist such determinations.

[28.] It should be noted that the question whether prosecution and defence activities ought to be coordinated is an open question. It is clear that such coordination is possible. In particular, the defence may request the Prosecutor to take certain investigative measures. In deciding upon such a request, the Prosecutor will have to duly consider his or her obligation under Article 54(1)(a) to investigate exonerating circumstances equally. On the other hand, the Defence, in principle, retains the right to adopt a go-alone investigative strategy. In particular, the Defence cannot be required to rely exclusively on the investigative activities of the Prosecutor, despite its necessary objectiveness. There are, however, two possible limitations of the Defence's freedom of action. First, the Pre-Trial Chamber *may* seek the views of the Prosecutor before complying with a Defence request under Article 57(3)(b). Hearing the Prosecutor at this point may save time, in particular where the Prosecutor has already conducted investigations in the same direction. At the same time, however, it would give the Prosecution a certain insight in the Defence strategy. Secondly, the Defence will have to involve the Prosecution wherever it wishes to make use of the "transport-function" of Rule 68(1).

[29.] However, it must also be noted that in many situations, there will no "defence" in a position to intervene at the early stage of the investigation, either because no individual has yet been signalled as suspect or accused, or because the person in question has been neither arrested nor summoned under Article 58 of the Statute. This will leave the determination of what may constitute "exonerating circumstances" entirely in the

hands of the Prosecution. Accordingly, it is desirable that the Prosecutor should explain, as part of his or her prosecutorial policy, how he or she intends to approach the matter and how he or she considers that the principle should operate in practice.

[30.] Apparently the principle of objectivity is not confined to the investigation only but also applies throughout the proceedings. The Prosecutor is, for example, entitled under Articles 81(1)(b) and 84(1), to appeal a judgment and seek revision on behalf of a convicted person. Consequently, the principle of objectivity will also have an impact on when prosecution disclosure should take place, and, in particular, may extend the prosecutorial duty of disclosure of exculpatory information to the appellate stage (as happens in the ICTY pursuant to the Appeals Chamber's settled jurisprudence).

4.3. Investigations

[31.] Lawyers with trial experience should be involved in investigations from the very beginning.

[32.] A focused and trial oriented investigation, aided by a clear prosecution strategy, would limit the scope of the investigation. While there may be other reasons for more extensive historical research into the conflict in question, research of this type can be very time-consuming and expensive.

[33.] As a general rule, in order to reduce post-indictment investigation, a case should be trial-ready by the time when the charges have been confirmed. In particular, to the extent possible, the Prosecution should prepare the materials intended for use at trial, for disclosure, the list of potential witnesses and exhibits for the trial, and a pre-trial brief.

[34.] Although the ICC Statute entrusts the Prosecutor with primary responsibility for the conduct of the investigation, the Pre-Trial Chambers have also been given a role in the investigative process.

[35.] By virtue of their powers under Article 56(3) and 57(3)(b), the Pre-Trial Chambers may contribute further to less time-consuming trials. In addition, it should be explored whether the powers under Article 56(1) and (2) and Rules 47 (2), 68, 86 and 112(5) can be interpreted broadly enough to significantly shorten the presentation of evidence at the trial stage.

[36.] Complementing the Prosecutor's obligation to conduct objective investigations (Article 54(1)(a)), the Pre-Trial Chamber may, at the request of the suspect, order specific investigative measures to be taken (Article 57(3)(b) and Rule 116). If used properly, this function may serve to enhance equality of arms and foster adherence to the statutory requirement of objective investigations and to promote coordination between "prosecution and defence cases". Even the mere existence of this mechanism could serve these objectives (which is the experience at least in some national jurisdictions with a similar scheme). There is, however, a risk that the mechanism could be misused, which could give rise to long and unnecessary delays. Hence the Chamber ought to be vigilant so that misuse is prevented.

4.4. Seizure of documents

[37.] Under Rule 77, the Prosecutor has an obligation to disclose to the defence the material that is *in his possession or control*. As the *ad hoc* Tribunals' experience shows, there may be situations when an enormous amount of domestic records (archives) will have to be seized by the prosecution in the various domestic archives.

[38.] Such massive seizures may be necessary because access to relevant domestic records in the territory of the conflict will be too limited in time (due to the hostile environment) to go through a given archive to identify relevant evidence. If left in the State's territory, the records may be meddled with and access may later be severely restricted.

[39.] Because of these factors, the selection of the relevant portions of the records (as against the initial seizure of evidence) will be done on the broadest relevance criteria (relevant time period and territory). If all these seized domestic archives are brought into the prosecution's custody, this will then activate in the prosecution's burden of disclosure. Indeed, processing, translation and disclosure of such a quantity of materials inevitably requires immense resources, and causes delays and complains (sometimes frivolous) from the defence.

[40.] In order to avoid this situation, once the selected portions of the given archive are brought to the seat of the Court to ensure their preservation, the Prosecutor could have them placed in a common archive under the Registry's supervision. This would ensure that the material is equally accessible both for the prosecution and defence. If there are legitimate

confidentiality concerns, the Prosecution retains at all times the ability not to choose this procedure and to keep the material solely in its possession, in which case the normal disclosure duties would be triggered.

4.5. Charging policy

[41.] The charging policy to be adopted by the Prosecutor, with later amendments as ICC jurisprudence develops, will have an impact on the length of trials. Every count that requires proof of additional elements will prolong the proceedings. Hence an excessive charging policy will lead on to lengthy trials and extensive evidence.

[42.] A major reason for an extensive charging policy is legal uncertainty concerning the crimes and how they relate to each other as well as about the fundamental approach the judges will take regarding classification of the charges as one crime or another. These are complex matters where different legal traditions offer different approaches and which the Court will have to resolve. While the principle of *jura novit curia*, which allows the judges to freely classify the facts of a charge as a crime, may provide for fewer counts in the indictment (and a lesser risk of acquittals for mainly “technical” reasons), other considerations might be thought to pull in the opposite direction. If the Chamber allows itself to re-classify offences from charges in the indictment to residual or “lesser-included” charges, a power that the Statute does not preclude, charges can be avoided.

[43.] Further, it is clear that uncertainty tends to result in extensive charges. Uncertainty as to the relevant criteria for criminal liability may also result in unfocused investigations. It is therefore advisable that these fundamental procedural issues are settled as early as possible by the Court.

[44.] The charging practice and the form of the charges are of course also important as the framework of the trial and to ensure the accused person has an opportunity to prepare for and answer to the case. Uncertainties will mean longer time for preparations (for both parties) and give rise to challenges to the relevant Chamber. OTP Guidelines issued by the Prosecutor on criteria for opening new individual investigations and the form of the charging document, which can then be amended as ICC’s own jurisprudence develops, may save both the Court’s time and its resources.

[45.] Another question is whether the Prosecutor could and should avoid the charging of offences that are clearly of relatively minor importance, such as war crimes against property interests where there is a strong case of, for example, deliberate targeting of civilians on a massive scale. This is of course a policy question and the answer does, to an extent, depend upon how the legal issues mentioned above are settled.

[46.] One may also ask how many incidents that should be included in an indictment in relation to a particular crime – should, for example, a crime against humanity during a certain period cover all 50 villages where various incidents took place or should only some of them be selected and proved? This is clearly another policy issue, where a more limited selection would reduce the length of the proceedings (from investigation to judgment), but other reasons may speak in favour of more extensive charges, such as a wish to expose the totality of the crimes committed and the degree of victimisation, whereby both legal reasons (for example requirements of scale or intensity or for sentencing purposes) and policy considerations will come into play. A complicating factor could be that a selection of incidents may affect the possibility of awarding reparations to victims (Article 75). In this regard, it might also be worth exploring whether reparations could be awarded not only to persons affected by incidents that were subject to trial (and conviction) but also, for example, to persons affected by other incidents related to such incidents in time and space. This would not be precluded by the very broad definition of “victims” in Rule 85.

5. Pre-trial and trial preparation stage

5.1. Judicial control over the preparations for confirmation of charges

[47.] Article 61 sets out measures that are to be taken before the hearing for confirmation of charges and Rule 121 envisages relatively strict judicial control over these preparations, including setting a date for the hearing at the first appearance of the suspect at the Court and time limits for disclosure requirements and motions. Although the date of the hearing may be postponed, this scheme is intended to provide for expeditious proceedings.

5.2. Confirmation hearing

[48.] Pursuant to Article 61, the Pre-Trial Chamber must hold a hearing to confirm the charges in the presence of the Prosecutor and, normally, the person charged, as well as his or her counsel.

[49.] Thorough scrutiny of the charges brought by the Prosecution, including, if necessary, the rejection of insufficiently substantiated charges could substantially contribute to more streamlined, and consequently less time consuming trial proceedings. There is, however, a risk of turning the confirmation hearing into a quasi trial.

[50.] To avoid that risk, the Prosecutor should, as a general rule, rely on documentary or summary evidence instead of calling witnesses expected to testify at the trial (Article 61(5)). Where the defence chooses to call witnesses, it will be important to bear in mind that the scope of the confirmation hearing is limited by its purpose: to determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. The risk of extensive live testimony at this stage should not be overestimated, however, since the defence may be reluctant to reveal evidence and to produce oral testimony on oath which could later be used at trial (or at least for the purpose of cross-examination). In addition, the principle of objectivity may lead to more limited charges due to exonerating evidence being already exposed to the Prosecutor during the investigation. But defence evidence in live form may have the effect of making the Prosecutor also inclined to present live evidence for the indictment (“just to be sure”), with the result that more extensive evidence would be submitted than is really needed for the purpose of confirmation.

[51.] If however witnesses do have to testify in person, thought should be given to the possibility of using, if necessary, the transcripts of their testimonies at trial (*confer* Rule 68(a)) instead of calling the witnesses to appear again at trial. This may provide for a more expeditious trial. Repeated testimonies may also affect the quality of the evidence and have negative effects for the victims and witnesses.

5.3. Communication between the parties

[52.] A Chamber or a judge, to whom the issues have been referred by the Chamber in accordance with Article 64(4), should co-ordinate communication between the parties during the trial preparation phase to en-

sure that the proceedings are not unduly delayed and take measures necessary to prepare the case for a fair and expeditious trial. The parties should adhere to the deadlines for various preparatory steps (Rule 101).

[53.] Regular meetings and various conferences for the preparations of the case (for example status conferences, Rule 132) should be held with the parties to observe the progress in trial preparation. Although senior legal officers of the Chambers cannot assume judicial functions, they may play a role in bringing the parties together to discuss matters that are outstanding between them.

[54.] Parties should be encouraged to consider agreements on the facts of the case as envisaged in Rule 69. Such agreements, although not binding on the Chamber, would often mean that evidence need not be provided regarding the facts in question.

[55.] Coordination between the parties may be conducted by a single judge designated by the Chamber in accordance with Article 57(2)(b). Coordinated and (single) judge-led communication between the parties has, in the experience of the *ad hoc* Tribunals, proved to be a valuable resource and result effective method to advance cases for trial.

5.4. Preparatory measures to expedite the proceedings

[56.] The judges may in accordance with Article 64(5) and Rule 136 direct that there be joinder or severance in respect of charges against more than one accused. Indeed, a *joinder* may save the time and resources of the Court and spare victims and witnesses from reappearing at multiple trials.

[57.] The judges should thoroughly control the presentation of evidence in order to avoid redundant or repetitive evidence. If the Chamber or a judge considers that an excessive number of witnesses are going to be called to prove the same facts, the party may be called upon to shorten the estimated length of the examination for particular witnesses, or reduce the number of witnesses.

5.5. Disclosure

[58.] The Rules provide for a system of mutual inspection, whereby both parties may inspect material in the opposing party's possession that is intended to be used at trial (and, in the defence case, information in the Prosecution's possession that is "material to the preparation of the de-

fence”, Rules 77 and 78). This provides for a very fertile ground to promote co-ordination and co-operation between the parties and, if properly used, should reduce the likelihood of subsequent claims of lack of disclosure.

[59.] Articles 61(3) and 67(2) as well as Rules 76, 77, 83 and 84 provide for the Prosecutor’s disclosure obligations at the pre-trial and trial preparation stage. According to Article 64(3), a Chamber shall provide for disclosure of documents or information, not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

[60.] It is envisaged in Rule 121(2) that the bulk of disclosure will take place before the confirmation of charges. This will contribute to trial-readiness of the case by the time the charges have been submitted for confirmation. It also corresponds to practical operation of the principle of objectivity, which presupposes that disclosure should take place before the decision on the charges in order to allow the suspect to request further investigative measures to be taken by the Prosecutor on his/her behalf.

[61.] To comply with its disclosure obligations, the Prosecution must be aware of what information and evidence has been collected by OTP. To this end, the OTP investigative and legal staff must adhere to the OTP internal guidelines governing collection and handling evidence.

[62.] By taking the Prosecutor’s disclosure obligations into account at early stages, and by instituting some way of noting or recording potentially discoverable evidence or information as it is found, the burdens of later providing disclosure at the appropriate time could be lightened.

5.6. Defence disclosure

[63.] The defence disclosure provided for in Rules 78-80 and 121 should certainly contribute to focusing and expedition of the trial.

[64.] Defence disclosure is an issue where different legal traditions offer substantively different answers. Early and comprehensive defence disclosure would normally reduce the length of the trial by providing for less of a “contest” at trial and allowing the Chamber better opportunity to plan it. This would be fully in line with a more coordinated approach by both parties as described earlier. While not incompatible with a more adversarial trial, a general defence disclosure before the end of the “prosecution case” would be seen by some as “unfair”, *id est* the defence should not be

required to say anything until the prosecution's evidence has been examined (at trial).

[65.] The Rules requires pre-trial disclosure of evidence that the defence wants to present at the hearing on confirmation of charges (Rule 121(6)) and disclosure of trial evidence regarding an alibi or a ground for excluding criminal responsibility "sufficiently in advance to enable the Prosecutor to prepare and to respond" (Rules 79 and 80). The Rules do not establish exactly when defence disclosure shall take place and, thus, the Court seems free to decide that this should be done even before the commencement of the trial. This is a policy decision regarding which there might be good reasons for differentiating between different situations, for example the level of coordination between the prosecution and the defence "cases".

[66.] It should also be noted that failure to give notice in advance does not limit the defendant's right to raise matters of alibi or grounds for excluding criminal responsibility and to present evidence. Hence, even with strict obligations of disclosure in advance, unwelcome postponements may occur. This might be an argument against requiring very early defence disclosure and also for focussing, to the extent possible, on promoting a more coordinated approach at the investigation stage.

5.7. Availability of the *dossier* to the judges

[67.] The question of what the Trial Chamber should see prior to Trial provoked widely divergent and strongly held views during the negotiations. This controversy has not been resolved in the Statute or the Rules. Rule 121.10 envisages that a full record of pre-trial proceedings will be compiled. This record will be transferred to the Trial Chamber pursuant to Rule 130 and should be maintained by the Registrar in accordance with Rule 131(1). The Rules are silent on two points: first, as to whether the record is to be 'up-dated' with documents disclosed after confirmation of the charges and prior to the trial, and second, as to whether the Trial Chamber may in fact have access to the record prior to trial. Rule 131(2) does not explicitly mention the Trial Chamber as one of those who may consult the record of the proceedings.

[68.] The main argument in favour of the Trial Chamber not seeing disclosed material before it hears a case is that, as arbiter of the facts whose decisions must be based squarely on evidence admitted at trial, the

court should be as ‘untainted’ as possible. The judges should not even be seen to be influenced before hearing the evidence. In light of the fact that this view was strongly held by many delegations, it might help the ICC to receive the widest degree of support if the Trial Chamber refrains from inspecting an up-dated record of the proceedings before the Trial.

[69.] On the other hand, Article 64(3)(c) and (6)(d), and Article 69(3) give the Trial Chamber broad powers, both before and during trial, in relation to disclosure and the production of additional evidence. It may be argued that to effectively use such powers, the Trial Chamber must have a thorough understanding of a case. Perusal of an updated record of the proceedings could also contribute to more effective management of the trial, including for the examination of witnesses as permitted under Rule 140 or requesting additional evidence in accordance with Article 69(3). Finally, it may be said that the ICC judges are likely to be clearly aware of the risk of real or perceived bias, and thus able to guard against it.

[70.] In light of the openness of the normative framework and of the weighty policy arguments *pro et contra*, it might be worth considering not to resort to the controversial “dossier-approach” right from the beginning of the Court’s operation. This would not exclude considering the use of this option in case the other available measures turn out to be insufficient to keep the proceedings at an acceptable length and the Court believes that the practice would indeed assist in a more effective management of the case.

[71.] If a “dossier-approach” is chosen, there may be the risk of confusion as to the evidence presented by the parties and material from the dossier that is not evidence, in particular since “the entire proceedings” shall be taken into account by the Chamber in its adjudication (Article 74(2)). In this regard, as the *ad hoc* Tribunals’ experience shows, it might be necessary to have a court officer, assigned to the case, included into the Chamber’s trial team. Once assigned to the case, a court officer, whereas still institutionally under the Registry, will become a member of the Chamber’s trial team and work under the co-ordination of the Trial Chamber’s Senior Legal Advisor until the case is concluded. This will ensure that the records of what has been tendered and admitted into evidence are properly kept and communicated to the Judges.

[72.] In the cases where the crime base comprises various geographical areas, the documents and other written material intended to be ten-

dered as evidence at trial can be organised on an area-by-area-basis and filed in advance with the Trial Chamber.

5.8. Motions and interlocutory appeals

[73.] Decision on motions should be given orally when the legal issue is not complicated. In appropriate cases, entirely written proceedings should be employed.

[74.] In some cases a Chamber could make a determination at the outset, in the abstract, on the preliminary legal issues that are suitable for judicial determination. The benefit of such an approach would be that if applicant does not succeed in relation to the legal issues, the relief sought in the motion must necessarily be refused without consideration of the factual issues. It may also be considered whether this should only take place when the parties agree or whether the Chamber should also assume a power to proceed this way on its own motion.

[75.] The Rules provide for joining a challenge to the jurisdiction of the Court, or the admissibility of the case or other motions, to a confirmation hearing or to the trial (Rules 19(2) and 122(6)). By dealing with more than one issue at the same time, efficiency in the proceedings could be gained. Rules 122 and 134 includes other means aimed at an early and consolidated disposal of motions. A Chamber may also consider applying other measures to enhance the efficacy in dealing with motions other than challenges to jurisdiction or admissibility, such as quick disposal of repeated motions without new facts or legal argument and time limits for the filing of certain motions.

[76.] A Chamber could also consider use of video or telephone conferences for hearings, when appropriate. This could be the case, for example, for presentation of arguments or other hearings where only counsel (and maybe legal representatives of victims) are to participate. This method could be a cost-saving measure, which could also prevent unnecessary postponements. It could also, when appropriate, be applied in order to avoid transporting a detained accused where, for example, security concerns or medical reasons made this undesirable.

[77.] Under Article 82 the right to bring an interlocutory appeal without the leave of the Chamber is limited to decisions with respect to jurisdiction or admissibility, granting or denying release of the person, and decisions of the Pre-Trial Chamber to act on its own initiative under Article

56(3). Other interlocutory appeals are subject to a system of leave to appeal. These appeals are limited to decisions that involve issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Such decisions may be appealed only if in the opinion of the Pre-Trial or Trial Chamber an immediate resolution by the Appeals Chamber may materially advance the proceedings.

[78.] In order to prevent a backlog of motions and interlocutory appeals the parties should be requested to first discuss a question in dispute before filing an appeal.

[79.] A Chamber should consider sanctions on counsel who raise frivolous motions. In particular, a Chamber may declare a motion frivolous with a recommendation to the Registrar not to pay fees to the counsel for work undertaken on such motions. To ensure proper regulation of and transparency in application of sanctions, the Judges may consider, together with the Registrar, adoption of relevant Regulations in accordance with Article 52. The Regulations would also contain references to the Code of Professional Conduct for counsel as it is envisaged in Rules 8 and 22(3).

[80.] It should also be explored how far an international “Bar Association” for the ICC could assist in developing good practices and preventing frivolous motions.

[81.] In order to make arguments by the parties more closely focused, the Court may issue a practice direction as to a standard format, page limits, *et cetera*. for applications, responses, and replies.

5.9. Change of legal counsel

[82.] Change of legal counsel for the suspect or accused can disrupt the proceedings and cause substantive delays. While respecting the rights relating to legal assistance as laid down in the Statute and the Rules, the regulations and practice relating to assignment (and discharge) of legal assistance should be developed so that change of counsel causes a minimum of disruption and delay. In this regard, it may be noted that the practice of appointing more than one counsel or retaining the replaced counsel during a transitional period has proved useful in the experience of the *ad hoc* Tribunals. Other methods should also be considered. A word of caution should be expressed in respect of the link between discharge of counsel and so-called “fee-splitting”, for example a request by the accused to change a counsel that refuses such arrangements, as experienced by the *ad*

hoc Tribunals and identified in a Report by the Secretary-General on the activities of the Office of Internal Oversight Services (A/55/759 of 1 February 2001).

6. Trial

6.1. Concentrated trials

[83.] In some national jurisdictions, a principle of concentration applies to criminal trials, meaning that the main hearing where the parties present their cases and evidence in principle must proceed with a minimum of interruption. This is generally seen as an efficient practice whereby repetitions as well as repeated recollection and preparations by the judges and parties can be avoided. The principle is upheld with particularly strictness where the accused is deprived of liberty.

[84.] However, such practice does require adequate facilities and human resources (court rooms, judges and other staff, *et cetera*) and exceptions are often necessary with respect to very long trials. Fragmented trials have also been the experience of the *ad hoc* Tribunals. While a certain degree of fragmentation of trials will almost certainly be inevitable in ICC as well, this should preferably be kept to a minimum. Awareness and planning may go a long way. A rigid formal scheme for adjournments will create unnecessary complications and be difficult to follow in practice. It should therefore be avoided, but the judges might want to consider concentrated trials as one priority (among others) when planning the court schedule.

6.2. Time limits for the presentation of a case at trial

[85.] Various means for simplifying and expediting the presentation of evidence at trial may be considered (see further below). One method that has been utilised in ICTY is to impose time limits for the parties' presentation of their respective cases. The main benefit is that the parties are forced to thoroughly consider the scope of their cases and the evidence to be submitted. The method provides for manageable cases that can be concluded within a reasonable and calculable time. The major draw-back, however, is that the shortening of the trial proceedings might result in incomplete or flawed descriptions of the events to the court by

the prosecution. In order to avoid such negative results, this method may have to be combined with exceptions from the principle of best evidence.

6.3. Form of adjudication

[86.] The relationship between adversarial and inquisitorial principles for the trial proceedings is not entirely clear from the Statute and the Rules. Hence there is a need for policy decisions to be made by the Court. This is particularly true in respect of Article 64(8)(b) and Rule 140 which primarily leaves it to the presiding judge to give directions for the conduct of the proceedings. In doing so, the presiding judge should ensure that they are conducted in a fair and impartial manner.

[87.] By entrusting the trial procedures to the presiding judge, there is a risk that the trial will be shaped in fundamentally different ways in different cases. While this to an extent may be motivated by different circumstances, for example the degree of defence involvement at the investigation stage, exercise of very extensive discretion in deciding the trial procedures to be followed in the particular case will lead to uncertainty. This uncertainty will also spill over and have repercussions for the earlier phases of the proceedings. One important example is the effect that uncertainty regarding examination of witnesses may have on the strategies of and preparations by the parties. For the prosecution, problems of uncertainty will already begin when collecting evidence during the investigation. It thus seems highly advisable to compensate the lack of precision in the Statute and Rules with judicial regulations (practice directives).

[88.] In addition to this, the character of the trial proceedings may also affect the structure and staffing needs of the Office of the Prosecutor. Adversarial trial teams will normally involve more staff (senior trial attorneys, co-counsels, legal officers, case managers, trial support assistants, *et cetera*) and, therefore, be more expensive. The same would also be true regarding defence teams.

[89.] But for a few principles (however important), the Court seems to be relatively free to choose and blend such procedures. Primarily, considerations regarding how fairness and impartiality as well as other interests and rights set forth in the Statute and Rules – such the role of the judges as active seekers of truth (for example Article 69(3)) and victims' participation in the proceedings in their own right (Article 68(3)) – are better served will play a dominant role in the determination. It could be argued,

for instance, that the right of victims to participate in the proceedings would be easier to facilitate when the trial is conducted in a less adversarial form. On the other hand, submission and presentation of evidence appears primarily to be a task for the parties, which may be held in favour of more adversarial trial proceedings. Rule 140(2) includes some minimum requirements in respect of the questioning of witnesses.

[90.] It ought to be repeated, however, that the operation of objective investigations – in general or *in casu* – may motivate variations in the trial proceedings. The defence may have no – or only very limited – evidence to present in “its case” because of its involvement in the objective investigation. However, such coordination does not *per se* prevent the defence from presenting additional evidence. On the contrary, this is a right of the accused (Articles 67(1)(e) and 69(3)), which must be upheld irrespective of the character of the trial proceedings.

[91.] If, on the other hand, the defence chooses not to coordinate “its case” with the prosecution case and a more adversarial form of presentation of evidence is adopted, there may be a possibility, after presentation of the prosecution evidence, to “purge” the case, dropping those charges and incidents that have not been sufficiently substantiated by the evidence (the so-called, “no case to answer” test in common law jurisdictions, leading to an advanced judgement of acquittal). Application of this procedural device will shorten the presentation of evidence by the defence, since the defence need only respond to charges that have passed a “no-case-to-answer” test. This is not explicitly provided for in the Statute or the Rules but would probably still be a possible tool for the Court to employ. It may be, however, that there will not be much room for using this device due to the test conducted when the charges are confirmed.

[92.] Whatever the outcome of the establishment of trial proceedings, it appears important that both the prosecution and the defence know how the trial will be conducted, maybe with different options, before they enter into investigations and set their respective strategies as to how to proceed with a case. Experience of the *ad hoc* Tribunals has proved that preparing the presentation of evidence in international criminal tribunals is a complex task, since the witnesses generally reside far away from the seat of the court, and the documentary evidence is also obtained from archives located in distant places, and must be scrutinised and compiled for the purposes of its presentation at trial. Certainty in advance as to how the tri-

al will be conducted will foster an efficient preparation, and accordingly an orderly and timely presentation of evidence.

6.4. Judicial Regulations

[93.] According to Article 64(8)(b), a Trial Chamber shall confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.

[94.] There may be a need for some judicial regulations (practice directions) to compensate for the lack of precision in the Statute. Otherwise, there is a risk that too much time will be taken to decide *how* to deal with such matters as victims' participation, *et cetera*, instead of addressing the substance of the issues. Furthermore, the lack of a practice direction and a "case-by-case" approach may result in confusion and parties' uncertainty in preparation cases by the parties to the proceedings. For the prosecutor the problems of uncertainty will begin already when collecting evidence during the investigation.

[95.] Practice directions seem also advisable in order to avoid different Chambers taking completely different approaches. At the same time, in some circumstance a room for differences might have advantages. For example, the degree of defence involvement at the investigative stage may differ and so that might have repercussions as to how the trial is conducted most expediently.

6.5. Admissibility of evidence

[96.] Like the *ad hoc* Tribunals, the ICC will operate with a relatively liberal law of evidence which is burdened by very few technical rules on admissibility of evidence (for example Article 69(4) and 7). This indicates a preference for discussions related to the weighing of evidence at the end of the trial rather than to the excluding of evidence beforehand. This could be a straightforward order where little time would be spent on issues of admissibility of evidence (leaving aside the question of irrelevant or repetitive evidence), similar to what is the case in some domestic legal systems. However, for those who are used to a more formal law of evidence with extensive technical rules, this lack of guidance may create some confusion and also leave ample room for numerous objections and challenges. Thus, this order, which is meant to simplify the proceedings, could instead lead to disruptive and time-consuming processes.

[97.] It should in the context be noted that certain procedures that have been developed for a swift resolution of admissibility issues in some legal systems might not be acceptable to lawyers with other backgrounds. For example, *voir dire* proceedings that are known in common law jurisdictions, whereby the admissibility of evidence is tested and decided in a separate proceeding within the trial by the same judges that will also adjudicate the case, could be perceived by civil law lawyers as an unacceptable pre-evaluation of evidence before whole case have been heard. Thus, simplifying measures that would counterbalance exclusionary rules domestically may not be available in an international jurisdiction. As a result, admissibility issues may take more time and resources to resolve than is normally the case in national trials.

[98.] Leaving the advantages and disadvantages of the various approaches aside, the ICC Chambers will also have to apply exclusionary rules relating to relevance or admissibility and, hence, challenges will be made. To the extent possible, such issues should be sorted out before the commencement of the trial. Moreover, by showing a clear general preference for evaluation (weighing) of evidence at trial instead of excluding it on admissibility grounds, the number of challenges may be reduced. In light of the fact that the Trial Chamber has broad discretion without having to fear reversal, the remaining admissibility issues should be determined speedily after proper argument.

6.6. Evidence by witness testimony

[99.] In the experience of the *ad hoc* Tribunals, witness testimony at trial is an (if not the most) important form of evidence in trials of this nature. This will probably also be the case before the ICC. Witness testimony is, however, also a time consuming and resource demanding exercise. Problems in bringing witnesses before the court may lead to postponements and, thus, to delays.

[100.] Article 69(2) seems to advance a best evidence principle in the sense that live testimony is the primary option. The requirement of testimony “given in person” should not, however, be seen as also a requirement that the witness be present in the courtroom. On the contrary, live testimony can also be taken by using a live video-link or a live telephone conference (see Article 69(2)). Such measures may prove particularly important due to the unfortunate fact that states are under no obligation to enforce an ICC court order for a witness to appear (*confer* Article

93(1)(e)). They may also be useful for the purpose of witness protection (Rule 87(3)(c)). There are no limitations to the use of these measures except that they must not be prejudicial to or inconsistent with the rights of the accused. The technology must permit the witness to be examined by the parties and the judges (Rule 67(1)). In some instances, the nature of the evidence or other circumstances might lead to the conclusion that the measures would fail the test. However, due to the cooperation regime there may also be instances where these measures are the best means available to the Court and the parties.

[101.] Witness testimony could also be taken before a national court by means of international legal assistance (Article 93(1)(b)), whereby the ICC in its request must make sure that the requirements for admitting the testimony into evidence at trial are observed.

6.7. Written statements and testimonies *in lieu* of oral testimony

[102.] In accordance with Article 69(2), a Chamber may also permit the introduction of documents or written transcripts. This measure must not be prejudicial to or inconsistent with the rights of the accused. It includes evidence in the form of a written statement from a witness as well as a transcript of evidence given by a witness in proceedings before the Court. By this means, the presentation of evidence at trial could be substantially shortened.

[103.] However, according to Rule 68, written statements and prior testimony are admissible only if the opposing party has or has had the opportunity to examine the witness, unless measures under Article 56 (unique investigative opportunity) have been taken by the Pre-Trial Chamber. Besides the possibilities to comply with Rule 68 in a coordinated effort by the prosecution and the defence, it is also important to utilize the Article 56 mechanism to ensure an efficient and complete presentation of evidence.

[104.] Bearing in mind the limitations set forth in Article 56, the Prosecutor and the Pre-Trial Chamber should explore the possible use of measures under that Article in order to obtain evidence that can later be presented at trial. It may, for example, be desirable to be able to hear witnesses, for example very young children, out of trial and later introduce the video-taped interview as evidence at trial, as is the practice in some national jurisdictions. Another example could be the declared or at least

very likely unwillingness of a witness to come and testify before the Court at trial in combination with the Court's lack of compelling powers to secure the attendance of the witness, possibly reserved for cases when other options such as testimony by video-link or the taking of testimony before a national court with power to secure attendance are not available. A third example of when the Court may want to have recourse to Article 56 could be when a particular war zone has only recently become accessible but there are serious doubts as to whether such accessibility will remain. What is crucial is the interpretation of "a unique opportunity [...] which may not be available subsequently for the purposes of trial" and whether this requirement could cover situations as the ones mentioned, something that is up to the Court to decide. In any event, proper weight should be given to the general principle, laid down in Article 69(2), that witnesses shall testify before the Court in person.

[105.] Article 56 also shows the intention to protect the rights of the defence. In this context, it should be noted that the Pre-Trial Chamber can appoint a counsel to represent the interests of the defence. This is indeed crucial since, depending on the nature of the evidence, it may be that only the presence and participation of a representative for the defence makes it legitimate to transfer the evidence taken to the trial, at least if that evidence goes to the proof of the conduct of the accused. This would especially be the case when the relevant investigative step consists in obtaining testimony of a witness who may be subsequently unavailable for trial. A more lenient standard should only be considered with respect to facts of a general nature, such as historical or political background, the existence and nature of an armed conflict, or when the evidence in question is of a forensic or scientific nature, or does not otherwise involve securing the evidence of witnesses that may not be available for trial purposes.

[106.] It may be noted that measures under Article 56 do not necessarily mean that a judge must participate when the testimony is taken. Recommendations and orders regarding procedures and participation of counsel for the defence could be sufficient (Article 56(2)), whereby the requirements of Rule 68 could also be met. It is, however, important that a witness makes a solemn undertaking in accordance with Rule 66 before testimony is taken by or with participation of the judge of the Pre-Trial Chamber. Special recording requirements should also be observed (Rule 112(4)).

[107.] Similarly, in the stage prior to the Pre-Trial Chambers authorisation for an investigation pursuant to Article 15, evidence can also be collected and preserved. When the Prosecutor considers that there is a serious risk that it might not be possible for the testimony to be taken subsequently, the Prosecutor may request the Pre-Trial Chamber to appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of the testimony in order to protect the rights of the defence (Rule 47(2)). Such evidence is also subject to the general admissibility provisions of Article 69(4).

6.8. Overview witnesses

[108.] Summary evidence is explicitly provided for in respect of confirmation of charges (Article 61(5)). There is no equivalent provision for trials. In light of the prospect of very long trials concerning complex situations and possible countermeasures such as imposed limitations of evidence or the time for the trial, the Court may want to consider whether summary evidence relayed by an “overview witness” could be admitted.

[109.] The practice of so-called “overview witnesses” has been debated in respect of the *ad hoc* Tribunals. This practice should, however, be distinguished from other methods of providing a general background to a case, *id est* the same function that a prosecutor performs in outlining the evidence in an opening statement. Nothing precludes the prosecutor from being assisted in this task by, for example, an investigator making parts of the presentation or using documents such as maps, time-tables, *et cetera*. This would of course not go into evidence of the case and the information would, if disputed, have to be proved by submitted evidence.

[110.] Instead, “overview witnesses” relate to statements proffered as evidence, for example as a comprehensive overview of the investigation conducted in the relevant sites and may include reference to a number of sources. What is put in evidence is only the statement of the “overview witness”, who could be cross-examined, and not any underlying witness statements or other material. However, both the opposing party and the Chamber could be provided with original statements of witnesses, as well as any other material analysed or referred to by the overview witness, to be able to verify the accuracy of the overview. In addition, a testimony of an “overview witness” should only be considered admissible to the extent it goes to proof of a matter other than the acts and conduct of the accused, *stricto sensu*, as charged in the document containing the charges.

[111.] The Statute and the Rules leave room for the practice of overview witnesses, but this means of evidence is controversial. It could include hearsay, at least in part, which may be difficult to assess both for the parties and the Court. And even if information that relates to unavailable sources is easy to challenge, limited possibilities to test the evidence by way of cross-examination may by some be seen as unfair. Any judgment where facts are based on such evidence alone would be considered unsafe. So if admitted, the practical use and evidentiary value of overview witnesses would be limited. Considering the difficulties and potential controversies, however, the Court may decide not to accept “overview witnesses”.

6.9. Some documentary evidence

[112.] Article 69(2) also allows documents to be introduced as evidence, as long as this is not prejudicial to or inconsistent with the rights of the accused. The view as to how documentary evidence may be introduced, *id est* whether it must be made through the maker as an intermediary or not, varies in different legal traditions. The *ad hoc* Tribunals have treated different kinds of documents differently. For example, investigative reports, which the Prosecutor may receive from various organizations and institutions, have been presented as documentary evidence through the makers of the reports. Various official public documents, on the other hand, have been admitted from the bar table. The former approach, which is of course more time-consuming than the latter, is motivated by the right of the accused to examine (*id est* cross-examine) evidence against him or her.

[113.] The opinion whether the accused persons’ right to examine evidence ought to require the appearance of the maker of a report as witness may be answered differently. It is generally accepted, however, that the accused has the right to call the maker of a report as a witness if he or she so wishes. This is not to be seen as a reversed onus of proof or an onus of rebuttal (*confer* Article 67(1)(i)). Moreover, the Chamber may also call the maker of the document as a witness, if necessary for ascertaining the truth (Article 69(3)). No provision explicitly hinders the Court from choosing either of the methods and, as noted, any admission that does not actually lead to the appearance of the maker of the document as a witness would expedite the proceedings.

6.10. Judicial notice

[114.] Article 69(6) grants the Court the authority to take judicial notice of facts of common knowledge. This is an avenue that could be explored by the Court in manner consistent with the right of the accused, in order to shorten proceedings. In the age of information, the concept of “facts of common knowledge” may be properly expanded in some cases to cover issues such as the existence of an armed conflict or, in indisputable cases, even the nature of that conflict, hence saving the need for a lengthy presentation of evidence to cover those issues. Use of this device could also prove effective to counter defence attempts to delay proceedings by disputing issues that could never be reasonably in dispute.

6.11. Unsworn statements of the accused

[115.] Pursuant to Article 67(1)(h) an accused has the right to make an unsworn statement in his or her defence. The Chamber may invoke this means by applying Article 64(8)(b).

[116.] Such an oral statement may bring out the essence of the defence at the beginning of the trial and, as a result, streamline the proceedings.

[117.] At the commencement of the trial, after the charges have been read, the Trial Chamber could ask the accused not only whether he enters a plea of guilty or not guilty, but also a few key questions about the lines of his defence – which he is not obliged to answer. This could, if the accused is prepared to answer the questions, have a useful effect in focusing the trial on the essential issues.

7. Victims’ participation

[118.] It will be very important to form views at an early stage as to how the participation of victims should operate in practice, in particular Rules 89 to 92. This is primarily a task for the judges and the Prosecutor’s obligations in this regard relate mainly to submission of relevant information at certain stages of the proceedings according to Rules 49, 50, 59 and 92. Such notifications are subject to explicit restrictions and, in general, relate to victims or their representatives who have already participated in the proceedings or communicated with the Court in the case in question.

[119.] Although it is the Registrar who keeps the register of victims who have communicated (Rule 16(3)), the Prosecutor may retain the right to deal with the notifications (which may also be given orally).

[120.] Regulations on the participation of victims in the proceedings would be useful, both for the Court and for the victims and their representatives. It should be noted that the scheme set forth in Article 68(3) and Rules 89-91 provides not only a right of participation but also a very wide discretion for the Court to establish how and when this right is to be exercised. In this sense, it cannot be denied that the existence of an additional actor in the proceedings can easily have an impact on the overall length. Each Chamber of the Court will have to balance all these factors while determining the right to participate in the instant stage of the proceedings, and the modality of its exercise.

8. Reparations proceedings

[121.] According to Article 76, representations concerning reparations could be heard at trial (if a unified trial is held or in case of an admission of guilt), at a sentencing hearing or at an additional hearing. Interim measures aimed to secure, *inter alia*, claims for reparations could also be ordered by the Pre-Trial Chamber at an earlier stage of the proceedings (Article 57(3)(e)). Procedures additional to those set forth in Rules 94 to 99 will have to be established by the Court.

[122.] Very probably evidence, including testimony by witnesses and expert witnesses, will also be submitted in respect of reparations. In many cases, this evidence will be the same as that presented in the criminal proceedings. It seems preferable that the Chamber should be able to hear such evidence (and the witnesses be obliged to appear) only once in the entire proceedings. Rule 91 could provide for such a solution in respect of the examination of witnesses.

[123.] As to the practical system for preparing and initially handling claims for reparations (and perhaps also investigations as to the most appropriate ways of providing reparations in collective forms), the Court could consider the use staff of other than judges, and possibly even external expertise. At least in some cases, extensive preparations can be envisaged.

Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation

Morten Bergsmo and Vladimir Tochilovsky*

44.1. Background and Mandate

In an article published in 1999, a few months after the Rome Diplomatic Conference, Louise Arbour and the co-ordinator of the 2002–2003 preparatory team for the Office of the Prosecutor of the International Criminal Court (‘ICC’)¹ stated:

States can paralyse the ICC not only by holding back acceptance of its jurisdiction and by pursuing domestic investigation and prosecution of the situation at hand, but also by *not co-operating with the Court and its Prosecutor in the preparation of cases which fall within the Court’s jurisdiction*. The main principle of the Statute, as articulated in Article 99 (1), is that the law of the requested State determines how requests for assistance from the Court will be executed. It is only if the execution will not contravene the law of the requested State that it can be done in the manner specified in the request, including “permitting

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¹ That is, Morten Bergsmo, co-author of this chapter.

persons specified in the request to be present at and assist in the execution process”. In effect, the authorities of the requested State decide how the request for assistance is to be executed, not the ICC or its Prosecutor. Based on the experience of the two *ad hoc* Tribunals, merely allowing Tribunal investigators to be present at and assist in the execution process *would fall far short of the requirements of effective international investigation and prosecution*. How can cases be prepared effectively if the Prosecutor cannot control the gathering of evidence?²

Published so soon after the adoption of the ICC Statute, and at a time when Louise Arbour was in intense media focus as Prosecutor of the ex-Yugoslavia Tribunal (‘ICTY’), this article came to define general thinking on the fact-finding capacity and constraints of the ICC Office of the Prosecutor for several years. The ICC was quickly perceived as the court of high *legitimacy* – being based on a multilateral treaty as opposed to the United Nations Security Council resolutions that set up the *ad hoc* tribunals – but of lower *efficiency* since it lacks the ultimate enforcement authority of Chapter VII of the United Nations Charter which has underpinned the fact-work of the *ad hoc* tribunals.

The publication highlighted that Article 99 of the ICC Statute is meant to apply also to

territorial States directly affected by the conflict and the alleged atrocities, not only to States far removed from the scene of the situation under investigation. Needless to say, this is *likely to create insurmountable difficulties for case preparation in cases where there has not been a change in regime after the alleged atrocities*. Elements of the domestic police in the territorial State in question will often have been involved in the commission of war crimes, and will not be inclined towards investigating those same crimes effectively and independently.

More disturbing is the idea of relying on State co-operation after a failed claim of inadmissibility. By finding a situation admissible, the ICC concludes that the national criminal justice system in question is unwilling or unable to genuinely

² See Louise Arbour and Morten Bergsmo, “Conspicuous Absence of Jurisdictional Overreach”, in *International Law Forum du Droit International*, 1999, vol. 1, no. 1, p. 18 (<http://www.legal-tools.org/doc/d4cfaf/>) (emphasis added).

investigate or prosecute. It would seem *unduly optimistic for the Court to send requests for assistance to the very same national authorities which it has declared unwilling or unable to investigate.*³

This concern for weakness in the architecture of the fact-finding capacity of the ICC captures the background to the expert consultation process considered in this chapter. A group of experts was asked in January 2003 to prepare a written analysis of those potential problems in the international co-operation regime particularly relevant to the fact-finding and investigative functions of the ICC Office of the Prosecutor. More specifically, the mandate of the group requested that the report

would note, in particular, the challenges which the chief prosecutor may face regarding the efficacy of fact-finding and investigative processes; indicate solutions and evaluate the relative strengths and weaknesses of indicated solutions to core issues; and finally, examine how the instrument of memoranda of understanding, concluded between the Office of the Prosecutor and States Parties, could and should be used to address the issues raised.⁴

The group was composed of the following experts (with their titles at the time indicated in parenthesis): Mr. Bruce Broomhall (Senior Legal Officer for International Justice, Open Society Institute, and Assistant Professor of International Law, Central European University, Budapest); Judge Håkan Friman (Deputy Director, Swedish Ministry of Justice); Mr. Laurent Grosse (Chief Counsel and Director, Legal Counsel's Office, ICPO-Interpol); Dr. Claus Kreß (Senior Research Fellow, Department of Foreign and International Criminal Law, University of Cologne); Ms. Susan R. Lamb (Legal Adviser, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia); Ms. Kim Prost (Head, Criminal Law Section, Deputy Director, Legal and Constitutional Affairs Division, Commonwealth Secretariat); Mr. David Scheffer (Visiting Professor of Law, Georgetown University Law Center, Washington, DC); Dr. Göran Sluiter (Lecturer in International Law, Utrecht University, and Judge at the Utrecht District Court (Criminal Division)); and Dr. Vladimir Tochilovsky (Trial Attorney, Office of the Prosecutor, International

³ *Ibid.* (emphasis added).

⁴ From a letter to late Judge Håkan Friman dated 3 March 2003.

Criminal Tribunal for the Former Yugoslavia). All authors contributed to the expert report in their personal capacity.

Dr. Tochilovsky co-ordinated the work within the group on its report. The group had a strong composition, including members with world-leading expertise on co-operation issues, such as later ICTY Judge Kim Prost.⁵ She played an important role in developing ideas and proposals through the group, some of which have had far-reaching practical consequences.

The report contains 110 paragraphs (33 pages) of analysis and advice, with multiple sections, including on the experiences of the *ad hoc* tribunals; organisational measures; preliminary examination; fact-finding, investigation, and admissibility procedures under Articles 18 and 19; investigation; enhanced co-operation through Security Council referral, voluntary co-operation by the states parties, or voluntary co-operation by states not party to the ICC Statute and with intergovernmental organisations; and issues for future consideration. The report contained several creative ideas some of which the preparatory team for the Office of the Prosecutor had not foreseen.

44.2. Seeking Memoranda of Understanding

The expert report echoed the 1999 article quoted above in recognising that the Prosecutor of the ICC,

whose powers are significantly weaker than those of his *ad hoc* Tribunals' counterpart, is likely to encounter similar unwillingness of States to cooperate. Such lack of co-operation from States could render the Prosecutor incapable of proceeding with critical investigations. While recognising that, in such circumstances, political support from States Parties will be vital, this paper addresses some legal means available to the ICC Prosecutor to enhance the efficiency of prosecutions through international co-operation.⁶

To reduce the negative impact of these restrictions built into the legal architecture of the ICC, the report, importantly, argued that it will be necessary for the Office of the Prosecutor to “negotiate access to a State’s

⁵ At the time of writing, Chef de Cabinet in the Presidency of the International Criminal Court.

⁶ Annex 1, para. 7 to this chapter.

territory and where necessary, try and obtain the maximum benefit possible from the provisions of the Statute through their liberal interpretation and application in practice”.⁷ More specifically, the report suggested that the Office of the Prosecutor should seek memoranda of understanding (‘MoUs’) with territorial states, in order to make the co-operation more efficient, as suggested by the mandate of the expert group.⁸ Such “MOU could either be specifically geared to this situation and thus based on Article 99(4) or may constitute a particular provision of a broader MOU of more general application. The MOU should simply provide that a faxed notice to the State of the date and place (if appropriate) of the interviews will suffice as the requisite consultations”.⁹

This practical proposal went straight to the heart of the concern expressed by Louise Arbour and her co-author, and has had far-reaching effects. Indeed, the Prosecutor introduced such MoUs already in the first situation that came before his Office, seeking to reduce some of the negative consequences of statutory weakness in the area of state co-operation. The expert report legitimised this idea for the Prosecutor.

44.3. Knowledge Base on Implementing Legislation

Another area where the report has had significant practical effect concerns its observation that the Office of the Prosecutor must know “all (enacted and draft) national legislation which implement the Statute. These laws offer not only useful information as to the appropriate channels of communication, but also provide the basis from which one may infer whether certain States are prepared to offer more assistance than they are presently required to provide under the Statute”.¹⁰ This recommendation

⁷ *Ibid.*, para. 8.

⁸ The preparatory team for the ICC Office of the Prosecutor approached Chief Prosecutor Carla Del Ponte of the ex-Yugoslavia Tribunal on 18 February 2003 with a request to consult a model memorandum of understanding on matters of co-operation as concluded between states and her Office, and she provided helpful information. The preparatory team also had informal contact with EUROPOL in February and March 2003 on memoranda of understanding in the area of mutual co-operation in criminal justice matters. Mr. Klaus Rackwitz, co-editor of this volume, liaised with EUROPOL on this matter.

⁹ Annex 1, para. 71.

¹⁰ *Ibid.*, para. 16. Late Mr. Christopher K. Hall of Amnesty International had collected, analysed and submitted a significant collection of implementing laws to the preparatory team of the ICC Office of the Prosecutor for which he was thanked in a letter to him dated 20 January 2003 (acknowledging his efforts to “systematically review implementing legisla-

led to the development of the National Implementing Legislation Database (‘NILD’) in the Legal Tools Database,¹¹ and, several years later in 2016, the Cooperation and Judicial Assistance Database (‘CJAD’) in the CMN Knowledge Hub of the Centre for International Law Research and Policy.¹² The NILD and CJAD services – both developed under the leadership of Professor Olympia Bekou of Nottingham University – provide analytical services that supplement the retrieval function for national implementing legislation offered by the Legal Tools Database. As a consequence, this area of practice is now unusually well supported by online, open access legal information services. Members of the group of experts should be pleased to see the extent of development along the lines of the idea they advanced in early 2003.

44.4. The Security Council as “the Court’s Partner”

The above-mentioned article co-authored by Louise Arbour suggested that the United Nations Charter “facilitates a constructive partnership between the Security Council and the ICC”.¹³ It opined that the “Security Council will want to override some statutory limitations by conferring upon the Prosecutor and the Court powers to obtain both co-operation and compliance when it refers situations under Chapter VII of the United Nations Charter to the Court, so that the powers of the Court would not be significantly weaker than those of the *ad hoc* Tribunals already established by the Council”.¹⁴

The expert group developed this idea further, stating, first, that a triggering of the Court’s jurisdiction under Article 13(b) of the ICC Statute is based on the Security Council’s “extensive powers conferred upon it by Chapter VII of the UN Charter”,¹⁵ and that it could use these powers to “specify particular measures to enable the Prosecutor to avoid strict requirements for state co-operation and to act with more authority to inves-

tion relevant to the ICC legal infrastructure”). Mr. Hall co-operated closely with the coordinator of the preparatory team, also after the latter left the ICC at the end of 2005, and Mr. Hall shared many of his files from his interaction with the Court in 2003 with him prior to his untimely passing.

¹¹ See <https://www.legal-tools.org/>.

¹² See <https://www.casematrixnetwork.org/cm-n-knowledge-hub/>.

¹³ Arbour and Bergsmo, 1999, p. 19, see *supra* note 2.

¹⁴ *Ibid.*, pp. 18–19.

¹⁵ Annex 1, para. 93.

tigate a situation. Such measures would be within the scope of the Security Council's enforcement powers". The first two Security Council referrals to the Court – Darfur and Libya – did not exhaust the measures envisaged by the expert report and the 1999 publication. This could be seen as surprising, insofar as the efficacy of the Security Council's referral action is a direct interest of the Council itself, not only of the Court and other stakeholders. It arguably undermines the Council's standing if its action is not as effective as it could be. It is not clear how sensitive the permanent or other members of the Council are to the perception of such weakness, given other limitations linked to the Council's decision-making process and consistency of action.

Second, and this may well be related, the expert group argued that the Prosecutor "should be prepared in the event of such a referral – and indeed preferably in advance of one – *to engage in dialogue with the Security Council concerning the wording of referral resolutions* which would ensure that State co-operation is adequately addressed and the Prosecutor's authority sufficiently enhanced through such Security Council referrals".¹⁶ This practical recommendation is based on a realistic understanding of how international organisations operate. The Security Council relies on the initiatives, ideas, facts and technical skills which the member states bring to the Council. The contemporary state-centred order does not allow the Council to operate in a manner similar to domestic cabinets with highly competent ministries of independent civil servants. So the expert report suggests that it may be necessary for the Office of the Prosecutor to discuss the wording of referral resolutions with the Council, without specifying how that should be done and what the risks may be for the Office or the Court as a whole.

It would be interesting to know whether the Office of the Prosecutor did engage in such dialogue prior to the Darfur and Libya referrals and, if so, how these discussions took place. When the Council adopted resolution 1593 (2005) on 31 March 2005¹⁷ which referred the situation in the Darfur to the Court, the first Chef de Cabinet of the Office – and head of its Jurisdiction, Complementarity and Cooperation Division – had not yet resigned from her position.¹⁸ She had worked closely with several

¹⁶ *Ibid.*, para. 94 (emphasis added).

¹⁷ The resolution is available at <http://www.legal-tools.org/doc/4b208f/>.

¹⁸ That is, Judge Silvia Fernández de Gurmendi who, at the time of writing, was President of the International Criminal Court.

governments during the ICC negotiations, including with members of the expert group who had represented their countries when the ICC Statute, Rules of Procedure and Evidence, or Elements of Crime document were negotiated. She was also well-known to at least two of the permanent members of the Security Council. She was therefore well-placed to follow what was happening in the Council at the time.

Indeed, recognising that the report has “by no means been able to cover all the issues related to fact-finding and investigation that will need to be the subject of policy-formulation and practical preparation by the Office of the Prosecutor in its early months”,¹⁹ the expert group took the opportunity “to identify what have come to our attention as possible key issues for early work in this area”. Among these was the suggestion of the “[c]omposition of the international co-operation unit within OTP”.²⁰ This seed led to the establishment of the above-mentioned Jurisdiction, Complementarity and Cooperation Division in the ICC Office of the Prosecutor (known as the ‘JCCD’). Also in this respect, the work of the expert group has had a direct and important impact on practice. The idea of the JCCD sprang out of the expert group – and thus a process that the preparatory team had started – and not through some clash of ideas about organisational design between the first Prosecutor and the preparatory team, as erroneously suggested by Professor Jens Meierhenrich.²¹ There was never any controversy between the preparatory team or any of its members and the Prosecutor about this question.

44.5. *Ad Hoc* Tribunal Practice

The expert group recalled the practice of the ex-Yugoslavia Tribunal which illustrated that objections related to the law of extradition were frequently raised by some states as an obstacle to arrest and surrender.²² The report notes that Article 102 of the ICC Statute clarifies that

¹⁹ Annex 1, para. 110.

²⁰ *Ibid.*

²¹ Jens Meierhenrich, “The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory”, in Martha Minow, C. True-Frost and Alex Whiting (editors), *The First Global Prosecutor: Promise and Constraints. Law, Meaning, and Violence*, University of Michigan Press, Ann Arbor, 2015, pp. 97–127.

²² Annex 1., para. 88. See ICTY, *Prosecutor v. Slobodan Milošević*, Trial Chamber, Decision on Preliminary Motions, IT-02-54, 8 November 2001 (<http://www.legal-tools.org/doc/f15771/>).

“surrender” and “extradition” at the ICC, like the ICTY, are not analogues.²³

The report also refers to the practice of the *ad hoc* Tribunals when addressing situations which may arise “where the Prosecutor is compelled, due to non-cooperation by a requested State or the sensitivity of ‘tipping off’ the requested State, to explore *ad hoc* measures to effectuate arrest”.²⁴ The report also suggests that, “alternatively, arrests may simply be spontaneously effected by private individuals in absence of any request or authorisation”.²⁵ The expert group recalls the practice of the ICTY where “third parties have, via irregular processes, simply detained indictees on their own initiative and thereafter delivered them to peacekeeping forces obliged to transfer indictees to the seat of the Tribunal”.²⁶ Indeed, in the *Dragan Nikolić* case, the Chamber dealt with a situation where the accused was allegedly illegally arrested and abducted from the territory of ex-Yugoslavia by some unknown individuals and transferred by them to the territory of Bosnia and Herzegovina where he was arrested by international force members and transferred to the Tribunal. Upon analysing relevant facts and law, the Chamber found no violation of sovereignty or of the rights of the accused.²⁷

²³ Annex 1, para. 88.

²⁴ *Ibid.*, para. 89.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ See ICTY, *Prosecutor v. Dragan Nikolić*, Trial Chamber, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, IT-94-2-PT, 9 October 2002 (<http://www.legal-tools.org/doc/352e8c/>).

Annex 1: Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation*

1. Introduction

[1.] The regime governing international co-operation in the fact-finding and investigative functions of the Office of the Prosecutor is complex and raises legal and practical questions essential to the effective functioning of the International Criminal Court.

[2.] With a view to contributing to timely reflection on this critical matter, and in order to prepare some ideas on potential solutions for the consideration of the Prosecutor, a consultative process among a select group of experts was initiated by the Director of Common Services of the ICC in January 2003. The group was invited to prepare a written analysis of those potential problems in the international co-operation regime particularly relevant to the fact-finding and investigative functions of the Office of the Prosecutor.

[3.] The members of the group who have prepared this informal paper are as follows:

Mr. Bruce Broomhall,

Senior Legal Officer for International Justice, Open Society Institute; Assistant Professor of International Law, Central European University, Budapest;

Mr. Håkan Friman,

Deputy Director, Swedish Ministry of Justice; former Associate Judge of Appeals;

Mr. Laurent Grosse,

Chief Counsel and Director, Legal Counsel's Office; ICPO-Interpol; General Secretariat;

Dr. Claus Kreß,

LL.M. (Cantab.), Senior Research Fellow, Department of Foreign and International Criminal Law, University of Cologne,

* The language of Annex 1 has been kept as it is in the original, including where it does not comply with the TOAEP Authors' and Formatting Manuals, except for minor typographical errors that have been corrected. The formatting of the text is faithful to the original to the extent possible.

Member of the German delegation to the Rome Conference and to the Preparatory Commission;

Ms. *Susan Lamb*,

Legal Adviser, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia (ICTY);

Ms. *Kim Prost*,

Head Criminal Law Section; Deputy Director, Legal and Constitutional Affairs Division, Commonwealth Secretariat;

Mr. *David Scheffer*,

Visiting Professor of Law, Georgetown University Law Center, Washington, D.C.;

Dr. *Göran Sluiter*,

Lecturer in International Law, Utrecht University; Judge at the Utrecht District Court (Criminal Division);

Dr. *Vladimir Tochilovsky*,

Trial Attorney, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia (ICTY), formerly representative of the ICTY to the Preparatory Commission for the International Criminal Court.

All authors contributed to this paper in their personal capacity. The views expressed in this paper do not necessarily represent the views of the organisations with which the authors are affiliated.

2. General observations

2.1. Experiences of the *ad hoc* Tribunals

[4.] Subject only to the limits prescribed by the Statute, unrestricted access to all forms of evidence by the ICC Prosecutor and the full cooperation of States is vital to the successful and fair functioning of the International Criminal Court.

[5.] The experience of the *ad hoc* Tribunals has proved that even with its far-reaching powers based on Chapter VII of the UN Charter (expressed *inter alia* through Article 29 of the ICTY Statute and Article 28 of the ICTR Statute, Rule 7*bis* (b) in conjunction with Rule 39(iii), and Rule 54*bis* of the ICTY Rules of Procedure and Evidence), the Prosecutor of

the Tribunals has had to surmount reluctance and even opposition from some States in order to ensure their co-operation. It has mainly been diplomatic support from key governments, the Security Council and the European Union that has ensured the co-operation of reluctant States with the Tribunals.

[6.] The Tribunals have had to deal with restrictions imposed on the powers of the Prosecutor to interview witnesses by national officials' threat to use national security legislation to prosecute those willing to testify before the Tribunal. There have been attempts to treat the Prosecutor's requests for documents as requests for physical access to records that require search warrants, *et cetera*. In some instances, States have refused to provide assistance on the pretext that the State does not have a special domestic law on co-operation with the Tribunal. Even where such legislation exists, other States have adopted a restrictive construction of it (for instance, by refusing to countenance co-operation with the ICTY-OTP by any other official organ other than those expressly mentioned in the law on co-operation itself).

[7.] The Prosecutor of the ICC, whose powers are significantly weaker than those of his *ad hoc* Tribunals' counterpart, is likely to encounter similar unwillingness of States to cooperate. Such lack of co-operation from States could render the Prosecutor incapable of proceeding with critical investigations. While recognising that, in such circumstances, *political* support from States Parties will be vital, this paper addresses some *legal* means available to the ICC Prosecutor to enhance the efficiency of prosecutions through international co-operation.

[8.] The ICC Prosecutor will be able to undertake investigative steps on the territory of a State largely through that State's co-operation. This limitation upon the Prosecutor's powers, while adopted as a compromise in the diplomatic negotiations, may ultimately impede the effectiveness of investigations. In order to reduce the impact of this limitation, it will frequently be necessary for the Prosecutor to negotiate access to a State's territory and where necessary, try and obtain the maximum benefit possible from the provisions of the Statute through their liberal interpretation and application in practice.

[9.] In addition to the powers explicitly attributed to him in the Statute, the ICC Prosecutor may on occasion invoke implied powers, *id est* the powers that are essential to the performance of the Prosecutor's duties, but which are not spelled out in the Statute or Rules. However, the actual

success of this approach will depend, initially, on its acceptance by States and ultimately by the ICC Chambers. Indeed, the Prosecutor will have to be extremely cautious in invoking implied powers since, in contrast to the *ad hoc* Tribunals' legal frameworks, the ICC Statute and Rules set out and regulate in detail the powers of the OTP. Invoking implied powers might therefore be more likely to be regarded as *ultra vires*. Indeed, even before the *ad hoc* Tribunals, the doctrine of implied powers has been resorted to only infrequently in its case law. Nevertheless, the *effet utile* doctrine may be utilised wherever there is a perceived risk that a particular interpretation would ensure that the ICC Prosecutor's *express* powers could be stultified.

[10.] Furthermore, Article 51(2) of the ICC Statute offers the Prosecutor the option of proposing amendments to the Rules. The experience of the *ad hoc* Tribunals illustrates that Rule-amendment has been a fruitful source of extension of the Tribunal's powers, both express and implied (for example, Rule 59*bis*, which enabled arrest warrants thenceforth to be transmitted by the Prosecutor to "appropriate international bodies", thus facilitating the arrest and transfer of Tribunal indictees by peacekeeping forces in the field). This avenue offers an alternative to a claim of implied powers which could sometimes be taken advantage of, although difficulties in winning broad ASP support for a given amendment may sometimes make this untenable.

2.2. Some organisational measures

[11.] The structure of the Office of the Prosecutor (OTP) in the first year budget does not expressly refer to a unit that will deal with matters related to State co-operation. It seems important that from the very beginning, the Prosecutor is assisted by staff with extensive expertise in this field.

[12.] The Prosecutor should develop various tools that will assist with State co-operation. In addition to the formal communication of information, a list of actual contact persons should be maintained as these relationships develop, in order to enhance the effectiveness of consultations and communications with States. This list should cover not only State Parties but also non-State Parties with which the OTP may be dealing in particular matters or generally, as well as contacts within international organisations.

[13.] In particular, contact information may contain such details as phone-, mobile, fax numbers, e-mail addresses as well as the languages spoken. This may also require some follow up work, as well as regular updating, by the Registrar (which the OTP may wish to encourage) as States Parties may not have provided sufficient contact information.

[14.] The experience of the *ad hoc* Tribunals shows that it is important to maintain predictable channels of communication with both States and external bodies, as well as mutually-agreed standard operating procedures pursuant, *inter alia*, to Memoranda of Understanding (MOUs, see below). This is necessary in order both to foster mutual trust and to ensure that the willingness of cooperative States and entities to assist is preserved. To this end, the OTP, while taking into account the need for flexibility and an individualised structure for requests for assistance, should prepare some standard forms or guidelines to ensure a consistent approach to different types of requests for assistance.

[15.] The Prosecutor should develop efficient access to and knowledge of all pertinent extradition treaties and other relevant legal assistance treaties, such as mutual legal assistance treaties, so that when conflicts seem to arise, he can examine the relevant international agreements as quickly as possible. A data bank of extradition and other legal assistance treaties should be developed for the Prosecutor. The Prosecutor may wish to benefit from existing data bases of this nature held by international organisations such as the United Nations Office of Drugs and Crime in Vienna and the Commonwealth Secretariat in London.

[16.] It is also important that the Prosecutor knows all (enacted and draft) national legislation which implement the Statute. These laws offer not only useful information as to the appropriate channels of communication, but also provide the basis from which one may infer whether certain States are prepared to offer more assistance than they are presently required to provide under the Statute. Moreover, these acts amount to important subsequent practice in the application of the ICC Statute and can, to some extent, stand as an interpretative tool of that instrument, including with respect to the scope of powers of the Prosecutor. The Prosecutor should be prepared to offer advice to receptive governments, in light of existing examples and best practice (from the OTP's viewpoint), on how best to structure implementing and other relevant legislation for the efficient operation of the Court, including the principle of complementarity. Such advice should, however, be carefully considered so that it does not

prejudice the Prosecutor's ability to subsequently request co-operation or any later determination of the State's compliance with the obligations under the Statute.

[17.] Subject to the requirements of consistency with the overall object and purpose of Part 9, Memoranda of Understanding may be negotiated as a useful supplement to implementing legislation in the area of state co-operation (see below).

[18.] It is important that various databases referred to above and elsewhere in this paper are carefully designed so that it can be used for different purposes and for long time. It may be useful to separate public and confidential information. The public information would be accessible for all organs of the Court and the defence. This public database may be compiled and maintained by both the OTP and the Registry. Considering the limited resources, a step-by-step and selective approach may be employed, which may also reduce the initial resources required for keeping the database updated.

3. Preliminary examination

[19.] Pursuant to Article 15 of the Statute, prior to commencement of an investigation, the Prosecutor must, when acting *proprio motu*, conduct a preliminary examination. It is only upon the subsequent application to and authorisation by the Pre-Trial Chamber that the OTP may proceed to the commencement of an investigation.

[20.] In conducting the Article 15 preliminary examination, the Prosecutor needs to analyze the seriousness of the information received (Article 15(1)) and determine whether there is a reasonable basis to proceed with an investigation (Article 15(2)). To this end, the Prosecutor must consider, in accordance with Rule 48 and Article 53(1), whether there is a reasonable basis to believe that a crime has been or is being committed, (b) that the crime is within the Court's jurisdiction, (c) that the case is or would be admissible under Article 17, and (d) that the interests of justice would be served by the investigation. The Prosecutor needs access to sufficient information in order to meet these objectives.

[21.] According to Article 15(2), the tools available to the Prosecutor at this stage include: received information; additional information from States, organs of the UN, intergovernmental or non-governmental organizations or other reliable sources and 'written or oral testimony' received

at the seat of the Court (whereby the ordinary procedures for questioning shall apply and the procedure for preservation of evidence for trial may apply pursuant to Rule 47). Although apparently limited in scope, the sources described under this rule are potentially rich in terms of the information they may in practice be able to provide. Moreover, there is arguably no reason to restrictively interpret the type of non-governmental or governmental organization that may and should be approached by the ICC Prosecutor under this provision. Flexibility and creativity should be employed in this regard, depending on the type of information sought.

3.1. Applicability of Part 9 of the Statute

[22.] While the Prosecutor may seek assistance in gathering the necessary information from State Parties, other States and international organisations, neither the Statute nor the Rules provide expressly for the application of Part 9 co-operation obligations of States Parties at this stage, nor are there any other specific powers set out for gathering the information from the sources listed in Article 15(2). This gives rise to two possible interpretations.

3.1.1. Narrow interpretation

[23.] Under narrow interpretation of Part 9, it is only once a ‘reasonable basis’ has been found by the Pre-Trial Chamber under Article 15(4) (or by the Prosecutor under Article 53(1)) that an ‘investigation’ would commence and at that point Part 9 would become available to the Prosecutor in accordance with Article 54(2) with the resulting obligations for the States Parties under Articles 86 and 93. Consequently, the measures taken before an authorisation (during what Article 15(6) refers to as a ‘preliminary examination’) are not (and should not be seen as) measures within a formal ‘investigation’. The Prosecutor’s task at this stage should rather be seen as a basic fact-finding mission necessary to establish only a “reasonable basis” with respect to the criteria outlined above; this ought to be reflected both in the measures to be taken and in the standards set by the Pre-Trial Chamber for finding a “reasonable basis” and authorising an investigation.

3.1.2. Broad interpretation

[24.] The broad interpretation would hold that Part 9 of the Statute does in fact apply to the preliminary examination under Article 15, putting a wider array of powers at the Prosecutor's disposal as well as a greater obligation on States. This argument would rest on an interpretation of the obligation of States Parties to cooperate fully with the Court under Article 86, arguing that there should be no distinction between pre-authorisation examination and post-authorisation investigation for purposes of the application of Part 9. Alternatively, it would argue teleologically for a general obligation for States to cooperate based on Article 86. Indeed, the States Parties are expected to be committed members of the ASP, performing in good faith their obligations to uphold the Statute. With this interpretation it would be argued that the Prosecutor could rely during the pre-authorisation stage upon co-operation under Part 9, although the restrictions set forth in Article 15(2) would still apply.

3.1.3. Preferred interpretation

[25.] The narrow interpretation is easier to reconcile with Article 15(2) than the broad interpretation, not least because it corresponds to the desire of States, during the negotiations, to limit the investigative powers of the Prosecutor prior to obtaining judicial authorisation in the case of *proprio motu* investigations. At the same time, the arguments supporting the broad interpretation are open to the counter-arguments that Article 86 specifically refers to co-operation in the 'investigation and prosecution of crimes', and that Article 15(3) (when read in French ['ouvrir'], Spanish ['abrir'] and Russian ['vozbudit;'], as well as English) implies that investigations are not opened until Pre-Trial Chamber authorisation has been obtained. The 'linear approach' (see below) – whereby the 'reasonable basis' finding that triggers notice to States under Article 18 would, in the case of *proprio motu* proceedings, be the finding of the Pre-Trial Chamber under Article 15(4) – is fully consistent with this view.

[26.] At the same time, the practical consequences of adopting the narrow view of the applicability of Part 9 should be addressed. Specifically, it should be asked whether the narrow interpretation may adversely affect the Prosecutor's ability to ensure States' co-operation in obtaining information essential for the determination of whether to seek authorisation. Under Article 15(2) the Prosecutor can certainly "seek" information from

States, including information that needs to be gathered through use of the measures outlined in Article 93. Many State Parties can be expected to assist the Court with such information regardless of the application of Part 9, though some may have technical difficulties in obtaining the necessary court orders to gather evidence before an investigation has commenced. With other States (for example a territorial state where there has been no regime change) it is likely that obtaining co-operation will be a problem whether or not the Prosecutor is relying on Part 9.

[27.] While the broad interpretation is therefore of marginal utility where it is needed most (*id est* in the case of the reluctant State), the narrow interpretation has an important procedural advantage for the Prosecutor. Because the narrow interpretation construes the Prosecutor's preliminary examination as pre-investigative, it also enables the Prosecutor to proceed without notice to States required by Article 18 and the subsequent procedural blocks that would normally arise. The broad approach, on the other hand, would necessarily involve notice to States that might be inclined to use every procedural means at their disposal to hamper the Prosecutor's work. Thus, and in particular where the key governments involved are likely to resist the OTP's work, the narrow approach could have real advantages for the expeditious commencement of the Prosecutor's work.

[28.] The absence of Part 9 co-operation powers requires a facilitative interpretation, and maximum use, of the fact-finding measures contemplated for the preliminary phase by Article 15(2) (see below). Broad means of gathering the necessary information (through open source information, reports of NGOs and IGOs, interviews of refugees conducted by organisations or cooperative States) would have to be utilised, while at the same time arguing to the Pre Trial Chamber that authorisation under Article 15(4) should be available on a low threshold given the applicable 'reasonable basis' test and the references throughout Article 15 to a requirement for "information". In this argument the Prosecutor may choose in fact to refer to the non application of Part 9 to bolster the position that clearly the intention must have been to require a different level and form of information than the kind of evidence required at the formal stages of the investigation and prosecution.

[29.] Overall, the narrow interpretation, joined with a facilitative interpretation of the Article 15(2) powers, allows the Prosecutor to put off the potentially hampering effects of Articles 18 and 19 for as long as pos-

sible, without sacrificing the co-operation of those states and entities that are in any event disposed to cooperate.

3.2. Receiving Information and Testimonies Related to Alleged Violations and Admissibility

[30.] The Prosecutor may seek assistance from UNHCHR, UNHCR, the ICRC, NGOs and others, present in the field, for preliminary witness identification/screening functions or other types of information that may be relevant to the assessment at this stage. ICC field offices, set up with consent with the relevant State, may also be indispensable for co-operation with these organisations in the field. Such identification activities should be as broad as possible to allow an early and vigorous start to the investigation, while maintaining that these activities are necessary ancillary functions of the preliminary examination, and are not part of the investigation as such. Agencies additional to those which deal with refugees and internally displaced persons (to include, for instance, bodies involved in financial tracking) may also yield useful results, whether at this stage or subsequently.

[31.] Article 15(2) requires that written or oral ‘testimony’ should be received by the Prosecutor at the seat of the Court. Given that the Prosecutor may seek information from States and other entities listed under Article 15(2) and the fact that the limitation applies only to ‘testimony’ received by the Prosecutor, there would appear to be nothing barring the Prosecutor from asking States or organizations to obtain information from potential witnesses as part of ‘seeking information’, including through obtaining voluntary written statements. Arguably, the Prosecutor may also be able to directly obtain information from witnesses as ‘other reliable sources’, with the State’s consent provided these do not amount to that ‘testimony’ which must be taken ‘at the seat of the Court’.

[32.] As discussed in the previous section, different views can be taken as to whether the Prosecutor’s gathering of information at the pre-authorisation stage constitutes an ‘investigation’ or not and, thus, whether co-operation under Part 9 is available. Irrespective of the conclusion, however, it is clear that a difference is foreseen (and expected) in the activities of the Prosecutor pre- and post-authorisation. Hence, it seems prudent at this stage to exercise caution in terms of field offices and other investigative activities (such as interviewing witnesses) within the territory

of States even with State consent, in order to avoid the impression that an investigation has begun without proper authorisation.

[33.] Moreover, while obtaining information at this stage, it should be borne in mind that this information will need to be adduced at the Article 15 hearing in the Pre-Trial Chamber. It would thus be useful if the information received was in a form that would be admissible at any confirmation hearing (Article 61) and trial if the Prosecutor later decides to use it as evidence (see also Rule 47). In particular, when the Prosecutor considers that there is a serious risk that it might not be possible for the testimony to be taken subsequently, the Prosecutor may request the Pre-Trial Chamber to appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of the written testimony under Article 15(2). However, given the differing standard and purpose of the Article 15 hearing and the limited ways in which information can be gathered at this stage, it may not be possible to obtain it in an admissible form for subsequent proceedings. In any event and particularly if the evidence may be used at later stages, matters of confidentiality and witness protection should also be addressed as necessary.

[34.] One pressing issue at the preliminary examination stage will be the protection and preservation of information pending authorisation for the commencement of an investigation. In this regard, the Rules of Procedure and Evidence mandate that the Prosecutor shall protect the confidentiality of the received information and testimony or take “any other necessary measures” (Rule 46). In this regard, the supporting material (Article 15(3)) should be submitted to the Pre-Trial Chamber as a confidential attachment to the request for authorisation.

4. Fact-finding, investigation, and admissibility procedures under Article 18 and 19

4.1. General provisions

[35.] The principle of complementarity is, needless to say, a cornerstone of the Statute and the Prosecutor may need to investigate a State’s investigative and prosecutorial conduct in order to determine whether the situation should remain under the jurisdiction of that State or whether jurisdiction should instead be assumed by the ICC. This may be called for at different stages of the proceedings and the Prosecutor will need to obtain relevant information for the determination of the issue. It may require set-

ting up a “complementarity monitoring team”, which would include staff with relevant skills, for monitoring national courts’ proceedings where this is feasible considering possibly lengthy domestic proceedings and other circumstances. The Prosecutor may also seek assistance from NGOs’ court monitors with necessary qualifications and training.

[36.] The Prosecutor’s relationship with the State exercising jurisdiction under complementarity will be critical to facilitating ultimate resolution to the issue, whether the situation remains within the purview of the State alone or whether the Prosecutor seeks approval from the Pre-Trial Chamber to commence his own investigation.

[37.] The Prosecutor may need to ask detailed questions to individuals in a national system and thus the degree to which there is a cooperative arrangement established may determine how successful the Prosecutor is in discharging his responsibilities. The standards set forth in Article 17 are unambiguously legal standards. Nevertheless, there may need to be political discussions and arrangements undertaken in order to facilitate decisions based on those legal standards.

[38.] Although this requires a determination *in casu*, (rendering relatively detailed information necessary), but the Prosecutor will also need more general background information and States may also wish to submit information of a more general nature (Rule 51).

4.1.1. Article 15

[39.] Both the Prosecutor and the Pre-Trial Chamber must, to the extent possible, assess issues of admissibility (and jurisdiction) in relation to an authorisation under Article 15. It is clear from the Statute, however, that this assessment is of a preliminary nature and does not prejudice any subsequent determinations (Article 15(4)). There is no opposing at this stage and the burden to seek information relevant to such an assessment rests squarely with the Prosecutor.

[40.] Even if the negotiations clearly showed a general intention not to allow States to challenge the admissibility of a case at this stage, a dialogue with the State in question (if possible) will frequently be advantageous.

4.1.2. Article 18

[41.] Issues of admissibility will have to be considered for the purpose of the proceedings under Article 18 and here the determination will be even more decisive. While the State seeking deferral will have to provide information and the Prosecutor may request additional information from that State (Rule 53), the Prosecutor may wish to also seek information from other sources. This will have to be done under a serious time constraint.

[42.] It is not clear from Article 18(2) whether the notification to States under this Article shall take place before or after authorisation of the Pre-Trial Chamber – *id est* when does the Prosecutor ‘initiate an investigation’ under Articles 13(c) and 15? One may also ask how an authorisation of the investigation under Article 18(2) relates to the authorisation under Article 15(4). However, the negotiations (of the Rules of Procedure and Evidence, in particular) show that delegations favoured a ‘linear approach’ to Articles 15, 18 and 19 and, thus, that the proceedings under Article 18 shall take place only upon authorisation according to Article 15(4). Further, a proposal to integrate the proceedings was rejected. A linear approach would also place state referral cases (Article 13(a)) and *proprio motu*-cases (Articles 13(c) and 15) on an equal footing.

[43.] Also in case of a deferral, the Prosecutor will have to follow up the national development of the case in question and a State Party may be obliged to submit periodical information on its progress (Article 18(5)). In this case, however, it is hard to claim that the Prosecutor is conducting an ‘investigation’ of a crime and it is very doubtful that the Prosecutor has recourse to any measures of co-operation under Part 9. Hence, the State’s own information and information from external sources may be the only material available as a basis for a review of a deferral according to Article 18(3).

4.1.3. Article 19

[44.] With the linear approach outlined above, which is also supported by Article 18(7), challenges to the admissibility of a case (or the Prosecutor’s request for a ruling on this issue) according to Article 19 will always be done at a stage when Part 9 co-operation has become available to the Prosecutor. However, investigations are normally suspended pending the outcome of such challenges (Articles 19(7) and (8)), and Part 9 itself is of

doubtful use in the Prosecutor's assessment of admissibility (see above). Again, however, other arrangements may be necessary *vis-à-vis* non-States Parties.

4.2. Provisional investigative measures

[45.] In spite of a deferral to a State's investigation or a request for authorisation under Article 18 and the suspensive effects of a challenge to the jurisdiction of the Court or the admissibility of a case according to Article 19, the Prosecutor may seek authorisation for provisional (investigative) measures (Article 19(8)). The Prosecutor's request shall be considered *ex parte* and *in camera* on an expedited basis (Rules 57 and 61).

[46.] In case of a deferral, such measures must be "necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available" (Article 18(6)). An authorisation for provisional measures is also required 'pending a ruling by the Pre-Trial Chamber' (on authorisation for the investigation). The linear approach means that Part 9 co-operation is available for provisional measures in the interim. While slightly more uncertain, an 'investigation' should also be considered commenced for provisional measures explicitly authorised by the Chamber in spite of a deferral (insofar the authorised measures are concerned), and thus Part 9 co-operation would apply.

[47.] In case of a challenge, the available measures are more extensive and also include the taking of a statement or testimony from a witness, completion of the collection and examination of evidence already initiated, and preventing a suspect under an arrest warrant from absconding (in co-operation with the relevant States) (Article 19(8)). Since the 'investigation' should only be considered suspended to the extent that provisional measures are not authorised, Part 9 co-operation would be available to the Prosecutor regarding such authorised measures. Moreover, orders and warrants ordered by the Court prior to the challenge continue to be valid (Article 19(9)) and States Parties continue to be obliged to fulfil requests based on such orders and warrants in accordance with Part 9.

5. Investigation

[48.] Two stages in the OTP's activities are envisaged. At the initial stage, when violations on humanitarian law are still being committed, the situation on the ground may often not permit investigations on the territory of the State of the conflict. At this stage, investigation teams principally commence interviewing those witnesses who are available outside the zone of the conflict (mainly refugees), although local and international non-governmental organisations may frequently continue to monitor abuses and gather information, with local NGOs, in particular, often having local knowledge, language skills, and established relationships with victims' communities. Deployment of peacekeeping forces or abatement of the conflict may thereafter permit sufficient security of an investigation on the territory of the State of the conflict. At this stage, investigative units may, within the terms of the Statute, commence investigations on the territory of the alleged violations, including interview of witnesses, examination of crime scenes, exhumations, search and seizures, *et cetera*. The ability and willingness of these peacekeepers also to apprehend persons indicted by the Court is also likely in time to become a key issue (see below).

[49.] The OTP will have to ensure safety and security of its team members through liaison with appropriate persons in the field. In this regard, as the *ad hoc* Tribunals' experience shows, the OTP will rely on the assistance and co-operation of international bodies, such as peacekeeping forces, and local authorities, such as the police. When it deems necessary, a request for assistance may contain reference to Article 48 of the Statute and the Agreement on Privileges and Immunities as to the immunities of the OTP investigators. Ratification of this Agreement is proceeding slowly. There is a need to urge ratification or resort to alternative 'bilateral' agreements where ratification is not possible. In case of a security threat from State officials, it might be necessary to make a reference to the Convention on the Prevention and Punishment of Crime against Internationally protected Persons, including Diplomatic Agents (1973). This Convention entails a number of obligations for the contracting parties, which may be others than the ICC States parties. Whilst confidentiality will generally be of prime importance, consideration will also have to be given to the length of notice these bodies require in order to make their necessary preparations to assist the OTP.

5.1. The relationship between the Prosecutor and State authorities under the ICC Statute – The basic features

[50.] Apart from the failed State scenario, which is covered by Article 57(3)(d) and which will be dealt with separately, the duties of States Parties to assist the Prosecutor in the exercise of his or her investigative functions are essentially contained in Part 9. The interpretation of the concrete duties enshrined in this Part should be guided by the overarching obligation fully to cooperate contained in Article 86, which alludes to the recognised interpretation rule of *effet utile*. The latter rule may also be of use when it comes to concretise the openly-worded compromises which Part 9 contains wherever delegations were unable to reach agreement in detail.

[51.] Part 9 creates co-operation regime for the gathering of evidence and for the arrest and surrender of persons. Article 86 of the Statute obliges State Parties to cooperate fully with the Court in its investigations and prosecutions. State Parties are obliged to comply with requests for the types of assistance listed in Article 93(1), sub-paragraphs (a)-(k), and with any other type of requested assistance unless it is prohibited by the law of the State Party (Article 93(1)(l)). While State Parties will use procedures of national law in meeting the request, under Article 88, importantly, a State Party must have procedures under national law for all the listed types of assistance. The only qualification to the obligation is the modification requirement in Article 93(3) and the process for national security information set out in Article 72. In addition to the general obligation to comply with the request, Article 99(1) requires that the request be executed in the manner specified therein unless that is prohibited by law. This allows the Prosecutor to specify not only what is required in terms of evidence gathering but the way in which it will be carried out. This request process under Part 9 should be the starting point for evidence gathering for the Prosecutor unless the situations outlined below relating to Article 99(4) arise or where there are other exceptional circumstances.

[52.] Despite the obligations of Part 9, it can be anticipated that there will be problems with its application on a practical level, in particular in the early stages. In addition to possible problems with wilful non-compliance, the most pressing problem may arise from States not having adopted implementing and other relevant legislation, leaving the State without the requisite powers to respond to the Courts requests. In order to better anticipate problems in this regard it would be useful for the OTP to

seek copies of implementing and other relevant legislation from State Parties; information which would also help with the framing of requests.

[53.] The Prosecutor should be aware of the manner in which some States may wish to interpret Article 97 of the ICC Statute. The duty to consult embodied by this provision could be seen as a justification for submitting grounds for refusal other than those set out in the Statute. In this respect, one could think of the accusation that a certain exercise of powers by the Prosecutor is *ultra vires* the Statute. Taking account of the drafting history, especially the inclusion of certain grounds for refusal as a compromise in the Statute as well as the references to domestic law, the Prosecutor may stress the self-contained character of the co-operation regime in as much as possible. The Prosecutor should thus be cautious that use of Article 97 does not result in watering down the co-operation regime. On the other hand, it may be in the direct interest of the Prosecutor and in the spirit of Article 97 to accept proposed alternatives by the requested State, if hereby the requested assistance will be obtained.

[54.] As far as requests for co-operation under Part 9 are concerned, the Prosecutor may directly communicate with States Parties (Rule 176(2)). For this purpose the OTP will want to have in its database an up-to-date list of any channel of communication designated by a State Party under Article 87(1)(a), including on a practical level precise contact information and the same type of information with respect to the transmission of requests via the diplomatic channel (see *Some Organisational Matters* section above).

[55.] Of particular importance is the interpretation to be accorded to Article 99(1), which sets out the principles that will govern execution of requests for assistance under Part 9. While Article 99(1) provides that requests are to be executed in accordance with the national law of the requested State, it importantly also provides that the request should be carried out in the manner specified in the request unless there is an actual prohibition in law against doing so. The Prosecutor should take full advantage of this exhortation, setting out in each request the manner in which the request should be executed, including with the direct participation of his staff and, if appropriate, defence counsel. For example, the Prosecutor could set out in the request that he wishes investigators within his office to be notified about when the witness interviews will take place in order to be able to attend the interviews and to pose the questions directly to the witnesses. Under the provisions of Article 99(1), the request-

ed State cannot refuse to carry out the request in that manner unless they can demonstrate an actual positive prohibition of such questioning under domestic law. It would thereupon not be sufficient to point to a usual practice or even the legislated procedures that are used for domestic proceedings. The State would need to point to an actual prohibition at law.

5.1.1. Application of Article 93

[56.] The Prosecutor will want to use the provisions of Part 9 to maximise his ability to directly gather relevant evidence. While Part 9 creates a regime that is dependent upon the co-operation of State Parties, there is still considerable scope for direct participation by the OTP in the execution of requests for assistance particularly when one bears in mind analogous practices under inter-State co-operation regimes.

[57.] Although Article 93 may be intended for use for requests for traditional rogatory commissions, meaning the requested State performs investigative acts at the request of and on behalf of the trial forum, an alternative use is not excluded. Taking account of the cardinal rule of interpretation of treaties, *id est* the ordinary meaning of the text, Article 93(1)(l) can serve as the basis for a request by the Prosecutor for on-site investigations. The wording of this provision does not rule out the duty of provision of passive assistance. Article 93 is also arguably compatible with States Parties voluntaristically assuming more extensive obligations than those strictly mandated by Part 9, such as by granting the OTP staff full powers to carry out investigative functions within its territory *via* MOUs or other ancillary instruments (see below). Indeed, passive (forthcoming) assistance may also be provided outside of formalised mechanisms of co-operation, *id est* no formal request for legal assistance would be necessary and could be easier for some States to accept than an MOU. In general terms, it seems that the whole process of encouraging both States Parties and non-parties to act proactively without awaiting a formal request of the Prosecutor will become an important diplomatic initiative for the OTP.

[58.] Thus, and although in the Article 93 scenario, the requested State will retain the ultimate control over the execution of the *request*, the Prosecutor can influence significantly the procedure for the execution of requests and in particular the level of participation of the OTP. In particular, the Prosecutor can frame the request for assistance so as to seek maximum involvement of officials from the OTP in the execution process. As another example the request can specify that OTP officials wish to inter-

view directly-named witnesses or that they wish to be present during the execution of a search warrant. Once again, this would be limited only by a prohibition under domestic law to such participation by the OTP, in accordance with Article 99(1). Indeed, in inter-State co-operation practice, treaty provisions framed in the terms of Article 99(1) are frequently applied to allow the authorities of a requesting State Party to participate in the execution of requests in this manner. The Prosecutor should use this tool to the greatest extent possible and should be very explicit in its requests for assistance in order to permit itself the maximum latitude and so as to avoid the need to renew requests in light of new questions and to ensure the admissibility of the evidence in the subsequent proceedings.

[59.] To comply with a request under Article 93(1), the State concerned may use the procedures under its national law including, in particular, its implementing and other relevant legislation. Although the lack of such procedures does not constitute a ground for refusal (Article 88), it may create a practical *obstacle*. Problems of that kind should thus be anticipated by the Prosecutor to the greatest extent possible. To that end, the compilation of State implementing and other relevant legislation mentioned above will be of great assistance. It is also commended that the Prosecutor engages in a dialogue with State Parties to ensure that the procedures which the respective national legal frameworks require for full co-operation with the Prosecutor are in place. As a first step, and if necessary in coordination with parallel initiatives in this regard ongoing in the Registry, the OTP could seek to collate existing national implementing and other relevant legislation and identify co-operation-friendly “best practice” examples for as wide a reception as possible. Ultimately, the OTP should maintain a complete database of implementing and other relevant legislation.

[60.] The database referred to under the previous heading will also be useful in light of any information, including that regarding the information, a requested State may require under Article 96(2)(e). The latter has the potential to operate as an obstacle to speedy co-operation, or, even worse, as an incentive for *avoiding* obligation of co-operation under Article 93(1). Therefore, it appears of great importance that Article 96(2)(e) be interpreted in the same spirit as with Article 91(2)(c). Furthermore, in its dialogue with States Parties referred to in the previous heading, the OTP should stress the need for the most liberal interpretation of information requirements so that only the minimum information necessary to

obtain the relevant measures under domestic law will be required under Article 96(2(e)).

[61.] In addition to the specific types of assistance listed in Article 93, the Prosecutor will want to keep in mind Article 93(1)(l) *which* is a “catch all” provision allowing for requests for other types of assistance provided they are not prohibited under national law. The Prosecutor may wish to employ this clause in seeking unusual types of assistance such as DNA samples or interception of communications with the understanding however that States have more flexibility with regard to these unlisted types of assistance and the assistance may not be possible because of prohibitions under national law.

[62.] Under Article 93(3), a requested State Party may invoke an existing fundamental legal principle of general application in order to render a request conditional or to ensure that it is otherwise modified. Although the openly-worded term “existing fundamental legal principle of general application” will have to be applied in light of the relevant national jurisdiction, it is important to stress, that it must be given an autonomous meaning and that it will have to be authoritatively defined by the competent ICC judges in case of controversy. Weighty reasons based on the *travaux preparatoires* and the *effet utile*, however, point to a narrow construction, this provision was included solely to address situations where the execution of a request for assistance would violate fundamental principles of a legal system. The Prosecutor needs to bear in mind that because issues such as the extent of the protection against self-incrimination or family incrimination and the application of privileges were yet to be determined (they were subsequently dealt with in the rules), many States were concerned that they might receive a request requiring them to breach a protection or privilege of this nature. Given the protections now accorded under Rules 73, 74 and 75, it is unlikely that the Prosecutor will present a request that will raise the kind of issue contemplated under Article 93(3). It is critical that if the provision is invoked the Prosecutor requires the State to clearly demonstrate all the requirements of the provision; *id est* a) that there is a legal principle involved (as opposed to a policy or practice); b) that it is fundamental in the sense of constitutional or of an entrenched nature protecting important values; c) that it applies generally to domestic cases and all foreign requests and is not of unique application to the ICC; and d) that it is pre-existing and is not a new provision. In order to assess the merits of the invocation of Article 93(3) in each case,

OTP staff will have to familiarise themselves with the legal landscape of the requested State. Preferably, this can be achieved through the consultation processes between the ICC and the State as envisaged in the Statute, but there may also occur instances where the OTP would have to seek external assistance, for example in the form of independent legal opinions.

[63.] Under Article 93(4) a State may, in accordance with Article 72, deny a request for assistance on national security grounds. The Prosecutor will have the difficult task of setting the tone in highly sensitive national security disputes. It seems that the reference to the “relevance” to the national security issue in Article 93(4) shall be read in conjunction with Article 72 which refers to “prejudice” to the national security.

[64.] The smooth execution of a formal request may at times be facilitated by prior informal consultations. In any event, Article 97 requires consultations with States Parties when there is a problem which may impede or prevent the execution of a request for co-operation. The Prosecutor should be deeply engaged in using Article 97 on behalf of the Court to arrive at practical solutions to such problems. The solutions may often be innovative in nature which is acceptable to the extent that they will withstand the scrutiny of the competent Chambers. The Article 97 authority is likely to become a daily exercise of authority by the Prosecutor. The consultations should not, however, convey the impression of the Prosecutor’s readiness to have the duties under Part 9 be watered down in practice. Indeed, in this regard, the preambular paragraph of Article 97 itself could be recalled; namely, that the emergence of issues impeding or preventing the execution of a request shall result in prompt consultations with the Court *in order to resolve the matter*. “Resolution” in this context ought to be interpreted in the light of States Parties’ general obligation of co-operation under Article 86 so as to ensure that any purported resort to “national security” concerns does not *ipso facto* and automatically debar any meaningful co-operation with the Court.

[65.] As mentioned above, in some cases, and particularly where the authorities of the State where the investigative measure is to be executed are alleged to be involved in the crime in question, it will be undesirable, if not impossible, to leave the execution of the investigative measure under the control of the requested State. In this case the Prosecutor will wish to execute the investigative measure directly.

5.1.2. Application of Article 99(4)

[66.] Article 99(4) gives the Prosecutor the authority to execute a request directly without the submission of the request to the State Party through the procedure outlined in Article 93. However, this Article is limited in application to measures that can be carried out without the need for a court order or judicial authorisation and was intended in particular to allow the Prosecutor to interview witnesses directly and if necessary outside the presence of the authorities of the State. The Article also imposes some requirements for its application.

[67.] As noted earlier, the Prosecutor may well be able to obtain direct access to witnesses on a voluntary or compelled basis under Article 93 by specifying this in the request for assistance. If, however, the Prosecutor is concerned only with voluntary witnesses and he anticipates problems with direct access under a request submitted in the normal course, it would be advisable to rely on the Article 99(4) process to conduct the interview. Article 99(4) should also be used in all cases where the Prosecutor determines that the witnesses will be constrained in any way in terms of the information they will provide as a result of any authority of the State being present at the interview. This would include situations where witnesses are afraid of any state authority because of the trauma resulting from their experiences.

[68.] The approach to the application of Article 99(4) will depend on whether the request is to be executed in the territorial State and there has been a determination of admissibility, or within another State. In the case of the latter – the non-territorial state - the Prosecutor may wish to establish a standard procedure for notifying the State in question of his intention and initiating the necessary consultations. To ensure maximum use of Article 99(4), the Prosecutor should clearly distinguish this process from a normal request under Article 93 by submitting an entirely different type of document to the State in question. Instead of a request it would be appropriate for the Prosecutor to send perhaps a Notice under Article 99(4) of his intention to directly execute a request. While the Prosecutor is required to consult with the requested State, he should take steps to ensure that the process is not delayed because the State fails to respond to the Notice. It would be advisable for the Prosecutor to set a deadline for the consultations and indicate that in the absence of a response by that time

the Prosecutor will presume that the State has no concerns to raise and that the consultations are thus concluded.

[69.] In terms of the information provided in the notice, it may depend on the particular circumstances as to the level of information the Prosecutor will provide. For example, if there are any concerns that witnesses will be interfered with if identified, the Prosecutor may wish to make only general reference to the interview of relevant witnesses in the requested State. As the Article 99(4) process is a distinct one, the Prosecutor does not have to provide all of the information required in a request and therefore can use his discretion to decide on the appropriate detail in each case.

[70.] It is also important to note that while the Requested State can raise concerns and propose “conditions”, the consent of the State is not required. Therefore the Prosecutor may need to negotiate with the State as to any applicable conditions for the execution of the request but always keeping in mind that the State may not impose “unreasonable” conditions and in particular cannot impose conditions contrary to the express terms of Article 99(4), *id est* by requiring the presence of officials of the State.

[71.] Where the Prosecutor anticipates that he will need to visit a State on several occasions to conduct a series of interviews, it may be useful for him to consider an MOU with the State in order to eliminate the need for new consultations in each case. This MOU could either be specifically geared to this situation and thus based on Article 99(4) or may constitute a particular provision of a broader MOU of more general application. The MOU should simply provide that a faxed notice to the State of the date and place (if appropriate) of the interviews will suffice as the requisite consultations.

[72.] In the case of the territorial state, the Prosecutor may proceed with execution after “all possible consultations”. What this will require will vary from situation to situation depending, for example, on whether the structures of the state are operational or not. The Prosecutor will want to attempt to carry out consultations by sending a notice through any available channels and by contacting any officials that may be able to conduct consultations on the part of the State. However, again in order that the process is not delayed, the Prosecutor should be prepared to proceed after reasonable efforts have been made even if there has been no response from the State.

[73.] Indeed, the opportunity for direct execution of the investigative measures only exists when the case has been found to be admissible. Otherwise, the requirements of consultations and reasonable conditions will apply in respect of the territorial state. There may be situations where the Prosecutor would prefer to encourage a State to investigate or prosecute the case instead of becoming involved in the cumbersome process of proving admissibility of the case. In particular, consultations and acceptance of reasonable conditions seems to be preferable in cases where there are institutions in place and (at least an emerging) political will to handle such cases in an acceptable way.

[74.] The modalities of conduct an investigation on the territory where the crime is alleged to have been committed, where consultations have been very limited or non-existent, will require careful planning and execution by the Prosecutor. Normally it would be through consultations that matters such as advance notice of forthcoming missions to the State, notification of the State of proposed investigative activities, authority of the liaison officer, *et cetera*, would be resolved. The plans for execution must take into account the logistical and security problems posed by the absence of such consultations.

[75.] Whatever process is used under Article 99(4), Article 99(5) requires that the Prosecutor's initiatives under Article 99 must still conform to the strict requirements for the protection of national security information provided for under Article 72.

5.1.3. Application of Article 57(3)

[76.] In exceptional circumstances, such as the need for access to the evidence in the State of the conflict which is clearly unable to execute a request for co-operation, the Prosecutor may seek authorisation from the Pre-Trial Chamber to take specific investigative steps within the territory of the State Party (Article 57(3)(d)); Rule 115). In this regard, since the Pre-Trial Chamber's order may specify the procedure to be followed in carrying out such collection of evidence, it seems important that the request to the Chamber is drafted with this possibility in mind.

[77.] In collecting evidence on the territory of a State under Article 57(3)(d), the Prosecutor may seek co-operation from any peacekeeping forces or multilateral observer missions deployed in the State. To this end, the Prosecutor may enter into co-operation agreements with the UN or

relevant regional organisations, within the framework of the ICC-UN Relationship Agreement, and other organisations in order to ensure that the needs of the Prosecution are taken into account when peacekeeping forces are deployed. In particular, such co-operation may be needed in exhumation of mass graves. In contrast with Article 99(4), the provisions of Article 57(3)(d) enable the Prosecutor to undertake such measure as the exhumation of mass graves, which generally results in the “modification of a public site”. It is clear that under Article 57(3)(d) the Prosecutor may carry out directly any measures that are authorised by the PTC including compulsory measures that would normally require the authorisation of a court in the requested state. So for example the Prosecutor may under the authority of the PTC directly conduct a search or exhumation of a gravesite. The scope for peacekeeping forces to eventually carry out arrests on the OTP’s behalf is considered separately.

5.2. Specific investigative measures

5.2.1. Interviewing witnesses

[78.] If the interview is conducted under Article 93(1)(b), where it is possible or likely that the testimony will be used at trial, the request for assistance should provide very specifically for direct participation of the Prosecutor in the questioning of the witness and for the presence and similar direct participation by the defence. (Note Rule 68(a)). Furthermore, it should be requested that the testimony be taken under oath, if possible using the solemn undertaking set forth in Rule 66, and in consonance with the procedures set out in Rules 111. The Prosecutor may also request that the recording, if possible, follows the procedure in Rule 112 (audio- or video-recording) also when a witness is questioned, particularly in respect of witnesses contemplated in Rule 112(4). The Court may sometimes have to provide technical and other support to the national authorities in order to make certain requirements possible to adhere to in practice.

[79.] If the interview is conducted under Article 99(4), and the use of the testimony at trial is envisaged or foreseeable, the defence should be given the opportunity to be present and to examine the witness and again the recording requirements and policies in accordance with Rules 111-112 should be observed. A solemn undertaking should also be made in accordance with Rule 66 before testimony is taken by or with the participa-

tion of the judge of the Pre-Trial Chamber. Thorough planning is necessary (when possible) in order to conduct such interviews in a cost-effective and efficient manner. In some cases, preliminary contacts with the witness should take place before the interview is conducted and in some cases, utilisation of Article 56 should be contemplated and defence counsel appointed.

[80.] Since under Article 93(10) the Court may transmit statements to a State Party upon its request, the witness should be asked if he or she agrees to his or her statement being provided to a State. The witness' response should be reflected at the end of the statement.

[81.] Article 93(1)(b) envisages a taking of witness testimony under oath as a means of international legal assistance. If it is envisaged that the testimony will be taken by the national authorities rather than the OTP, this provision shall be included in the request. This means of taking evidence does not necessarily rule out participation of representatives of the OTP or the defence (or an ICC judge), if requested, when the testimony is taken.

5.2.2. Arrests and surrender

[82.] The Statute and the Rules uses the generic term 'the Court' for the making of a request for provisional arrest or arrest and surrender. Given that such a request (pre-conviction) would always be based on a warrant of arrest issued by a Chamber (Article 58(5)), the Prosecutor should be considered empowered to make the request to a State under his power to 'seek co-operation' of any State (Article 54(3)(c)). This is particularly important in order to keep an arrest warrant sealed, if necessary, and to be able to request provisional arrest at the appropriate moment. It will also be important because there may be questions that arise as to the information or documentation required under Article 91(2)(c) and the Prosecutor will be in the best position to dialogue with the State on that issue. The State's obligations to act upon the request are set out in Article 59 and Article 89(1).

[83.] The request and required accompanying material could be prepared in advance (including necessary translations) to ensure a speedy transmission when needed. In order to be able to observe the obligations in Rule 117(1) (notification to the arrested person), a request should ex-

explicitly require that the Prosecutor and the Registrar be informed of the arrest as soon as it is executed.

[84.] It is also important that the Prosecutor makes sure that arrest warrants are amended as the investigation proceeds (Article 58(6)) so that post-surrender issues relating to the principle of specialty (Article 101) can be avoided or minimised.

[85.] The Statute allows the Prosecutor to seek the issuance of a summons to appear as alternative to an arrest warrant (Article 58(7)). Such a summons can be issued with conditions restricting liberty (other than detention), but only if such are provided for in the State which is to enforce the summons and the Prosecutor is obliged to ascertain the relevant provisions of national law (Rule 119(5)). A database of such law focused on the most relevant jurisdictions and updated on the regular basis could be useful. Such a database could also be used for cases when conditional release with restrictions may take place.

[86.] The Prosecutor will doubtless be deeply engaged in resolving competing requests for the surrender of an individual under Article 90. The Prosecutor will need to determine, pursuant to Article 90(6)-(7), when to intervene to strengthen the Court's claim for surrender of an individual and when possibly to strengthen the implementation of complementarity if the facts or prudent policy considerations demonstrate that a competing request should take precedence, and then make that argument to the Trial Chamber.

[87.] Article 98(1) may require the Prosecutor to negotiate a waiver of diplomatic immunity of an individual from a third State, and those negotiations may prove exceptionally delicate and politically challenging. Article 98(2) may require the Prosecutor to negotiate with a "sending State" a consent for the surrender of an individual sought by the Court, and again those negotiations may prove extremely difficult and ultimately futile.

[88.] The practice of the ICTY has indicated that stumbling blocks more familiar to the law of extradition are frequently proffered by sending states as an obstacle to arrest and surrender. Despite the differing basis of arrest powers under the *ad hoc* Tribunals and the ICC, Article 102 usefully clarifies that "surrender" and "extradition" in the ICC context also are not analogues. This in turn enhances the capacity of the OTP to argue that the obligation to surrender indictees to the Court amounts to a *sui generis* obligation, subject only to the provisions of Part 9 (in particular Article

101, pertaining to the rule of specialty). This principle may become especially important before a Pre-Trial Chamber in the event the Court's personal jurisdiction over an accused is challenged on the basis of particular defects alleged to vitiate an accused's arrest or surrender to the Court (see attached annex).

[89.] Articles 91 and 92 set forth arrest procedures in coordination with requested States. However, situations may arise where the Prosecutor is compelled, due to non-co-operation by a requested State or the sensitivity of "tipping off" the requested State, to explore *ad hoc* measures to effectuate arrest. The type of co-operation the Prosecutor may need from various States to execute an arrest warrant under these circumstances could lead to innovative and extraordinary measures not contemplated by the Statute or the rules. Alternatively, arrests may simply be spontaneously effected by private individuals in absence of any request or authorisation. This has on occasion occurred before the *ad hoc* Tribunals, where third parties have, *via* irregular processes, simply detained indictees on their own initiative and thereafter delivered them to peacekeeping forces obliged to transfer indictees to the seat of the Tribunal, thus prompting an immediate jurisdictional challenge before a Pre-Trial Chamber.

[90.] The Prosecutor should seek, to the extent possible, cooperative arrangements and consultations under Articles 91 and 92 in order to avoid legal challenges to any arrest or transfer. However, both the complexity of the arrest and surrender mechanisms under Part 9 itself and the factual realities which may lead to an indictee coming into the Court's custody in the first place ensure that legal challenges to the lawfulness of arrests and surrenders are also foreseeable in the ICC context. The regime governing arrest and surrender within the *ad hoc* Tribunals is largely *sui generis*, and the extent and manner to which the *ad hoc* Tribunal jurisprudence in this area will influence the ICC case law is a matter for determination by a Pre-Trial Chamber. As the above-mentioned scenarios are unlikely to arise in the early months of the OTP's operation, an outline of the broader principles to be gleaned from the experiences of arrests and surrender before the *ad hoc* Tribunals is provided, for future reference, in a separate annex to this report.

[91.] Further, the practice of the *ad hoc* Tribunals demonstrates that the assumptions underpinning its original Statute and Rules – namely, that arrests and surrenders would be conducted by national authorities – proved in practice to be overly-optimistic. Indeed, significant numbers of

arrests did not occur within the ICTY context until the enactment of Rule 59*bis*, which permitted the transmission of arrest warrants to peacekeepers deployed in Bosnia-Herzegovina and a willingness on the part of these forces to interpret their force mandates in a manner consistent with detention of indictees on the Tribunal's behalf. While it is hoped that States Parties will take their obligations of arrest and surrender to the Court seriously, the possibility that territorial States in particular may be unwilling or unable to do so cannot be excluded. Accordingly, the Prosecutor may also in time wish to explore both the willingness and modalities of peacekeeping forces deployed on the territory of relevant States apprehending persons indicted by the Court. An analysis of the difficult questions raised by these issues and possible mechanisms to facilitate this are addressed both below and in the above-mentioned separate annex on arrests.

6. Enhanced co-operation

6.1. Security Council referral

[92.] A Security Council referral under Article 13(b) can greatly enhance the Prosecutor's authority to compel co-operation from States, including those not party to the Statute.

[93.] As Article 13(b) entails Security Council action under the extensive powers conferred upon it by Chapter VII of the UN Charter, the Security Council could also use its Article 13(b) referral power to specify particular measures to enable the Prosecutor to avoid strict requirements for state co-operation and to act with more authority to investigate a situation. Such measures would be within the scope of the Security Council's enforcement powers.

[94.] Accordingly, the Prosecutor should be prepared in the event of such a referral – and indeed preferably in advance of one – to engage in dialogue with the Security Council concerning the wording of referral resolutions which would ensure that State co-operation is adequately addressed and the Prosecutor's authority sufficiently enhanced through such Security Council referrals.

[95.] The Statute, in Article 87(5) and (7), limits the Court's referral to the Security Council of non-co-operation findings to situations "where the Security Council referred the matter to the Court". Of course, it is possible for the Court to exercise its jurisdiction pursuant to a State referral or

a *proprio motu* action of the Prosecutor in a situation in which the Council is engaged under its Chapter VII mandate (provided only that the Council has not requested the deferral of ICC proceedings in conformity with Article 16). In such a situation, the text of the Statute implies that findings of non-co-operation under Article 87(5) would be referred only to the Assembly of States Parties, and not to the Council, because the latter did not “refer the matter”. It seems nonetheless probable that the Court will be able to call upon the Council for its support more broadly, as Article 87(6) allows the Court to “ask any intergovernmental organisation to provide ... forms of co-operation and assistance which may be agreed upon with such an organisation and which are in accordance with its competence or mandate” and the Relationship Agreement between the ICC and the UN includes (in Article 17) a broad commitment to cooperate on the part of the UN. For its part, the Council has shown itself capable at least in limited circumstances of linking matters that ‘shock the conscience of humanity’ to its Chapter VII mandate. Thus, whatever the present political realities, the Court may in principle call upon the Council for assistance, particularly where UN-mandated personnel are in a position to gather evidence, protect victims and witnesses or arrest suspects.

6.2. Voluntary co-operation by the States Parties

[96.] Article 54(3)(d) empowers the Prosecutor to enter into such arrangements or agreements, not inconsistent with the Statute, as may be necessary to facilitate the co-operation of a State, intergovernmental organisation or person. The circumstances that may give rise to the need for an Article 54(3)(d) arrangement or agreement may pressure the Prosecutor to consider procedures that arguably would conflict with Part 9 or any specific agreement already negotiated under it. Any such Article 54(3)(d) arrangement or agreement should be drafted so as not to lead to such a result.

[97.] Within these broad constraints, however, instruments such as Memoranda of Understanding may usefully – and permissibly – supplement the regime established by Part 9.

[98.] Part 9 of the Statute sets out the scope of obligations regarding international co-operation and judicial assistance. In many respects, Part 9 reflects the lowest common denominator. Many States Parties would have been prepared to go beyond the duties contained in Part 9. It is not unlikely, that those States will be willing to go beyond what is required under

Part 9. In fact, some implementing legislation does offer voluntary co-operation to the Prosecutor. Even States Parties which have been rather reluctant during the negotiations may be prepared to cooperate in an enhanced manner for the purpose of a concrete investigation. The requested State may also be prepared to voluntarily grant enhanced co-operation for one or more categories of investigative measures, be it for the purpose of a concrete investigation or generally. For example, a State may be willing to allow the Prosecutor the autonomous taking of voluntary witness testimony without the restrictions contained in Article 99(4). Where such an attitude is not already fixed by the implementing legislation, the Prosecutor may wish to rely on his or her competence under Article 54(3)(d) and enter into an agreement with the State concerned or exchange letters.

[99.] Thus, Part 9 should be viewed as setting out the minimum obligations of States parties in this regard, but which does not preclude the capacity of State Parties to *go beyond* what is required or supplement and further enhance the level of co-operation demanded by the Statute. At the same time the Prosecutor should also keep in mind that the minimal powers of Part 9 may provide a sufficient basis in many cases to obtain the relevant evidence in the desired form, such that an additional agreement will not be necessary. Because of limited resources it would be prudent to adopt a focused strategy for the negotiation of such agreements, concentrating on those countries where it would be of the most practical benefit.

[100.] In some constitutional settings at least, informal arrangements such as Memoranda of Understanding or Exchanges of Letters, not being treaties, may accomplish this result more expeditiously and afford greater flexibility; in particular, by allowing for the rapid provision of assistance on a notification basis to a central authority or even direct communication with particular authorities (*id est* outside of diplomatic channels). There also appears to be no impediment to employing them with regard to States who may in principle be cooperative with the Court but for whom, for whatever reason, ratification of the Statute may still be some way off. Interim forms of co-operation may nevertheless be possible *via* these less formal mechanisms.

[101.] The feasibility of obtaining such *ad hoc* consent of a concerned State for the purpose of a specific investigative measure can be tested out by informal consultations.

[102.] The Prosecutor should accordingly consider preparation of one or more model 54(3)(d) agreements that can be negotiated expeditiously

when circumstances require, and which can be adapted to the circumstances of the investigation. The Prosecutor should not be constrained by form language in any such model agreement, but be pragmatic in negotiating what is actually required in the investigation at hand. Nonetheless, great care should be taken in not developing model agreements that on their face challenge Part 9 agreements. A template Memorandum of Understanding is annexed to this report, which may provide a basis for further work in this area.

[103.] An agreement under Article 54(3)(d) should not include provisions that replicate duties which already exist under Part 9 as this would weaken the obligatory nature of the statutory minimum standard. It might not be necessary to adopt an agreement under Article 54(3)(d) wherever that seems possible. Given the limited resources it could rather be commendable to target specific States depending on the foreseeable degree of utility. Should some general obstacles to an efficient investigation become evident in the course of future practice, the Prosecutor may wish to remedy this situation by standard agreements with as many States Parties as possible.

[104.] The Prosecutor may also enter into agreements on the protection of national security information (Article 54(3)(e)). Article 72 will require the Prosecutor to engage with any requested State that is concerned with the provision of information that, in its opinion, would prejudice its national security interests if released to the Court. Article 72(5) points to the cooperative means and the possible conditional agreement that may be required to obtain such information. The Prosecutor may find, particularly with States that can offer useful information on a regular basis, that a permanent agreement under Article 72(5) setting forth the procedures for the provision of such information in all (or at least most) cases of cooperation on national security information would be most useful and efficient for investigative as well as prosecutorial purposes. However, and as has been demonstrated by the interpretation adopted of cooperative legislation within the practice of the *ad hoc* Tribunals, there may be a risk that such agreements may be used to instead circumvent State's obligations under Part 9. In any event, when entering into such agreements, provisions of Articles 93(3) (grounds for refusal) and 72 will be kept in mind. An agreement with a States Party regarding national security information may also address the issue of disclosure of information or documents that

has been transferred to and is held by another State Party in accordance with Article 73.

6.3. Voluntary co-operation by States not party to the ICC Statute and with intergovernmental organisations

[105.] As mentioned above, such co-operation may occur on both an informal or formal and on an *ad hoc* or on a permanent basis. The ICC's power to enter into such contacts is enshrined in Article 87(5), 87(6) and the Prosecutor's respective competence are contained in Article 54(3)(c) and (d) extends to States not party to the ICC Statute and to international organisations.

[106.] In particular, agreements with a State not party to the ICC Statute may include provisions related to access to or collection of evidence on the territory of that State. The agreement may, in particular, provide for the some or all of the forms of assistance set out in Article 93(1) as may be necessary or useful in the particular circumstances.

[107.] The Prosecutor may apply such means of co-operation as *Memorandum of Understanding* with international organisations such as UNHCR, UN Headquarter, and NATO. The existing (confidential) MOU between NATO and the ICTY, which sets forth procedures to be followed in the case of apprehension of indictees by NATO-led peacekeeping forces, may provide a point of departure for a future attempt at drafting the latter, although this example also provides an illustration of a number of pitfalls to be avoided with regard to such agreements (see attached annex).

[108.] The *ad hoc* Tribunals' experience shows that there might be attempts by some intergovernmental organisations to restrict OTP access to their current or former staff as potential witnesses directly without the organisation's mediation. Indeed, such a restriction can be justified if the staff enjoy immunity in respect of proceedings at the ICC. Some intergovernmental organisations might insist on extension of the application of Article 54(3)(e) (confidentiality) to *any* material provided by the organisation to the Prosecutor. As Tribunals' experience proves, such a blanket approach may conflict with the Prosecutor's disclosure obligation, particularly in regard to exculpatory material. At the same time the OTP shall be vigilant of and react adequately to any breach of the confidentiality as to materials received under Article 54(3)(e) since such incidents may sig-

nificantly damage the ICC credibility not only with the provider of the material, but with other providers.

[109.] These and other related matters will have to be addressed in the OTP internal guidelines on co-operation with intergovernmental organisations.

7. Issues for future consideration

[110.] This memorandum has by no means been able to cover all the issues related to fact-finding and investigation that will need to be the subject of policy-formulation and practical preparation by the Office of the Prosecutor in its early months. We therefore take this opportunity to identify what have come to our attention as possible key issues for early work in this area:

- Respective roles of the Registry, Chambers and Prosecutor’s role pursuant to Part 9 of the ICC Statute;
- Composition of the international co-operation unit within OTP;
- Preparation of models agreements, including those under Article 54(3)(d) and agreements with the UN related to the Prosecution’s co-operation with deployed peacekeeping forces;
- Requests by a State to the Court;
- Guidelines on co-operation with intergovernmental organisations;
- Approaches to issues of immunity and confidentiality;
- Interaction with the Assembly of States Parties and determination of respective roles with respect to provision of technical assistance on implementing legislation, non-co-operation, and other issues;
- Arrest strategies that respond to non-co-operation from requested States.

The Principle of Complementarity in Practice

Morten Bergsmo and SONG Tianying*

The co-ordinator of the preparatory team for the Office of the Prosecutor of the International Criminal Court ('ICC')¹ published an article in late 1998 entitled "The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11–19)" in which he opined that "one striking feature of the ICC Statute is the strength of the complementarity principle. It is difficult to understand how states can have *bona fide* fear of the jurisdictional reach of the Court as long as it must defer to states with jurisdiction which are willing and able to investigate and prosecute".² He proposed that the numerous questions which the discussed provisions raise "will be made the subject of considered discussion and careful analysis over the months and years ahead".³ When he initiated an expert group on complementarity early in 2003, following communication with the Prosecutor-designate Mr. Luis Moreno Ocampo and approval of the Director of Common Services in April 2003,⁴ it was precisely to generate "considered discussion and careful analysis" on the implications of the strong complementarity principle on the operations of the ICC Office of the Prosecutor, by preparing a "reflection paper on the potential legal, policy and management challenges which are likely to confront the [Office of the

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¹ The co-editor of this volume, Morten Bergsmo, served in this capacity, as explained in the Foreword and Chapter 1 above.

² Morten Bergsmo, "The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11–19)", in *European Journal of Crime, Criminal Law and Criminal Justice*, 1998, vol. 6, no. 4, p. 362. The term 'jurisdictional régime' of the ICC became commonplace from 1999 onwards.

³ *Ibid.*

⁴ Most of his invitation letters to the experts went out on 21 April 2003, a few in May 2003.

Prosecutor] as a consequence of the complementarity regime of the Statute”.⁵

The mandate of the group was spelled out in some detail in the invitation letter:

The experts are kindly invited to prepare a reflection paper on potential legal, policy and management challenges which are likely to confront the ICC Office of the Prosecutor as a consequence of the complementarity regime of the Statute. The experts are free to choose the questions which they would like to address. This may include questions such as: (a) whether the normal principles of treaty interpretation apply to the inability/unwillingness standard in article 17(1); (b) whether, and if so, how, the complementarity regime applies to cases that are pursued as a consequence of referrals by the Security Council; (c) whether there are particular *evidentiary* considerations relevant to the application of article 17(1); (d) the fact-finding and -analysis implications of the Prosecution’s burden to prove inability or unwillingness to genuinely investigating and prosecuting; (e) management questions relevant to the application of article 17(1), including (i) how to identify and secure the services of the most qualified personnel to deal with the *systemic* facts which underpin the complementarity standard, (ii) how to develop specialised investigative and analytical methods and approaches which may be required to deal with the relevant systemic facts, and (iii) which skill-sets are best suited to deal with factual questions relevant to article 17(1) (including how they can be developed through training); (f) the identification of available measures which the chief prosecutor can use in the dialogue with states and their criminal justice systems under the complementarity regime, including (i) the nature, level and regularity of meetings, (ii) mutual exchange of information, (iii) technical advice provided by the Office of the Prosecutor, (iv) using training to assist states, (v) competence-building through secondment of experts to the Office of the Prosecutor, (vi) role of non-governmental organisations, (vii) use of the media, and (viii) the possible role of third-party states in the dialogue with territorial states; (g) questions relevant to the possible

⁵ See the introduction of the report in Annex 1 to this chapter.

existence of a truth and reconciliation process in the territorial state; (h) the role of non-territorial states which may have jurisdiction; and (i) the situation where states waive complementarity. The experts may wish to address only some of these issues – or others not mentioned here – in their report.⁶

This was the last of the expert consultations to be conceived and implemented by the preparatory team, working from April through October 2003, with meetings at the interim seat of the Court on 28 May and 31 October 2003. When the idea for the expert group was taken forward, the Prosecutor-designate had informed the co-ordinator of the preparatory team that if he were to be confirmed as Prosecutor, he would make Judge Silvia Fernández de Gurmendi⁷ – then a member of the foreign service of Argentina who led his campaign to be elected – his Chef de Cabinet. The co-ordinator therefore selected as members of the group four persons with whom Judge Fernández de Gurmendi had worked particularly closely during the ICC negotiations, to ensure that its work would be properly explained to the most senior diplomat in the Office of the Prosecutor: the late Judge Håkan Friman (Sweden), Ambassador John T. Holmes (Canada), Professor Darryl Robinson (Canada) and Professor Elizabeth S. Wilmshurst (United Kingdom). Other members of the group included (with their affiliation at the time in parenthesis) Mr. Xabier Agirre (ICTY), late Judge Antonio Cassese, Ambassador Rolf Einar Fife (member of the Bureau of the ICC Assembly of States Parties), late Mr. Christopher K. Hall (Amnesty International), Professor Jann Kleffner (University of Amsterdam), Professor Hector Olásolo (University of Utrecht), Ms. Norul H. Rashid (ICTY) and Professor Andreas Zimmermann (Kiel University). The experts participated in the expert group in their individual capacity.

Most members of the group were intimately involved with the Court and its establishment. Ambassador Fife, late Judge Friman, late Mr. Hall, Ambassador Holmes, and Professors Olásolo, Robinson, Wilmshurst and Zimmermann had all participated in the negotiations on complementarity. Professor Kleffner proceeded to write his doctoral disserta-

⁶ From the invitation letter to late Judge Håkan Friman dated 19 May 2003.

⁷ At the time of publication of this volume, President of the International Criminal Court.

tion on complementarity.⁸ Professors Robinson and Wilmshurst had already joined the Jurisdiction, Complementarity and Cooperation Division of the ICC Office of the Prosecutor in 2003.⁹ Later Mr. Agirre joined the Investigation Division and Professor Olásolo joined Chambers of the Court, both as staff members, and late Judge Friman served as a Consultant to the Court on different occasions. Ambassador Fife was a leading member of the Bureau of the ICC Assembly of States Parties, and Ambassador Holmes and Professor Zimmermann were advising the Canadian and German governments respectively on international criminal justice policy at the time.

The expert group worked mostly through e-mail communication. It received written input from several persons, including from Mr. Agirre (with Mr. Eric Manton), late Judge Friman, late Mr. Hall, Ambassador Holmes and Professor Robinson, Professor Olásolo (with Mr. Gaston Gramajo and Ms. Julieta Solano), and Professor Zimmermann. Professor Robinson co-ordinated the internal discussions and drafting of the group. The first Prosecutor was sworn in on 16 June 2003, his Chef de Cabinet having already assumed her work at the Court the preceding month. So Professor Robinson liaised not only with the co-ordinator of the preparatory team, but he also communicated with the Chef de Cabinet about the report, as did Professor Wilmshurst.

The tangible work product of the expert group – the report on “The Principle of Complementarity in Practice” – was submitted late November 2003. It has 77 paragraphs (50 pages), divided into three sections: on partnership and dialogue with states; the vigilance function of the Office of the Prosecutor in assessing unwillingness and inability of states to carry out national proceedings; and special issues such as uncontested admissibility, consensual sharing of labour between the Office of the Prosecutor

⁸ Jan K. Kleffner, “Complementarity in the Rome Statute and National Criminal Jurisdictions”, Ph.D. Thesis, University of Amsterdam, awarded 12 January 2007.

⁹ The four first persons hired by the Chef de Cabinet were Mr. Andras Vamos-Goldman (who represented the Canadian Department of Foreign Affairs and International Trade during the ICC negotiations – he was hired as a consultant and worked from New York), Mr. Gavin Hood (then desk officer for international criminal justice issues in the UK Foreign and Commonwealth Office), Professor Wilmshurst (who had been Deputy Legal Adviser of the UK Foreign and Commonwealth Office until she resigned on 20 March 2003 over the Iraq war, and had played a very influential role during the ICC negotiations), and Professor Robinson (then desk officer for international criminal justice issues in the Canadian Department of Foreign Affairs and International Trade).

and states, Security Council referrals, amnesties and approaches other than prosecution, and roles of non-territorial states. The report also includes eight annexes on the relevant legal rules and guidelines.

As regards the implementation of the complementarity principle, the report outlines two aspects of the ICC's relationship with states: partnership and vigilance. Partnership is to encourage and facilitate national prosecution, which includes general and specific communications, promoting the prevention and punishment of crimes through other international organisations, and providing direct assistance and advice.¹⁰ The partnership aspect aims to maximise national capacity to prosecute international crimes and consequently the impact of the existence of the Court. Its policy dimension recognises the potential of national proceedings and limits of the Court's capacity. The experts believe the "establishment of an international order wherein national institutions respond effectively to international crimes", thus "obviating the need for trials before the ICC, would indeed be a major success for the Court and the international community as a whole".¹¹ This "fundamental element of the philosophy and aspiration underlying the complementarity principle"¹² is still pertinent in the Court's self-positioning today.

Vigilance means that the Prosecutor must ensure that relevant national proceedings meet the requirements under the ICC Statute and be prepared to initiate proceedings before the Court where this is not the case. The report considers three scenarios relating to admissibility: 1) where no state has initiated an investigation, the case is straightforward admissible; 2) where the case is being or has been investigated or prosecuted by a state, it is inadmissible; and 3) if such national proceedings are not "genuine", the case becomes admissible.¹³ It continues to consider the admissibility issue in different phases. For example, admissibility can be a factor when the Prosecutor determines whether to proceed with an investigation. After the initiation of investigation, a greater degree of specificity regarding the object of the investigation is required for the admissibility assessment.¹⁴

¹⁰ Report in Annex 1 to this chapter, section 2.

¹¹ *Ibid.*, para. 2.

¹² *Ibid.*

¹³ *Ibid.*, paras. 17–20.

¹⁴ *Ibid.*, paras. 24–26.

The report examines the extent of states' obligation to co-operate in the Prosecutor's fact-finding relating to the admissibility assessment.¹⁵ It also reflects on the methodology in fact-finding and analysis. It sees the admissibility assessment as a multidisciplinary undertaking, where a "graduated approach" can be adopted. It considers the general context of a state's judiciary, types of evidence and resources to be used, and lists possible interlocutors from national agencies and international organisations.¹⁶ With regard to criteria for assessing national proceedings, Annex 4 to the report itself lists indicia of unwillingness and inability.

The report recognises "a potential tension between the two aspects of the complementarity function, that is, the dialogue role and the monitoring role".¹⁷ If the Office of the Prosecutor gets too closely involved in providing advice and assistance to a national proceeding, it may have difficulty to credibly criticise the proceeding which subsequently proves to be non-genuine.¹⁸ It is suggested to have clear guidelines to "avoid perceptions of negotiation, which would be inconsistent with a future investigatory role".¹⁹

In addition to the ICC–state relationship, the report touches on Security Council referral and alternatives to prosecution such as amnesty. The experts agreed that the complementarity regime applies even in the event of a Security Council referral – the Court can still decide independently on issues of jurisdiction and admissibility. It is difficult to recognise approaches other than criminal proceedings given the Court's mandate to end impunity, but the expert group suggests to consider critical factors on a case-by-case basis rather than to dismiss alternative approaches categorically in the admissibility assessment.

Overall, this expert report is – as its title "The Principle of Complementarity in Practice" suggests – well-tuned to pragmatism, while recognising the requirements of consistency and impartiality. It sees the delicacy of rotating between partner and monitor roles, and envisions a constructive, rigorous and principled relationship with states. It develops

¹⁵ *Ibid.*, paras. 27–32.

¹⁶ *Ibid.*, sub-section 3.3.

¹⁷ *Ibid.*, para. 14.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 15.

what had been coined a few months earlier in the preparatory team as ‘positive complementarity’.

Annex 1: Expert Report on The Principle of Complementarity in Practice*

Participants and terms of references

In April 2003, the then Director of Common Services of the International Criminal Court (ICC), Mr. Bruno Cathala, approved the suggestion from the start-up team of the Court's Office of the Prosecutor (OTP) that there be an expert consultation process on complementarity in practice for the benefit of the future Chief Prosecutor and the staff of his Office. Members of the group of experts (the Group) were invited in writing to participate in an "informal expert consultation on complementarity in practice" and to prepare a reflection paper on the potential legal, policy and management challenges which are likely to confront the OTP as a consequence of the complementarity regime of the Statute.

The Group met on 28 May 2003 and again on 31 October 2003 at the interim seat of the Court. The Group worked primarily and extensively by electronic mail, to discuss issues and refine drafts of the report over a six-month period of consultation. The Group selected one of its members, Mr. Darryl Robinson, as the co-ordinator for its discussions and drafting. The independent work of the Group was aided from the side of the Court by Mr. Morten Bergsmo, Senior Legal Adviser in the ICC-OTP.

Experts participated in their individual capacity, and therefore the views reflected in this document do not necessarily reflect the views of their respective organisations. In no way do these views constitute a statement of any institution. Moreover, the Group operated in a collegial manner to try to develop a collective report, and hence the views reflected in this document do not necessarily reflect the views of each individual member.

In alphabetical order, the participants were:

Xabier Agirre
Antonio Cassese
Rolf Einar Fife

* The language of Annex 1 has been kept as it is in the original, including where it does not comply with the TOAEP Authors' and Formatting Manuals, except for minor typographical errors that have been corrected. The formatting of the text is faithful to the original to the extent possible. The references in Annex 5 and Annex 8 have been checked and corrected where required.

Håkan Friman
Christopher K. Hall
John T. Holmes
Jann Kleffner
Hector Olasolo
Norul H. Rashid
Darryl Robinson
Elizabeth Wilmshurst
Andreas Zimmermann

The Group also benefited from an examination of various papers, to which the contributions of Eric Manton, Gaston Gramajo Chapman and Julieta Solano McCausland are gratefully acknowledged. The Group welcomed the participation of Marieke Wierda and Paul Seils of the International Center for Transitional Justice at the October 31 meeting.

1. Introduction

As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.

Statement by Mr. Luis Moreno-Ocampo, June 16, 2003
Ceremony for the Solemn Undertaking of the Chief Prosecutor

[1.] *Complementarity*: The Principle of complementarity governs the exercise of the Court's jurisdiction. This distinguishes the Court in several significant ways from other known institutions, including the international criminal tribunals for the former Yugoslavia and Rwanda (the ICTY and the ICTR). The Statute recognizes that States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings. The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings. Moreover, there are limits on the number of prosecutions the ICC, a single institution, can feasibly conduct.

[2.] *Objectives*: The statement above conveys a fundamental element of the philosophy and aspiration underlying the complementarity principle. The establishment of an international order wherein national institutions respond effectively to international crimes, thereby obviating the need for trials before the ICC, would indeed be a major success for the Court and the international community as a whole. Of course, it is expected that, in practice, trials before the ICC will remain very important. The sad reality is that national institutions have all too frequently proven unable or unwilling to address international crimes. The statement nonetheless usefully highlights that the Prosecutor's objective is not to "compete" with States for jurisdiction, but to help ensure that the most serious international crimes do not go unpunished and thereby to put an end to impunity. The complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes. Where States fail to genuinely carry out proceedings, the Prosecutor must be ready to move decisively with ICC proceedings. Such proceedings will provide independent and impartial justice, demonstrate the determination of the international community to repress international crimes, and demonstrate the real prospect of ICC action, thus encouraging prosecution by States in the future.

[3.] *Guiding principles*: Accordingly, two "guiding principles" may inform the approach to complementarity: partnership and vigilance.

- *Partnership* highlights the fact that the relationship with States that are genuinely investigating and prosecuting can and should be a positive, constructive one. The Prosecutor can, acting within the mandate provided by the Statute, encourage the State concerned to initiate national proceedings, help develop cooperative anti-impunity strategies, and possibly provide advice and certain forms of assistance to facilitate national efforts. There may also be situations where the Office of the Prosecutor (OTP) and the State concerned agree that a consensual division of labour is in the best interests of justice; for example, where a conflict-torn State is unable to carry out effective proceedings against persons most responsible.
- *Vigilance* marks the converse principle that, at the same time, the ICC must diligently carry out its responsibilities under the Statute. The Prosecutor must be able to gather information in order to verify that national procedures are carried out genuinely. Cooperative States should generally benefit from a presumption of *bona fides*

and baseline levels of scrutiny, but where there are indicia that a national process is not genuine, the Prosecutor must be poised to take follow-up steps, leading if necessary to an exercise of jurisdiction.

[4.] *Interaction:* Paradoxically, these twin aspects of the complementarity function (partnership and vigilance) are in tension and yet are inseparably related. For example, the advice and guidance of the partnership function may resolve potential shortcomings in the national proceedings and thus avoid any need to consider ICC exercise of jurisdiction under the vigilance function. Conversely, the mere existence of complementarity fact-finding activities will often encourage genuine and effective national proceedings.

[5.] *Stance of OTP:* A major goal of the Prosecutor, aided in particular by the External Relations and Complementarity Unit, would therefore be to contribute to the removal of the need for the other pillars of the OTP to be fully activated, by motivating genuine national proceedings on the basis of effective legislation. The commitment of resources and energy into these activities is expected to prove a sound and effective investment, by reducing the need for intensive investigations and prosecutions by the ICC. In carrying out its partnership and vigilance functions, the OTP must be active and effective in order to fulfil its vitally important mandate and demonstrate the value of the ICC. The OTP must also be principled, consistent and fair in order to fulfil its mandate and maintain and build international support.¹ The principle of objectivity (Article 54(1)) should be extended to admissibility fact-finding and analysis, so that willingness and ability are assessed in an objective, uniform and principled manner.

[6.] *Impact:* The principle of complementarity can magnify the effectiveness of the ICC beyond what it could achieve through its own prosecutions, as it prompts a network of over 90 States Parties and other States to carry out consistent and rigorous national proceedings. The ICC would have this effect:

¹ The Group referred at times to three different considerations in developing or recommending interpretations, policies and practices. These considerations might also be considered by the OTP. An overarching consideration was to identify the approaches best supported by objective interpretations of the Statute and international law. Another consideration was to minimize unnecessary obstacles for the OTP and to facilitate its work. Another was to seek credible, reasonable approaches that would maintain the support of the international community. All three considerations ultimately lead to increasing the Court's effectiveness.

- through its encouragement and co-operation;
- through the prospect of the ICC exercising jurisdiction;
- through its own exemplary and standard-setting proceedings; and
- through its moral presence, which will shape perspectives and strengthen resolve on the need for accountability.

2. Partnership and dialogue with States²

2.1. Encouraging national action and promoting anti-impunity measures

[7.] *States*: Consistent with its mandate to help ensure that serious international crimes do not go unpunished, it should be a high priority for the Office of the Prosecutor³ to actively remind States of their responsibility to adopt and implement effective legislation and to encourage them to carry out effective investigations and prosecutions. Such encouragement could be *general*, for example, in public statements; or *specific*, for example, in private bilateral meetings. Fact-finding contacts and inquiries to States may be accompanied by dissemination of information and exertion of a powerful reminder of the existence of the Court and the interest of the international community in well functioning national legal systems. At no point can there be any doubt, however, of the determination of the OTP to fulfil its mandate on the basis of objective criteria.

[8.] *International fora*: The Office of the Prosecutor has an appropriate role to play in relevant international fora, working not only with interested States, but also within the UN system⁴ and other intergovernmental organisations, to promote consistent and decisive action in preventing and

² This is a comparatively new and developing area, and therefore this report can only offer a few general suggestions. It should also be noted that it will be more difficult to measure the efficiency and impact of activities in the partnership/dialogue area, in comparison with other functions of an international criminal court or tribunal. The OTP may therefore need to try to establish objective benchmarks, objectives and management parameters in order to measure the effectiveness of these initiatives.

³ It is recommended that this should be a priority not only for the OTP, but for all parts of the Court system. The organs of the Court and the Secretariat of the ASP may consider developing an action plan on implementing legislation as an essential foundation for an effective complementarity regime.

⁴ Relevant agencies include, *inter alia*, the Office of the High Commissioner for Human Rights.

punishing crimes. The OTP will acquire valuable expertise and experience that should be made available to bodies negotiating resolutions on relevant topics, developing intergovernmental policies or administering a region. Advancing an anti-impunity “vision” and strategy in other fora will reduce the need for the ICC to exercise its jurisdiction.

[9.] *Judicial institutions*: While Article 17 requires ICC deference to investigations and prosecutions carried out genuinely by a “State”, the OTP should as a policy matter be prepared to adopt a similar approach in respect of the ICTY, the ICTR, hybrid tribunals such as the Sierra Leone Special Court, courts and tribunals of UN administered territories, and other such courts. Thus, the same cooperative ties should be forged with such entities.

2.2. Providing direct assistance and advice

[10.] *Information and evidence*: To exchange information and evidence to facilitate a national investigation or prosecution will generally be consistent with the Prosecutor’s mandate.⁵ This conclusion is reinforced by Article 93(10) of the Statute, which contemplates ICC assistance to national investigations and prosecutions. The prospect of such assistance, or continued assistance, should be used where possible as an incentive to encourage co-operation on the part of the State concerned. For example, information might be shared as part of a two-way agreement, or anti-impunity strategy, such that non-co-operation with ICC requests could lead to a withholding of ICC assistance flowing to the State. At the same time, the credibility of the Court requires a projection of and compliance with clear standards, not to compromise its legitimacy. Due diligence is required in order not to create or foment a perception that international assistance may be necessary for a State in order to comply with international legal obligations to prevent and suppress impunity for the worst international crimes. Anti-impunity strategies and international assistance would have to be based on sustained demonstration of good faith by the State concerned.

⁵ This assumes that the assistance does not jeopardize security of sources or preservation of evidence. The Prosecutor may also consider the appropriate extent of co-operation with national proceedings that contravene international human rights standards, or in which suspects face torture, inhuman treatment or the death penalty.

[11.] *Technical advice*: Providing technical advice would also be generally consistent with the Prosecutor's mandate.⁶ With respect to international legal issues (crimes, defences, modes of liability, *et cetera*), and practical issues of investigating and prosecuting mass crimes, the OTP will build up a unique and unparalleled in-house expertise. This may be shared on the same basis as described in the previous paragraph.

[12.] *Training*: The extent to which the OTP can provide training to countries is a sensitive question. The Group has only contemplated priorities at the early stages of the Court's existence, and does not pretend to preclude nor to address possible future roles. Generally speaking, the presumption is that the Court will need to move step by step in building up its capacity to deal with its mandate. The provision of training is not expressly contemplated in the Statute or the RPE. On the one hand, providing such training would advance the overall objective of building a network of States able to carry out effective prosecutions. On the other hand, there could be significant resource implications that are not directly linked to the core mandate of the OTP. It may be advisable to proceed gradually, assessing the views of the Assembly of States Parties, and in particular avoiding any perception of diverting resources from implementation of the mandate, whether in terms of financial or personnel resources. The OTP could identify the need for such training, indicate benchmarks, encourage others to address the matter and review progress reports.

[13.] *Brokering other assistance*: In addition to assistance that may appropriately be provided by the OTP from its resources (for example, sharing of information and evidence), the OTP may also be able to act as an intermediary between States, facilitating situations where States may assist one another in carrying out national proceedings. Under such circumstances, it is important not to jeopardize or compromise any future role by the Court, should developments so require. The OTP may also be able to share its expertise in training activities organized by States and organisations.

2.3. Relationship between roles (partnership/vigilance)

[14.] *Risks*: There is a potential tension between the two aspects of the complementarity function, that is, the dialogue role and the monitoring role. There is a potential danger that if the OTP gets too closely involved

⁶ Subject to the qualifications mentioned in the previous footnote.

in providing training, advice and assistance to a national proceeding, it may be difficult to extricate the OTP to credibly criticize and question the process if it subsequently proves to be a non-genuine proceeding. Nonetheless, in the abstract, the benefits of co-operation appear to be such that this is a worthwhile risk, provided that the above precaution be exercised. It is suggested that, consistent with the presumption of *bona fides* toward cooperative States, the OTP proceed with a positive, cooperative approach to assisting national efforts, where appropriate, albeit with some caution to avoid being exploited in efforts to legitimize or shield inadequate national efforts from criticism. The OTP can assess this approach over time in the light of experience and lessons learned.

[15.] *Multi-tasking*: There is also a question of whether the OTP should strictly separate the two functions (dialogue and monitoring) to reduce the risk of such conflicts, for example, by never including experts in the two functions on the same delegation. It is suggested that such a strict separation may not be necessary and may not always be possible in a context of limited resources. This requires, at the same time, clear guidelines to avoid perceptions of negotiation, which would be inconsistent with a future investigatory role. It is true that there is a tension between the roles, but they are also intertwined.

3. The vigilance function: fact-finding and analysis

3.1. Framework issues of Article 17

[16.] This report does not attempt to provide a doctrinal analysis of the provisions of Article 17 (for ease of reference, that Article is reproduced in Annex 1). Nonetheless, the following three observations provide a useful context for the report's recommendations. It should be emphasized that this report focuses on the complementarity issues reflected in Articles 17(1)(a)-(c) and not the distinct issue of "sufficient gravity" reflected in Article 17(1)(d), an important issue which could form the basis of a separate inquiry.

3.1.1. "Inaction" versus "unwillingness" and "inability"

[17.] Although it is common to emphasize the "unwilling or unable" test in Article 17, the Article in fact deals with three logically distinct circumstances.

[18.] First, the most straightforward scenario is where no State has initiated any investigation (the inaction scenario). In such a scenario, none of the alternatives of Articles 17(1)(a)-(c) are satisfied and there is no impediment to admissibility. Thus, there is no need to examine the factors of unwillingness or inability; the case is simply admissible under the clear terms of Article 17.

[19.] Second, it is only where a State is investigating or prosecuting, or has already completed such a proceeding, that Articles 17(1)(a)-(c) are engaged.⁷ In such circumstances, the case will be inadmissible, unless the exceptions in those provisions are established.

[20.] Third, this inadmissibility is displaced where it can be shown that the proceedings are not genuine, because the State is either unwilling or unable to carry out genuine proceedings. Thus, the issues of “unwilling”, “unable” and “genuine” only arise where a State purports to be handling the matter, but there are reasons to believe that a genuine proceeding will not result.

3.1.2. “Genuine” proceedings

[21.] Some uncertainty has arisen at times about which term is modified by the adverb “genuinely”; *id est* whether it modifies “unable” (and possibly even “unwilling”) or modifies “to carry out” and “to prosecute”. The correct interpretation is the latter, *id est* that the term qualifies “to carry out the investigation or prosecution” and “to prosecute”. This is made clear in Article 17(1)(b), where the terms are more clearly separated (“unwillingness or inability of the State genuinely to prosecute”.)⁸

[22.] The term “genuinely” restricts the class of national proceedings that require deference from the ICC. Without such a qualifier, *any* national proceeding would preclude ICC action, even if the national proceeding were fraudulent or hopelessly inadequate. This balance was one of the key compromises of the Rome Statute, giving the ICC a certain scope to assess the objective quality of a national proceeding, but setting a standard

⁷ See *infra* note 26 on the interpretation of Article 17(1)(b).

⁸ This conclusion is also confirmed by reference to the drafting history. Earlier drafts (“to genuinely carry out”, “to genuinely prosecute”) were adjusted on purely technical grounds to avoid splitting the infinitive. It is also confirmed by the purpose of including the term “genuinely”, *id est* to restrict the class of national proceedings warranting deference from the ICC (see next paragraph).

no higher (but no lower) than that the proceedings be carried out “genuinely”.⁹

[23.] The term “genuine” is defined, for example, in the Oxford dictionary, as “having the supposed character, not sham or feigned”. The context of Article 17 affirms that the term must be interpreted in relation not only to “unwillingness” (sham, feigned) but also to “inability”, and it therefore also connotes a certain basic level of objective quality. Thus, a country devastated by conflict and facing a collapse of its system might be *willing* to conduct proceedings, and yet be *unable* to genuinely carry out proceedings. It was extremely important to many States that proceedings cannot be found “non-genuine” simply because of a comparative lack of resources or because of a lack of full compliance with all human rights standards. The issue is whether the proceedings are so inadequate that they cannot be considered “genuine” proceedings. Of course, although the ICC is not a “human rights court”, human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely.

3.1.3. Implications for admissibility of differing phases of ICC proceedings

[24.] Complementarity issues can arise in different ways at different phases in ICC proceedings. At some phases there will be a particular suspect and a particular case, whereas in earlier phases, the admissibility assessment must be more generalised.

[25.] Admissibility can arise as a factor for the Prosecutor to assess in determining whether to proceed with an investigation, either upon the referral of a “situation” by a States Party or by the Security Council or when determining whether to seek authorisation for an investigation in accordance with Article 15. At such points, admissibility is not an issue for liti-

⁹ Terms such as “effectively”, proposed in earlier drafts, were unacceptable to several delegations, because of a concern that the ICC might “judge” a legal system against a perfectionist standard (for example, that the ICC might set aside proceedings because, in the Court’s opinion, the prosecution might have chosen a more effective strategy). While these concerns are legitimate, and the plain language must be respected, the Prosecutor should also avoid adopting standards of “genuineness” that are too permissive or conducive to impunity. In interpreting Article 17, the Prosecutor must also “have regard to principles of due process recognized under international law”.

gation and judicial determination, but rather a matter for the OTP to consider and assess in reaching decisions.

[26.] When a determination of admissibility is explicitly required, however, for the purpose of the initiation of an investigation – by the Prosecutor in accordance with Article 53(1) and Article 15(3) as clarified by Rule 48, as well as by the Pre-Trial Chamber under Article 15(4) – a greater degree of specificity regarding the object of the investigation is required. The same is true in order to allow the Prosecutor, the State in question (or the Security Council) and the Chamber to assess and determine issues of admissibility in proceedings that may follow immediately thereafter pursuant to Article 18(2) or (3) and Article 53(3). The Statute refers to “the admissibility of a case”.¹⁰

¹⁰ While a certain degree of specificity is required for admissibility determinations, the object of the investigation (defined in parameters which can be personal, territorial and temporal) cannot be too narrowly construed at this early stage of the proceedings when the Prosecutor has not yet or only just commenced the investigation. A particular suspect will not always be identified at this stage. Moreover, a prosecutorial strategy aiming at perpetrators in a leadership position could mean that the investigation covers many events.

The object of the investigation will often, but not always, be more concrete and confined than a “situation” which a State or the Security Council may refer to the Court (Articles 13 to 14). This means that an analytical process must take place in the OTP between the referral of a situation and the decision whether to commence one or more investigations (also underlined by the factors set forth in Article 53(1)).

Once the investigation is initiated, the object of the investigation will be further concretized within the abovementioned parameters. The more specific case or cases would normally be the focus of subsequent admissibility determinations and challenges under Article 19(2) (although nothing prevents a challenge under this provision immediately after the Article 18 proceedings).

Different views could be expressed as to the terminology and the specificity actually required at the stage of the commencement of an investigation. One view is that the term “case” should be used from this stage and onwards (which reflects the reference to “admissibility of the case” in the Statute) and that the “case” should be sufficiently specified with reference to events and possibly, but not necessarily, to a suspect. This is necessary in order to assess and determine the “admissibility of the case” (although “inability” seems to be a concept that, at least in part, deals with systemic features of the system, or parts of it, rather than the national action or inaction in the particular “case”). Avoiding assessments and scrutiny of a broader “situation” would also alleviate one of the major fears that some States had during the negotiations, namely that their entire legal systems would come under scrutiny. The identification of events could be, *inter alia*, the massacre in a certain village or a campaign in a particular geographic area during a particular time period.

Another view is that the object of the early proceedings should be referred to as a “situation” (on the assumption that the parameters of the investigation would often coincide with those of the referred “situation”), and that first the object of proceedings under

3.2. Power to conduct fact-finding and to secure co-operation

[27.] The Statute clearly contemplates that the OTP will gather facts and conduct analysis in order to form views (and if necessary, submit arguments) on admissibility, and hence, on whether national institutions are genuinely carrying out proceedings (Articles 15, 17, 18, 19, 20 and 53). This section addresses the extent to which such efforts may be bolstered by obligations to co-operate.

[28.] It appears that the co-operation regime under Part 9 of the Statute is linked to an “investigation” (Article 86) and so are the powers of the Prosecutor set forth in Article 54. A formal “investigation” commences by either the Pre-Trial Chamber’s authorisation in accordance with Article 15(4) or the Prosecutor’s decision to initiate an investigation under Article 53(1) (*id est* following the referral of a situation). The expression “proceed with an investigation” in the English version of Article 15(3)-(4) may lend itself to different interpretations. Other language versions are clearer, to the effect that an “investigation” cannot be initiated before the Pre-Trial Chamber has granted authorisation (for example “ouvrir” in French and “abrir” in Spanish). Hence, formal co-operation in accordance with Part 9 would not apply pre-authorisation (*proprio motu* ‘triggered’) or before the commencement of the investigation (referral ‘triggered’). Thus, the better view appears to be that the powers of the Prosecutor to conduct “fact-finding” prior to authorisation or upon the referral of a situation, but before the commencement of an investigation of a case, are those set forth in Article 15(2) and rule 104. They would therefore have to be carried out in a non-compulsory manner.

[29.] A broader interpretation could also be advanced, construing Part 9 co-operation as also applying to phase prior to investigation, but such an

Article 19 (2) would constitute a “case”, *id est* a “case” would require a higher degree of specificity than in accordance with the other view and normally that the suspect has been identified and would occur later into the criminal investigation (Art. 54 *et seq.*). This approach is based on the view of Articles 15, 18 and 53(1), (3) and (4) as an autonomous procedure (triggering procedure) directed to the determination of the temporal, territorial and/or personal parameters over which the Court is going to exercise its jurisdiction (for example crimes committed by Rwandan nationals in the territory of Rwanda and neighbouring states between April and June of 1994). In accordance with this view, limiting *de facto* the personal jurisdiction of the Court to the leaders involved in the crimes committed in a given situation (“most responsible persons”) would avoid the risks of scrutinizing entire legal systems as a result of assessments of admissibility carried out during the triggering procedure.

argument would need to rely on the scheme of the Rome Statute and the general duties of States to combat impunity.

[30.] As a practical matter, it is expected that States Parties and other supportive States will choose to co-operate voluntarily with the OTP, and will likely respond to reasonable requests for information. Co-operation might also be further encouraged by courteously making States aware of the possibility that reasonable inferences might of necessity be drawn if information cannot be collected because of non-co-operation. In exceptional cases, other interested States may be able to intervene to help resolve any impasses.

[31.] Arguably, the Pre-Trial Chamber should take into account the limited powers of the Prosecutor at the preliminary stage when setting its standards for authorisation.

[32.] Once an investigation has been formally initiated, facts relevant for determination of admissibility should be seen as forming part of the “investigation” and co-operation in accordance with Part 9 is available. Importantly, Part 9 would also apply during proceedings under Article 18.¹¹ Article 18(5) also creates an obligation for States Parties (and an invitation for non-States parties) to provide periodic progress reports, which should also be helpful for admissibility fact-finding.

3.3. Methodology of fact-finding and analysis

[33.] *Multidisciplinary*: An admissibility assessment is a multidisciplinary undertaking, which will have *normative* dimensions – requiring an understanding of legislation, jurisprudence, procedures and norms – and *empirical* dimensions – involving an assessment of the context and the actual handling of the relevant case or cases.

[34.] *Graduated measures*: The best way to satisfy both the partnership and vigilance principles would be for the OTP to pursue a “*graduated measures*” approach. Where a State is open and cooperative, and there is every sign of a genuine, good faith process, the OTP verification may be minimal, relying on open sources and periodic checks. Where warning signs arise, the OTP should immediately follow up, with more active efforts – for instance, to independently gather information on the context

¹¹ In line with this, the Prosecutor should argue that the co-operation regime under Part 9 applies also in respect of such exceptional “investigative steps” as may be authorised by the Pre-Trial Chamber (PTC) according to Article 18(6).

and the handling of proceedings. This would escalate to a full-scale collection of information for a possible admissibility hearing where circumstances warrant.¹² Moreover, as noted above (paragraphs 18 and 19), a survey of unwillingness and inability is not necessary where there are no national investigations or prosecutions, as admissibility is clear in such circumstances.

[35.] *Inferences from general context:* While Article 17 requires a focus on the handling of a particular case (or, in earlier stages, the likely handling of an anticipated set of possible cases against persons most responsible), it will almost inevitably be necessary to consider the broader context, laws, procedures, practices and standards of the State concerned. One may credibly draw inferences from the general to the particular.¹³ Where a system is shown to be independent, impartial and meeting standards of genuineness, this may contribute to an inference of genuineness in the particular case. Conversely, where a system shown to be plagued with political interference, scripted trials, and unwillingness to pursue certain groups of offenders or offences, this may contribute to an inference of a lack of genuineness in the particular case. Nonetheless, caution should be exercised, since the admissibility assessment is not intended to “judge” a national legal system as a whole, but simply to assess the handling of the matter in question.

[36.] *Types of evidence:* Relevant evidence may include official documents (legislation, transcripts, reports, dossiers, judgments), other documents (reports on the political and legal system, reports of observers and monitors), testimony of observers, monitors, and insiders, and expert opinion on the political and legal system and on the handling of the relevant case or cases. Circumstantial evidence will likely be extremely important, particularly in assessing “willingness” to carry out genuine proceedings.

[37.] *Diversity of sources:* The OTP will likely have to engage in active monitoring (conducting interviews, sending observers) and passive

¹² In order to further demonstrate the OTP’s fair and standardized approach to states, the OTP may wish to develop objective categories describing the level of co-operation provided (for example: responsive, partially responsive and unresponsive). The OTP might increase its activity in gathering information and its reliance on alternative sources depending on the degree of co-operation and the presence of indicia warranting further follow-up.

¹³ This is supported by Rule 51 of the RPE, which allows States to bring information about their legal system to the attention of the Court.

monitoring (receiving reports, transcripts, media) of national proceedings. An admissibility assessment will require a diversity of interlocutors and a diversity of sources, with information coming from the prosecuting State, other actors (media, NGOs, experts, other States, international organisations), and information gathered directly by the OTP. Information should be assessed with an awareness of possible biases or weaknesses, and cross-checked against multiple independent sources, so as to evaluate its reliability and credibility. An internal system of source assessment, and possibly semi-structured protocols of source assessment may prove useful and appropriate in handling multiple sources.

[38.] *Official sources*: An appropriate starting point would likely be to obtain information from the prosecuting State about the proceedings.¹⁴ Within a government, there may be a variety of useful interlocutors, including different branches of government and authorities of sub-entities. The OTP should not necessarily deal with only one channel of communication, particularly where governmental institutions have differing interests and perspectives. Interlocutors may include:

- Investigative/police/intelligence services (knowledge of investigative efforts, challenges faced);
- Prosecution services (knowledge of prosecution efforts, procedures, challenges);
- Ministry of justice (knowledge of legal system);
- Ministry of defence (if the armed forces were allegedly involved, or if military plays a role in collecting evidence and providing security);
- Ministry of foreign affairs (external interlocutor, often more sensitive to international obligations and perspectives); and
- Human rights commissions, commissions of inquiry, *ad hoc* truth commissions, ombudspersons (perspective, possible reports and statistics).

¹⁴ This approach is useful (i) to show respect for the State, (ii) for reasons of fairness (since the national efforts are being “scrutinized”), and (iii) for practical efficiency reasons, since the State has pertinent information and is a useful starting point. This general approach may need adjustment where there is a risk of jeopardizing future investigations, and possibly the security of victims and witnesses, in cases of disclosing information to authorities who appear to be implicated in the reported crimes, or unable to protect sensitive information.

[39.] *Other sources:* In order to fulfil its duties (particularly the principle of vigilance), the OTP cannot rely only on official sources, and must gather information from other sources to develop a complete picture. Such information would be collected on a voluntary basis and sources could include:

- Political parties;
- Open media sources;
- NGOs;
- Academics and leading experts in relevant fields (law, politics, administration of justice, social sciences, history);
- Journalists;
- International organisations (UN, regional organisations); and
- Bar associations.

Reliance on other sources may at times lead to diplomatic challenges (for example, where a State resents consultation with groups with conflicting agendas). Nonetheless, the effort to acquire information from diverse sources is needed to make an objective assessment. Unless circumstances indicate otherwise, the OTP should advise the government that it is gathering information of this nature and explain its approach, to avoid any misunderstandings.

[40.] *Observers/monitors:* The OTP should develop a means of deploying on-site observers or trial monitors. Monitors could be arranged with the consent of the State (which should hardly be difficult where trials are open to the public). Refusal to allow monitors should give rise to adverse inferences. Monitors may be persons contracted and trained by the OTP, or the OTP might rely on expert reports from other bodies. (The OTP should issue guidelines on procedures and content for such reports to be as useful as possible for ICC proceedings; such guidelines should be developed in consultation with entities with experience in the field, including NGOs, IGOs and diplomatic missions.)

[41.] *Open sources:* Systematic evaluation of information available in the public domain, including internet resources, should be a priority. Specialised electronic tools and systematic collection plans are necessary, as well as personnel able to utilize these sources in their original language. The OTP may develop in-house expertise, contract the services of private

providers, subscribe to digests or bulletins, or rely on summaries provided by others.

[42.] *Secondary analysis*: The OTP may analyse primary sources gathered by other organisations. Reliance should not be such as to amount to “investigation by proxy”, the material would have to be assessed for reliability and credibility, as part of a broader effort to gather information.

3.4. Criteria for assessing national proceedings

3.4.1. Contextual information

[43.] As noted above (paragraphs 18, 19 and 34), the extent of fact-finding will depend on the circumstances, including the presence or absence of national proceedings, and whether there are any indicia of non-genuineness warranting further scrutiny. Where circumstances warrant significant fact-finding, there is certain background contextual information that may be gathered in order to inform an admissibility assessment under either the “unwillingness” or “inability” branches. Such information may relate to the legislative framework, the powers attributed to institutions of the criminal justice system, degrees of independence, jurisdictional territorial divisions and so on. A list of relevant indicators is included in Annex 4. Statistical analyses may be of relevance in early stages, when assessing the likelihood that a potential situation will be addressed by national institutions, but will be less relevant in later stages when the issue is the handling of particular cases.

3.4.2. Unwillingness

[44.] *General*: To demonstrate “unwillingness” may be technically difficult (likely involving inferences and circumstantial evidence) and politically sensitive (amounting to an accusation against the authorities). It is possible that a regime may employ sophisticated schemes to cover up involvement and to whitewash crimes, so information and analytic tools are needed to penetrate such tactics. Article 17(2) specifies certain factors that the Court “shall consider” in making its determination, namely:

- purpose of shielding the person from criminal responsibility;
- unjustified delay inconsistent with an intent to bring the person to justice;

- lack of independence and impartiality, inconsistent with intent to bring to justice.

[45.] *Intra-State divergences in willingness*: The OTP should be alert to the possibility of differing degrees of willingness and internal differences within a State. For example, the judiciary may be “willing”, whereas the executive is not. Investigators may be willing but an “unwilling” military may frustrate and hinder investigative efforts. Unwillingness in one branch of government may create “inability” in another branch attempting sincerely to investigate or prosecute. There is also a possibility of selective “willingness”: authorities may be eager to investigate crimes by rebel groups but be reticent with respect to government forces.

[46.] *Process, not outcome*: The unwillingness test cannot be based on the *outcome* of proceedings, for example, from the acquittal of an obviously guilty person. At first glance, it may seem attractive to suggest a test such as “no reasonable tribunal could acquit the person on the evidence”. However, such a test would create grave complications and is likely inconsistent with the Rome Statute. For example, where a PTC had determined as a preliminary procedural matter that no reasonable tribunal could acquit the person, this would undermine the accused’s right to be presumed innocent at trial once before the ICC. Therefore, the admissibility assessment should be based on *procedural* and *institutional* factors, not the substantive outcome.

[47.] *Indicia*: An assessment of unwillingness will involve a search for *indicia* of a purpose of shielding the person from criminal responsibility or a lack of an intent to bring the person to justice. This may be inferred from:

- direct or indirect proof of political interference or deliberate obstruction and delay;
- general institutional deficiencies (political subordination of investigative, prosecutorial or judicial branch);
- procedural irregularities indicating a lack of willingness to genuinely investigate or prosecute; or
- a combination of these factors.

A detailed list of potential indicators of unwillingness is included in Annex 4.

3.4.3. Inability

[48.] *General:* An “inability” assessment is likely to be less complex than an “unwillingness” assessment, as the evidence sought is more readily available, there is no need to infer hidden motives, and the authorities are not being accused of deception. Nonetheless, there may be an implication that the authorities are incorrect in believing that they are able to genuinely carry out proceedings, so significant sensitivities remain.

[49.] *Standard:* The standard for showing inability should be a stringent one, as the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards. The focus of the complementarity regime is on the more basic question of whether the State is unable to genuinely carry out a proceeding. Article 17(3) specifies certain considerations in reaching the inability determination. The wording of Article 17(3) indicates that there are two cumulative sets of considerations; first, “collapse” or “unavailability” of the national judicial system,¹⁵ and second, whether the State is unable to obtain the accused, or the evidence and testimony, or otherwise unable to carry out proceedings.

[50.] *Relevant facts and evidence:* The following facts and evidence may be relevant to the first set of considerations (total or substantial collapse or unavailability of national judicial system) (see also Annex 4):

- lack of necessary personnel, judges, investigators, prosecutor;
- lack of judicial infrastructure;
- lack of substantive or procedural penal legislation rendering system “unavailable”;
- lack of access rendering system “unavailable”;
- obstruction by uncontrolled elements rendering system unavailable;
- amnesties, immunities rendering system “unavailable”.

¹⁵ It is suggested that the term “unavailability” should be given a broad interpretation, so as to cover the various “inability” scenarios in the latter part of Article 17(3) and to cover typical cases of inability.

3.5. Evidentiary considerations

3.5.1. Applicable rules of evidence

[51.] Although the Statute provisions on evidence appear in Part 6 (The Trial), the Rules of Procedure and Evidence make clear that the general provisions on evidence apply to all phases of ICC proceedings.¹⁶ Thus, the general rules of evidence are the point of departure for any analysis. However, if evidentiary difficulties were to arise, a case could be made for a comparatively flexible approach to normal rules of evidence in admissibility assessments, since the dispute does not pertain to the guilt or innocence of the person, but simply to deciding the appropriate forum. On the other hand, the determination is nonetheless an important procedural decision, so evidence must at least be reasonable and reliable. Standards to ensure a fair trial, to respect privileges, and to ensure compliance with the Statute (Article 69(4)(5) and (7)) apply at all stages of proceedings.

3.5.2. The standard of proof

[52.] As the issue in complementarity is one of admissibility before a particular forum, rather than the objective and subjective elements of a particular crime, the appropriate burden is the simple balance of probabilities, rather than any higher standard such as “proof beyond a reasonable doubt”. The ICC will intervene despite national proceedings only in clear cases of unwillingness or inability to genuinely prosecute. The standard for assessing “genuineness” should reflect appropriate deference to national systems as well as the fact that the ICC is not an international court of appeal, nor is it a human rights body designed to monitor all imperfections of legal systems.

3.5.3. Allocation of the burden of proof

[53.] The Rome Statute does not expressly allocate burdens of proof for admissibility determinations, so this must be developed in the practice

¹⁶ Article 69 is worded generally and not restricted to trials. In the RPE, evidence is addressed in Chapter 4, “Provisions relating to various stages of the proceedings”. Rule 63 further affirms the general application of those rules.

and jurisprudence of the Court.¹⁷ The following are suggestions for positions of the OTP.

[54.] *Investigation/prosecution*: In accordance with normal principles for assigning burdens of proof, the initial burden of proving the existence or non-existence of an investigation or prosecution would be on the party raising the issue (for example, by seeking authorisation or bringing a challenge). Thus, the burden can fall on the Prosecutor: for example, in a request for authorisation for investigation (Article 15(3)); application to proceed despite State notification (Article 18(2) or (3)); or request for review of inadmissibility decision (Article 19(10)). The burden can also fall on the accused or person sought, or on interested States, where they are the ones raising the issue, for example under Article 19(2), or on appeal from an admissibility ruling (Article 18(4) or 19(6)).¹⁸

[55.] *Genuineness*: With respect to the issue of “genuineness” (*id est* the unwillingness or inability to genuinely carry out proceedings), there are several reasons to conclude that the *initial* burden is on the party arguing for admissibility. (This will almost always be the Prosecutor, except under Article 53(3), where a referring State or the Security Council seeks reconsideration of a determination of inadmissibility by the Prosecutor.) This assignment of the burden is suggested by the structure of Article 17, which calls for a determination of inadmissibility “*unless*” non-genuineness is shown. The term “unless” suggests a distinct issue, one that logically must fall on the party arguing for admissibility. This conclusion is further bolstered by a policy of giving the benefit of the doubt to

¹⁷ There are various accepted principles for allocating the burden of proof. The general principle is *onus probandi actori incumbit*, or “he who alleges must prove”: the party raising an issue has the burden of proving the requirements. However, other relevant principles can place the burden on the party seeking to change the *status quo*; the party making a disfavoured contention (*i.e.*, alleging bad faith); or the party with particular or sole knowledge of the facts. This is further discussed in Annex 5.

¹⁸ The Statute does not specify who carries the burden where a referring state or the Security Council requests reconsideration of a Prosecutor decision under Article 53(3) not to proceed. The burden presumably is on referring State or the Council, as they are requesting reconsideration. A more complex issue arises where the PTC raises admissibility on its own motion. In such a case, the Prosecutor may be required to bring information, evidence, or an explanation, in order to show that the decision was reasoned. However, if that decision is to be set aside, the burden should fall on some other interested party to make out the case for setting aside the decision, as a corollary of respect for prosecutorial discretion. Thus, this may be a situation where the burden of bringing evidence (at least at the outset) and the burden of persuasion fall on different parties.

States exercising jurisdiction and assuming that they are acting in good faith. In addition, it is an evidentiary principle that a party alleging bad faith generally carries the burden.

[56.] *Shifting the burden of proof*: While the initial burden of proof will be on the Prosecutor in many situations (particularly with respect to the “genuineness” issue), there are various principles that can shift the burden.¹⁹ (As a cautionary note, it is important to avoid the confusion in some literature that refers too readily to a “shifting” of burdens, whereas such shifts as a matter of law are comparatively rare.²⁰) Some prospects that bear consideration:

- *Prior determination*: Where there has already been a specific finding of admissibility in relation to the particular case, any subsequent challenger should carry the burden of displacing that earlier finding. Thus, for example, if the Prosecutor has already proven the non-genuineness of a national proceeding (for example, under Article 18(2)), then in a subsequent challenge (for example, by the accused under Article 19(2)), the burden should be on the accused to establish that the proceedings are indeed genuine.
- *Exclusive or superior access to necessary information*: Various authorities, including in the context of international law, have allowed a shift of the burden of proof where the State has exclusive or superior access to the necessary information, and therefore is in the best position to know the state of affairs and provide evidence.²¹ This principle may be particularly useful in shifting the burden on the “genuineness” issue to the State claiming to genuinely carry out proceedings. This will arise primarily where the State is being uncooperative and successfully prevents the OTP from gathering in-

¹⁹ Additional material is provided in Annex 5, Materials on the burden of proof.

²⁰ It is common to hear, for example, that after a party introduces particular circumstantial evidence, that the burden “shifts” to the other party. However, in most cases, there is no *legal* shift of the burden; what has happened is that the party has presented a persuasive *prima facie* case, such that *as a practical matter* the other party had better introduce contrary evidence or else lose on that point. There is a difference between this practical shift (*id est* the need for the responding party to introduce evidence in response to compelling evidence) and formal rules that actually shift the *legal* burden to the other party.

²¹ This is further explored in Annex 5. Such an approach is supported in decisions of international bodies, such as *Bleier v. Uruguay* (decision of the Human Rights Committee); and *Avsar v. Turkey* and *Salman v. Turkey* (judgments of the European Court of Human Rights), discussed in Annex 5.

formation, which certainly raises grave doubts about the State's intent. It may also arise in cases of non-public trials.²²

[57.] *Facilitating satisfaction of the burden:* Other principles may facilitate the work of the Prosecutor by making it easier to satisfy the burden of proof. For example, proof of obstruction or other suspicious circumstances may enable adverse inferences to be drawn, although additional supplementing information may still be required to complete a persuasive case.

- *Proving a negative:* It was indicated above that in some cases the Prosecutor may have to establish that no national investigations or prosecutions are taking place. There is of course a philosophical difficulty in “proving a negative”. As a practical matter, such burdens may be satisfied in a legal context by demonstrating the reasonable steps taken to determine whether any national investigation or prosecution was undertaken. Prior to the Article 18 process, the OTP might refer to its contacts with relevant governments and other efforts to identify whether national proceedings were underway. After the Article 18 process, where the OTP has notified all States Parties and all States that would normally exercise jurisdiction over the crimes concerned, and has not received any notification from States, this fact alone should be sufficient to establish *prima facie* the absence of national proceedings. At this point, it would be incumbent on the party alleging that there were such proceedings to introduce evidence demonstrating this.
- *Non-co-operation:* The OTP should argue that, where a State Party is not being cooperative in furnishing information about its proceedings, the Court may draw an adverse inference.²³ Such a lack of co-operation undermines the presumption of good faith that is otherwise granted to States, thus reducing the rationale for placing the

²² There may of course be a sound explanation for non-public trials – for example, reasons of security – but the State should at least be expected to provide an explanation, and provide some information, since the Court's capacity to verify genuineness would otherwise be frustrated.

²³ This principle is closely related to the “superior access to information” principle, since non-co-operation may frustrate the Prosecutor's ability to gather information. However, adverse inferences might appropriately be drawn even where the OTP manages to obtain significant amounts of information.

burden on the Prosecutor. Adopting this rule is also sound legal policy, as it will help encourage co-operation.

[58.] *Practical need to gather evidence*: Finally, as a practical matter, however the burdens are allocated – *id est* even where the burden falls upon a challenger – it will be incumbent on the Prosecutor to gather the necessary information and evidence in order to build a persuasive admissibility case in response.

4. Special issues

4.1. Uncontested admissibility and consensual sharing of labour

[59.] *Uncontested admissibility*: The foregoing sections have focused on scenarios where admissibility is contested, on the grounds that a genuine national investigation or prosecution is apparently underway. There may be other scenarios where admissibility is not contested. Of course, in the absence of a challenge from a State that would normally exercise jurisdiction, admissibility issues may still be raised by the accused or person sought (Article 19(2)(a)), by the Prosecutor (Article 19(3)), or by the Court on its own motion (Article 19(1)). However, in cases where no State has initiated an investigation, it will be clear on the facts that none of the criteria of Article 17(1)(a)-(c) are satisfied, and that the case is admissible. Thus, even if a challenge were raised, the outcome would be clear. There may even be situations where the admissibility issue is further simplified, because the State in question is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution.

[60.] *Preventing an overburdening of the Court*: The effective and efficient operation of the Court presumes that States will carry the main burden of investigating and prosecuting international crimes. It is important to ensure that the Court does not become overburdened as a result of States shirking their responsibilities to help end impunity. The Prosecutor may use the following techniques to deter a mass and unnecessary influx of cases:

- bilateral discussions to encourage States to carry out their own prosecutions
- overt public pressure to urge States to carry out their own prosecutions
- prosecutorial policy focusing on persons most responsible

- determination that action is “not in the interests of justice” (Article 53(1)(c) and (2)(c))
- determination that a matter is “not of sufficient gravity” (Article 17(1)(d))
- determination that there is “not a sufficient legal or factual basis” (Article 53(2)(a))

[61.] *Appropriate circumstances for burden-sharing*: There may also be situations where the appropriate course of action is for a State concerned not to exercise jurisdiction, in order to facilitate admissibility before the ICC. Voluntary acceptance of ICC admissibility does not necessarily presuppose or entail a loss of national credibility nor a lack of commitment to the fight against impunity.²⁴

- For example, in cases where the ICC has accumulated strong evidence against a leadership group, and one of the suspects flees to a third State, the third State is not compelled to compete with the ICC for jurisdiction. All interested parties may agree that the ICC has developed superior evidence, witnesses and expertise relating to that situation, making the ICC the more effective forum. Where the third State has not investigated, there is simply no obstacle to admissibility under Article 17, and no need to label the State as “unwilling” or “unable” before it can co-operate with the Court by surrendering the suspect.

²⁴ Article 17 specifies the consequences for admissibility where a state is investigating or prosecuting, but does not expressly oblige states to act. However, paragraph 6 of the preamble refers to the “duty” of States to exercise criminal jurisdiction. While the preamble does not as such create legal obligations, the provisions of the Statute may be interpreted in the light of the preamble. The duty to “exercise criminal jurisdiction” should be read in a manner consistent with the customary obligation *aut dedere aut judicare*, and is therefore satisfied by extradition and surrender, since those are criminal proceedings that result in prosecution. However, as noted above, the reference to a duty also reflects the *spirit* of the Statute that States are intended to carry the main burden of investigating and prosecuting. This is necessary for the effective operation of the ICC. In the types of situations described here, to decline to exercise jurisdiction in favour of prosecution before the ICC is a step taken to *enhance* the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes. This is distinguishable from a failure to prosecute out of apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity.

- Similarly, the ICC and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Alternatively, groups bitterly divided by conflict may oppose prosecutions at each other's hands (fearing biased proceedings) and yet agree to leadership prosecution by a Court seen as neutral and impartial. In such cases, declining to exercise primary jurisdiction in order to facilitate international jurisdiction is not a sign of apathy or lack of commitment. Such a scenario demonstrates the value and utility of the ICC and ensures that justice is effectively done. Article 17 does not require any branding of the State as "unable", since there would be an absence of investigations and thus clear admissibility under Article 17.

[62.] *Acknowledgement of non-exercise of jurisdiction*: In these types of situations, it may be appropriate for the State concerned to simplify the admissibility proceedings by expressly acknowledging that it is not investigating or prosecuting particular cases, in favour of ICC jurisdiction. This does not entail any re-writing or alteration of the jurisdictional and admissibility regime of the Statute.²⁵ Article 17 clearly provides for admissibility where a State is not investigating or prosecuting,²⁶ and the express acknowledgement of the State merely simplifies the factual determination. Of course, such an acknowledgement cannot prejudice the principle of *ne bis in idem*.

[63.] *Other States not bound*: It goes without saying that a State's acknowledgement that it is not investigating or prosecuting does not affect the primacy of any other State that wishes to investigate or prosecute.

²⁵ The Statute does not require any finding that the State is "unwilling" or "unable" to genuinely prosecute in such scenarios. As noted above (Framework Issues of Article 17), those terms only apply in cases where a state *purports* to exercise jurisdiction.

²⁶ Where the State has in fact initiated an investigation, but wishes to agree to ICC exercise of jurisdiction, it is less clear how such a situation is best analyzed under Article 17. One possibility is that Article 17(1)(b) applies only where an investigation has been completed and there was a decision not to prosecute, and therefore that scenarios where an investigation has been suspended without ongoing action fall outside of Article 17(1)(b) as a simple "inaction" scenario. Another possibility is that the term "decision not to prosecute" should be interpreted purposively, and therefore excludes scenarios where the State decides to prosecute or to facilitate prosecution elsewhere through extradition or surrender. A third possibility is that such scenarios must be assessed under the "unwilling or unable to genuinely prosecute" test, in which case the Prosecutor could mitigate the "stigmatization" of such a finding by expressly acknowledging the good faith of the State concerned in agreeing to an ICC exercise of jurisdiction.

Thus, for example, even if a territorial State agreed to non-exercise of jurisdiction over certain crimes in favour of ICC prosecution, other States would remain entitled to investigate and prosecute on other jurisdictional bases (active nationality, passive nationality, universal jurisdiction) and admissibility could accordingly be challenged by such States or by the accused. It will therefore be prudent to consult with interested States before forming such arrangements.

[64.] *Rights of the accused*: For greater clarity, it may be reiterated that such arrangements do not purport to remove the procedural right of the accused to raise challenges to admissibility. However, in the clear absence of any investigation or prosecution by a State, an admissibility challenge on the grounds of complementarity would not have any merit. It is also worth noting that the ICC would not be “bound” by an acknowledgement of non-prosecution where there was evidence that the State was in fact or had in fact carried out proceedings.

[65.] *Other obligations*: Such an acknowledgment does not remove any pre-existing obligations under customary or conventional international law to investigate and to prosecute or extradite with respect to crimes that are not addressed by the ICC.

[66.] *Form of acknowledgement*: Where the State concerned and the Prosecutor have agreed that the ICC would be the most appropriate forum for at least some of the cases in question, it would be preferable for the OTP to seek express and written confirmation from that State. The OTP should consider developing a form wherein the State acknowledges non-exercise of jurisdiction in favour of ICC jurisdiction and pledges its cooperation with the ICC investigation and prosecution.²⁷ This is particularly important where the State concerned is a non-State Party (see for analogy Article 12(3), allowing assumption of the obligations of Part 9). Such arrangements could also be coupled with a declaration of acceptance of jurisdiction under Article 12(3). For States Parties, such arrangements can effectively bolster or make more effective compliance with obligations of Part 9. Arrangements with States Parties and non-States Parties could also be coupled with a referral of the situation to the ICC.

²⁷ Such arrangements would have a firm legal basis in the Statute, see for example Article 54(3)(c) and (d), as well as Article 4(1) (legal capacity).

4.2. Security Council referrals

[67.] *Significance of Chapter Seven:* A Security Council referral under Article 13 (b) of the Statute presupposes action taken under Chapter VII of the Charter of the United Nations, which may only be taken after the Security Council has determined the existence of a threat to the peace. The action is taken to maintain or restore international peace and security, in conformity with Article 39 of the Charter. According to Article 48 of the Charter, the action required to carry out decisions of the Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. Such action may be taken by the Members concerned directly and through their action in the appropriate international agencies of which they are members.

[68.] *Complementarity regime applies:* As a matter of principle, the complementarity regime applies even in the event of a Security Council referral. Articles 17 and 19 do not indicate any exception for Security Council referrals. Although the Security Council has enforcement powers under the UN Charter when acting under Chapter VII (Articles 25, 41, 103), these powers relate primarily to States, and not directly to international institutions such as the ICC. Moreover, the Statute explicitly contemplates and addresses the interaction of ICC procedures and Security Council actions, including the extent to which procedures are affected by a Security Council action (Articles 13, 16, 18). For example, the Statute specifies that the Article 18 notification procedure does not apply for Security Council referrals, whereas no such suspension is stipulated for Articles 17 and 19, raising a clear *e contrario* inference.

[69.] *Order to States to facilitate admissibility:* While the Security Council may not be able to alter the principles of the Statute, it clearly can issue binding orders to States. All members of the Group agreed that the Security Council has the power to issue orders to States to comply with requests from the ICC.²⁸ The Group also discussed whether the Security

²⁸ In this connection, the OTP should be ready, once the international climate is conducive, to forge cooperative ties with the Council, in order to report on ICC activities and to provide objective information that might under appropriate circumstances inspire the Council to refer a situation. The OTP may also have general information which in given contexts might prove useful or indeed important for the Security Council in the exercise of its functions. In the meantime, nothing prevents the OTP from informing or alerting the UN Secretary General of developments which may be important for the Organization, which the

Council could go further and, in a given case, acting under Chapter VII, order all or some UN Member States to yield to the Court, by declining to exercise their primary jurisdiction with respect to crimes investigated and prosecuted by the ICC. Under such an approach, the complementarity principle would still apply,²⁹ but admissibility would be upheld by the Court, given the resulting absence of competing national proceedings as a result of compliance with the order of the Council. As an autonomous body, the ICC would remain free to make an independent and final determination of issues of jurisdiction and admissibility. It is important not to overstate the powers of the Council, and in particular it was emphasized that the Council would not be ordering non-action with a view to enabling impunity, but rather non-action in order to facilitate prosecution by the ICC. It was also emphasized that the Council is bound by the UN Charter and may only act in accordance with it.

[70.] *Assessment:* The Group was divided in its assessment of the proposition that the Council could issue such orders to facilitate admissibility. On the one hand, some members believed that it was legally sound and offered significant benefits.³⁰ On the other hand, some members did not believe that the Security Council had the power to issue such orders,³¹

Secretary-General may in turn choose to bring to the attention of the Security Council under Article 99 of the UN Charter.

²⁹ The procedural right of the accused to challenge admissibility would remain intact, but in practice, such challenges would not succeed on the merits (apart from challenges based on the principle of *ne bis in idem* pursuant to Articles 17(1)(c) and 20(3) where the accused had previously been convicted or acquitted and insufficient gravity pursuant to Article 17(1)(d)) given that States concerned would have declined to investigate or prosecute as per the Security Council order.

³⁰ These members noted that the Security Council already has the power to create Tribunals with primary jurisdiction (see Article 9(2) of the ICTY Statute and Article 8(2) of the ICTR Statute), and felt that it would be retrogressive and inconsistent with the purposes of the UN Charter if the ICC could not be placed in a comparable situation. These members felt that Security Council referrals of this nature can render the ICC more effective in difficult situations.

³¹ These members noted that the Security Council does not have the power to order Member States directly not to investigate or prosecute genocide, crimes against humanity or war crimes, crimes which violate *jus cogens* prohibitions over which States have *erga omnes* obligations to repress. These members also thought that the exercise of any such power would alter the balance of the proper relationship between the Security Council and the ICC as reflected in the Rome Statute and in the draft Relationship Agreement. Instead, the Security Council simply had the power under the UN Charter to require Member States to comply with requests to defer to the ICC's concurrent jurisdiction and to co-operate with the ICC.

and some members had policy concerns about the wisdom of exercising such a power.³²

4.3. Amnesties and approaches other than prosecution

[71.] The stance of the OTP with respect to alternative forms of justice should probably be framed, conceptually, under Article 53(1)(c) and (2)(c), *id est*, the prosecutorial discretion not to proceed where it is not in the “interests of justice” to do so. Nonetheless, the issue is still noteworthy in a report on complementarity, as it relates to the proper relationship between the ICC and national efforts.

[72.] Mechanisms other than prosecution for dealing with past abuses, including alternative forms of justice, may raise difficult questions for the OTP in interpreting its role and mandate. In certain circumstances, such mechanisms can supplement criminal justice, but difficulties arise when they result in non-prosecution of ICC crimes. On the one hand, alternative approaches should not be summarily dismissed.³³ On the other hand, the ICC is entrusted with a specific Statute mandate to help ensure that the most serious crimes do not go unpunished.

[73.] Critical factors that might guide the OTP include:

- *Persons most responsible*: Are conditional amnesties/alternative measures made available only to lower-ranked offenders? Or, are they available to the persons most responsible (PMR)? There may be logistical, moral, and legal grounds to treat lesser offenders through alternative measures – particularly following mass crimes where the number of offenders is overwhelming – but it is more problematic where PMR obtain lenient treatment. The ICC may properly focus on the PMR and be more prepared to insist on prose-

³² These members felt that it would not be prudent to advocate exercise of such a power, particularly in the current international climate, where the Security Council has not always been exemplary in the battle against impunity. Exercise of such a power could easily be open to abuse.

³³ Two members emphasized, however, that amnesties for genocide, crimes against humanity or war crimes are prohibited under international law (one suggested that this bar applied in all cases and the other suggested that it applied at least for the most responsible persons), and that this should be a decisive consideration for the Prosecutor’s exercise of discretion. They also emphasized that even if they were permitted under international law that it would not be wise for the Prosecutor to announce that he was considering criteria for determining which national amnesties would be acceptable.

cution, and yet have less reason to intervene in the handling of lesser offences by recovering societies.

- *International legitimation*: Has the international community, for example through competent organs of the United Nations such as the Security Council, endorsed the mechanism or otherwise signified that it constitutes a contribution to international peace and security, justice or other main purposes of the United Nations? The fact that the international community is supportive of national efforts in this context may have a bearing on the prosecutorial discretion not to proceed in the interests of justice.
- *Self-amnesty*: Are the more lenient alternative measures granted by a regime to itself, or are they granted by the society as a whole, in a democratic process? Have the perpetrators remained in power?
- *Bringing to justice*: Does the alternative justice mechanism lead to some form of punishment, or does it result in complete exoneration and amnesty?
- *Quality of measures*: Various other factors may also be relevant:
 - Compatibility with international duties to bring perpetrators to justice?
 - Severity of circumstances of necessity justifying departure?
 - Is there a full and effective investigation into the facts?
 - Is the commission or body independent and impartial?
 - Is the commission or body effective, equipped with the necessary resources and powers to carry out its mandate?
 - Does the procedure provide a sense of justice for victims?
 - Is the procedure an attempt to shield perpetrators from justice?
- *General considerations*:
 - Gravity and severity of crimes; international community interest in repression of such crimes;
 - Rights and interests of individual victims and groups of victims, as communicated by themselves or their representatives;
 - Interest of the affected society, as communicated by its political representatives; and
 - Consistency in ICC prosecutorial policy.

[74.] In the view of the majority of the Group,³⁴ it would be preferable for the OTP to avoid promulgating too precise a position on the issue, until some experience is acquired in actual situations. Past experience demonstrates that it would be arduous to attempt to develop a general doctrine on how to assess such situations. One must be alert to different contexts, including political, cultural, security-related and other factors. A proactive stance will however be necessary if, for example, the OTP is consulted by a State Party developing an alternative justice mechanism.

4.4. Role of non-territorial states

[75.] Jurisdictional bases other than territory, such as active nationality as well as passive nationality and universal jurisdiction, can also play an important role in the fight against impunity. Under the complementarity principle, a genuine investigation by such third States would preclude the ICC from exercising jurisdiction, provided they are indeed able to secure the surrender of offenders and obtain access to evidence. The non-exercise of jurisdiction by a territorial State does not alter the primacy of other States *vis-à-vis* the ICC.³⁵

[76.] In addition to encouraging prosecution by territorial States, the Prosecutor may strengthen the complementarity regime by actively encouraging non-territorial States to exercise jurisdiction. The guiding principle in doing so should be to actively encourage those States that provide the most promising prospect for an effective investigation and prosecu-

³⁴ Two members of the group expressed the view that the Office of the Prosecutor should take a proactive stance, and should establish, publicize and consistently apply, clear criteria regarding Truth Commissions and amnesty laws as soon as practicable. In accordance with this view, this would increase transparency and certainty in the action of the OTP, avoid potential criticisms of arbitrariness, facilitate the decision-making process of States thinking of establishing Truth Commissions and/or passing amnesty laws, and enhance the *auctoritas* of the Office within the international community.

³⁵ In fact, the procedures under Articles 18 and 19 clarify that non-territorial States are included in the process of preliminary rulings and challenges to admissibility. Article 18(1) requires the Prosecutor to notify “all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned” and “any such State may inform the Court that it is investigating or has investigated “its nationals or others within its jurisdiction” (Article 18(2)). Likewise, Article 19(2)(b) and (c) are clear as to providing not only the territorial State with the possibility of challenging admissibility, but also the State of active nationality and “a State which has jurisdiction over a case” provided the latter “is investigating or prosecuting the case or has investigated or prosecuted”.

tion. The availability of and access to witnesses, the presence of the alleged perpetrator on a State's territory, and the independence and impartiality of the judiciary are important elements in determining that prospect.

[77.] Non-territorial States may also be encouraged to provide political, technical and logistical assistance to facilitate investigation efforts and prosecution efforts, whether by another State or by the ICC.

Annex 1: Article 17 of the Rome Statute

For ease of reference, Article 17 of the Rome Statute is reproduced here.

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
 - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;
 - (d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine the unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
 - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
 - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Annex 2: Rules of interpretation

The established principles of treaty interpretation should govern the interpretation of Article 17.

An important starting point under the ICC Statute is Article 21, which sets out the law to be applied by the Court, and thereby also indicates a hierarchy of sources that may be used by the Court.³⁶ Thus, the complementarity provisions of the Statute may be interpreted in the light of the Rules and Elements (Article 21(1)(a)); applicable treaties and the principles and rules of international law (Article 21(1)(b)); and general principles of law derived from national laws of legal systems of the world (Article 21(1)(c)).

Textual construction should be guided by general customary law rules of interpretation, such as those reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLOT). Treaties should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (see, for example Article 31(1) VCLOT). Regard should be had to subsequent agreements or subsequent practice on the interpretation or application of terms, as well as special meanings established as intended by the parties (see, for example Article 31(3) VCLOT). Recourse may also be made to supplementary means of interpretation, such as *travaux préparatoires*, for confirmation or for clarification where terms otherwise appear obscure, vague or unreasonable (Article 32 VCLOT).

Taking into account that the negotiating history is not determinative and is only a supplementary means of interpretation, reference to the negotiating history may be useful to establish special meanings, to confirm interpretations, and to provide clarification of obscure terms.³⁷ The nego-

³⁶ Further discussion of Article 21 is available, *inter alia*, in Margaret McAuliffe deGuzman, “Article 21”, Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos, Baden-Baden, 1999; and in Alain Pellet, “Applicable Law”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002.

³⁷ The *travaux préparatoires* of the Rome Conference are now available (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Official Records, Vol. I-III, A/CONF.183/13). With respect to other sources on the negotiating history, such as commentaries, it is important to bear in mind the difficulties in reconstructing the history, given the complexity

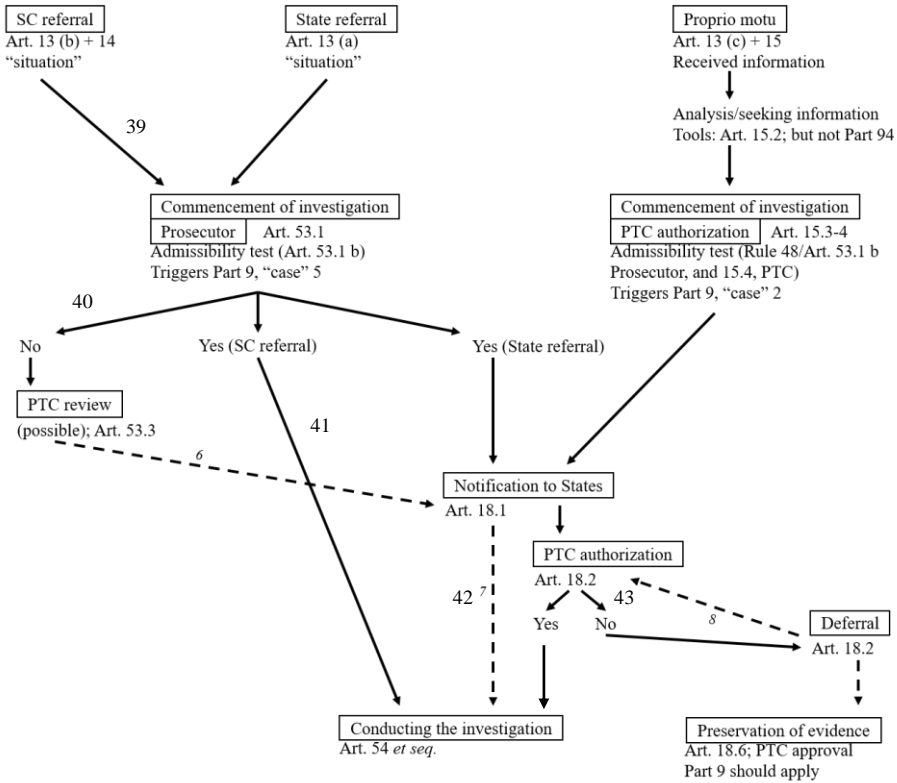
tiating history is also a useful guidepost to the ongoing sensitivities and perceptions of states, which may be borne in mind when developing policies.

With respect to the constituent instrument of an international organization, several authorities indicate that the general rules should be applied with particular emphasis on object and purpose, *id est* the principle of effectiveness.³⁸ The teleological principle is a sound compass point when applying Article 17, although one must also be sure to apply the terms of the Statute in a credible and even-handed manner.

of the Statute, the paucity of formal records, and the large amount of drafting that took place in informal meetings.

³⁸ See, for example, International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep, 1996, para. 19; and Malcolm Shaw, *International Law*, 4th ed., Cambridge University Press: Cambridge, 1997, pp. 914–15.

Annex 3: ICC procedures and complementarity



³⁹ According to one view, however, Part 9 could be applicable also at this preliminary stage.

⁴⁰ Another view is that Articles 15, 18 and 53 constitute an autonomous procedure (triggering procedure) whose object are “situations”, and that one or more “case(s)” consisting of specific events and identified suspects will occur only later as a result of conducting criminal investigation (Article 54 *et seq.*). See main text of the report, Section 3, paragraph 26, note 10.

⁴¹ The result of a PTC review under Article 53.3 may be that an investigation commences (upon the Prosecutor’s reconsideration or otherwise).

⁴² The result if no State upon notification seeks deferral (Article 18).

⁴³ The result if a deferral is ‘withdrawn’ upon review (Article 18.3), which seems to apply only in case the Prosecutor has deferred the case (not when this is the result of a denied authorisation under Article 18.2). Although not explicitly spelled out, the Prosecutor is probably required to seek PTC authorisation before an investigation can start subsequent to a deferral.

- Chamber “may” try admissibility on its own motion (Article 19(1));
- Prosecutor should, when motivated, re-assess admissibility on his own motion during the investigation (in the spirit of Article 54(1)(a), and shall do so when deciding whether to prosecute (Article 53(2)(b));
- State may challenge admissibility (Article 19(2)(b)-(c); Article 18(7) may apply);
- Accused and person subject to arrest warrant/summoned to appear may challenge admissibility (Article 19(2)(a));
- Prosecutor may seek ruling on admissibility (Article 19(3); for example, for Article 90).

Annex 4: List of indicia of unwillingness or inability to genuinely carry out proceedings

The following are suggestions as to factors that may be relevant in determining the unwillingness or inability of a State to genuinely carry out proceedings. The OTP may wish to consider these indicia further and to organise them into a structured, systematised format.

1. Contextual information

As noted in the Report, where circumstances warrant significant fact-finding, there are certain background context issues that may be gathered in order to inform an admissibility assessment under either the “unwillingness” or “inability” branches. These include:

- Constitutional role, separation of powers, and powers attributed to institutions of the criminal justice system;
- Legislative framework (offences, jurisdiction, procedures, defences);
- Parameters of prosecuting powers and discretion;
- Degree of *de jure* and *de facto* independence of judiciary, prosecutors, investigating agencies;
- Jurisdictional territorial divisions; special jurisdictional regimes (military tribunals);
- Privileges and immunities of State authorities;
- Creation of extrajudicial commissions of enquiry, truth commissions, *et cetera*;
- Granting of amnesties, pardons, enforcement of sentences, parole regimes;
- Legal regime of access to evidence;
- Legal regime of extradition, asylum, *et cetera*;
- Legal regime of due process standards, rights of accused, procedures;
- Conditions of security for witnesses and investigators, access to scene of crime;
- Integrity/corruptibility of staff and institutions;

- Resources invested and ability of State institutions to cope with scale of crime; and
- Identify key ministries and other points of contact

2. Unwillingness

As noted in the Report, proof of unwillingness may arise from a variety of factors relating to the aspects of Article 17(2). Some examples of relevant facts and evidence that may be gathered:

Purpose of shielding

- It is always possible that one may obtain direct evidence of a purpose of shielding, for example, through testimony of an “insider”;
- Evidence of shielding may exist in documentary form, including legislation, orders, amnesty decrees, instructions and correspondence;⁴⁴
- Proof of shielding may also be sought through expert witnesses on the politicised nature of a national system;
- Many factors listed below (delay, lack of impartiality, longstanding knowledge of crimes without action) will also help establish “shielding”.

Delay

- Delay in various stages of the proceedings (both investigative and prosecutorial) should be examined, for example, in comparison with normal delays in that national system for cases of similar complexity.
- Where there is delay, are there justifications for that delay?

⁴⁴ For an example of an explicit order, see the Barabarossa Jurisdiction Order issued by the German High Command in May 1941, which established that for “crimes committed against inhabitants by the Wehrmacht and its auxiliaries [...] prosecution is not obligatory and would take place only if necessary for the maintenance of discipline or the security of the Forces”: See *The German High Command Trial, Law Reports of Trials of War Criminals*, Howard Ferting, New York, 1994 (reproduction of original publication of 1949), pp. 29–31.

- Where there is unjustified delay, is it inconsistent with an intent to bring the person concerned to justice?

Independence

- Degree of independence of judiciary, of prosecutors of investigating agencies; procedures of appointment and dismissal; nature of governing body;
- Patterns of political interference in investigation and prosecution; and
- Patterns of trials reaching preordained outcomes.

Impartiality

- Commonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication. This constitutes circumstantial evidence for an inference of non-genuineness. This can include:
 - political objectives of state authority, dominant political party; and
 - coincidence or dissonance in objectives and crime (political gains, territorial goals, subjugation of group).
- Rapport between authorities and suspected perpetrators (this applies only in situations where the investigative, prosecutorial or judicial authorities are not independent of other authorities):
 - official statements (condemning or praising actions);
 - awards or sanctions, promotion or demotion;
 - financial support; and
 - deployment or withdrawal of law enforcement, inhibiting or supporting investigation.
- Linkages between perpetrators and judges; and
- Dismissal, reprisals against investigating staff for diligence or lack thereof.

Other indicators that may relate to “shielding”, “intent”, “impartiality”, and to “manner” of conducting proceedings

The following indicators may not be sufficient proof of unwillingness on their own, but may be relevant when considered in context along with other indicators:

- Longstanding knowledge of crimes without action, and investigation launched only when ICC took action;
- Number of investigations opened (in proportion to number of crimes, resources);
- Resources allocated to investigation and prosecution;
- Pacing and development of investigation;
- Uncharacteristic hastiness may also be an indication of a desire to whitewash as quickly as possible;
- Overall investigative steps manifestly insufficient in the light of the available steps;
- Evidence gathered was manifestly insufficient in the light of evidence the OTP can show is available;
- Hierarchical level: how high up the scale of authority did investigations and prosecutions reach?
- Adequacy of charges and modes of liability *vis-à-vis* the gravity and evidence;
- Were special tribunals, special processes or special investigators with lenient approaches established specifically for the perpetrators? Were special judges, prosecutors or jury members selected for the trial, in deviation from normal processes?
- Did investigators, judges or prosecutors deviate from established practices and procedures in a manner suggesting a deliberate lack of diligence?
- Was the evidence introduced manifestly insufficient in the light of evidence collected?
- Was inculpatory evidence ignored and downplayed? Was the overall situation consistently characterized in a misleading way (for example avoiding obvious proof of state involvement, describing a

one-sided genocide as civil unrest, *et cetera*)? Was exculpatory evidence exaggerated?

- Were victims and witnesses intimidated or discouraged from participating? Were reasonable steps taken to protect witnesses from being intimidated by third parties?
- Obvious departures from normal procedures, showing unusual lenience and deference to accused;
- Were findings rendered that were irreconcilable with the evidence tendered? Were findings markedly slanted in one direction?
- Were unusual rulings of law made in departure from previous practice and to the benefit of accused? Was substantive law (offences, defences) generally compatible with international standards, or where there significant departures that raise concerns about “genuineness”?
- Were amnesties, pardons, or grossly inadequate sentences issued after the proceeding, in a manner that brings into question the genuineness of the proceedings as a whole?
- Refusal to allow observers or trial monitors (unless justification shown); and
- Refusal to co-operate with the ICC by a State Party or a State otherwise accepting an obligation to co-operate.

3. Inability

The following facts and evidence may be relevant to the first set of considerations in the inability test (total or substantial collapse or unavailability of national judicial system):

- lack of necessary personnel, judges, investigators, prosecutor;
- lack of judicial infrastructure;
- lack of substantive or procedural penal legislation rendering system “unavailable”;
- lack of access rendering system “unavailable”;
- obstruction by uncontrolled elements rendering system “unavailable”; and
- amnesties, immunities rendering system “unavailable”.

Annex 5: Materials on the burden of proof

The following texts are suggested as possible sources for further research on the burden of proof:

- Mojtaba Kazazi, *Burden of Proof and Related Issues: A study on Evidence before International Tribunals*, Kluwer Law International, London, 1995.
- Richard B. Lillich, ed., *Fact-Finding Before International Tribunals*, Transnational Publishers, New York, 1990.
- Durward V. Sandifer, *Evidence Before International Tribunals*, University Press of Virginia, Charlottesville, 1975.
- Sir Rupert Cross and Colin Tapper, *Cross on Evidence*, 7th ed., Butterworth, London, 1990.
- J.D. Heydon, *Cases and Materials on Evidence*, Butterworth, London, 1975.
- Ron Delisle and Don Stuart, *Evidence: Principles and Problems*, 6th ed., Carswell, Toronto, 2001.

International law as well as domestic laws, in both civil and common law systems, generally require that the party alleging a claim bears the burden of proof as to the support of that claim.⁴⁵

There are various authorities indicating that that burden of proof can be shifted in some circumstances, such as where another party has the

⁴⁵ *Onus probandi actori incumbit* “is the basic rule of the burden of proof. According to this rule, the party who makes allegations regarding a disputed fact or issue bears the burden of proving such fact or issue. This rule places the brunt of the burden of proof on the claimant. This is a principle which is generally recognized and accepted in different legal systems [civil and common law alike] and in international law.” (See Kazazi, 1995, p. 369)

The “normal rule of evidence and burden of proof that has been adopted in the practice of the [ICJ] is the simplest of all formulations: that a party seeking to assert a claim should bear the burden of proof as to the facts necessary to support that claim” (see Lillich, 1990, p. 34).

The burden of proof principles of specific countries of various legal systems also provide support for this general proposition. For example, the “general rule” in England is that “the legal burden of proving facts lies on him who asserts them” (see Heydon, 1975, 14). Canada and the US generally also subscribe to this principle. With respect to civil law countries, it is also the case that the party that seeks to alter an existing or acquired situation by establishing a proposition bears the burden of proof (see, for example, France and Belgium) (see Kazazi, 1995, pp. 60–61).

best access to the relevant information. In this connection, there are international law precedents that may be of particular interest. The *Bleier v. Uruguay* decision of the Human Rights Committee, held at para. 13.3.:

With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.

Judgments of the European Court of Human Rights may also be of interest. For example, the Court held in *Avsar v. Turkey*:

Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; *Ertak v. Turkey*, no. 20764/92, § 32, ECHR 2000-V, and *Timurtaş v. Turkey*, no. 23531/94, § 82, ECHR 2000-VI).

Similarly, in *Salman v. Turkey*, the Court held:

[...] such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their con-

trol in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

In the *Corfu Channel Case*, the International Court of Justice “considering the difficulties to be faced by a victim of a breach of international law in finding direct proof of facts in the territory of another State, recognized the admissibility of inferences and circumstantial evidence. According to the Court, ‘such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence’” (Kazaki, p. 261).

Commentators also note that adverse inferences may be drawn by international tribunals from a party’s refusal to produce evidence known or presumed to be in its position, and that tribunals have given judgment based on the application of such a rule (see, for example, Sandifer, pp. 147–53 and Lillich, p. 209).

It was agreed that further research was needed to determine the circumstances when the burden of proof falls on the party with control of the information and when adverse inferences may be drawn if a party with information fails to produce it, with a view to preparing a litigation strategy for each stage of the proceedings when admissibility may be at issue.

Annex 6: Materials on norms of due process

International principles and standards related to due process and impunity

There are many sources on international principles and standards related to due process and impunity. The following documents may be of interest. In addition, there are significant cases on the matter that should be examined (see, for example, Annex 7).

- UN Guidelines on the Role of Prosecutors (1990)
- UN Basic Principles on the Independence of the Judiciary (1985)
- UN Basic Principles on the Role of Lawyers (1990)
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)
- UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2000)
- UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (1973)
- UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- UN Standard Minimum Rules for the Treatment of Prisoners
- Final Report of the Special Rapporteur on Impunity (1996)
- UN Commission on Human Rights Resolution 2002/79 on “Impunity”
- HRC General Comment 3, “Implementation at the national level” (Obligation to ensure rights), Article 2, Thirteenth session (1981)
- HRC General Comment 8, “Right to liberty and security of persons”, Article 9, Sixteenth session (1982)
- HRC General Comment 13, “Equality before the courts and the right to a fair and public hearing by an independent court established by law”, Article 14, Twenty-first session (1984)

- HRC General Comment 20, “Concerning prohibition of torture and cruel treatment or punishment”, Article 7, Forty-fourth session (1992)
- CoE Recommendation No. R (94) 12 of the Committee Of Ministers To Member States On The Independence, Efficiency And Role Of Judges (1994)
- CoE Recommendation Rec (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system (2000)
- CoE Recommendation Rec (2000) 21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer (2000)

Annex 7: Selected human rights jurisprudence of possible relevance to admissibility

The following authorities may be of interest, although one must bear in mind that the standard for admissibility is distinct from these human rights standards, and moreover that the available jurisprudence is not entirely consistent.

Unwillingness or inability:

Horvath v. Secretary of State for the Home Department, House of Lords, 6 July 2000

Obligation to investigate and prosecute:⁴⁶

Bleier Quinteros v. Uruguay, UN Human Rights Committee, 17 September 1981

Bautista de Arellana v. Colombia, UN Human Rights Committee, 27 October 1995

Mahmut Kaya v. Turkey, European Court of Human Rights, 28 March 2000

Cyprus v. Turkey, European Court of Human Rights, 10 May 2001

Selmouni v. France, European Court of Human Rights, 28 July 1999

Assenov v. Bulgaria, European Court of Human Rights, Application No. 00024760/94

Aksoy v. Turkey, European Court of Human Rights, 18 December 1996

Kiliç v. Turkey, European Court of Human Rights, 28 March 2000

⁴⁶ In the context of determining whether local remedies had to be exhausted because they were effective, see also the following jurisprudence from the Human Rights Committee, *Dermi Barbato v. Uruguay*, Communication 84/81; the European Court for Human Rights, *Öcalan v. Turkey*, 12 March 2003 and *Akdivar and others v. Turkey*, 16 September 1996; the Inter-American Court of Human Rights, *Velásquez Rodríguez* case, Preliminary Objections, 26 June 1987, *Godínez Cruz* case, January 20, *Fairén Garbi and Solís Corrales* case, March 15, Advisory Opinion of 10 August 1990 on “Exceptions to the Exhaustion of Domestic Remedies”, Advisory Opinion OC-11/90, August 10, 1990, Inter-Am. Ct. H.R. (Ser. A) No. 11 (1990); and on relevant jurisprudence of the African Commission on Human and Peoples’ Rights, see N. J. Udombana, ‘So far, so fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights’, 97 AJIL (2003), pp. 1-37, pp. 21-34.

Orhan v. Turkey, European Court of Human Rights, 18 June 2002

Godinez Cruz v. Honduras, Inter-American Commission for Human Rights, 18 April 1986

Blake case, Inter-American Commission for Human Rights, 24 January 1998

Guy Malary case, Inter-American Commission for Human Rights, Case 11.335, report n. 78/02.

Velasquez Rodriguez case, Inter-American Court for Human Rights, 29 July 1988

Barrios Altos case, Inter-American Court for Human Rights, 14 May 2001

Shielding:

Genie-Lacayo v. Nicaragua, Inter-American Court for Human Rights, 29 January 1997 (also unjustified delay and lack of independent and impartial)

Villagrán Morales et al., Inter-American Court for Human Rights, 19 November 1999.

Ignacio Ellacuria, Inter-American Commission for Human Rights, Case 10.488, report n. 136/99.

Unjustified delay:

European Court of Human Rights, Italian group case on undue delay [violation of Article 6(1)] of 2 February 1991: *Manzoni, Pugliese (I), Alimena, Frau, Ficara, Viezzer, Angelucci, Maj, Girolami, Ferraro*

Abdoella v. The Netherlands, European Court of Human Rights, 25 November 1992

Dobbertin v. France, European Court of Human Rights, 25 February 1993

M'Boissona v. Central African Republic, UN Human Rights Committee, 7 April 1994

Taylor (Desmond) v. Jamaica, UN Human Rights Committee, 2 April 1998

Finn v Jamaica, UN Human Rights Committee, 31 July 1998

Other Jamaican cases: *Little, Lewis, McLawrence, Steadman, Taylor, Thomas, Walker and Richards, Williams*

Genie Lacayo case, Inter-American Court for Human Rights, 29 January 1997, series A no. 30

Guy Malary case, Inter-American Commission for Human Rights, Case 11.335, report n. 78/02

Independent and impartial:

Bahamonde v. Equatorial Guinea, UN Human Rights Committee, 20 October 1993

Constitutional Rights Project (in respect of Akamu, Adegas and Ors) v. Nigeria, African Commission for Human and Peoples Rights, 2 October 1995

Coyne v. U.K., European Court of Human Rights, 24 Sept. 1997

Ciraklar v. Turkey, European Court of Human Rights, 28 October 1998

Villagrán Morales et al., Inter-American Court for Human Rights, 19 November 1999

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Part 3

Code of Conduct and Regulations of the Office of the Prosecutor

Draft Regulations of the Office of the Prosecutor

Carlos Vasconcelos*

46.1. Introduction

Inputs received in the broadly-based consultation process in Part 1 of this volume – from legal practitioners in different criminal justice systems, both civil and common law – suggest that the Prosecutor of the International Criminal Court (‘ICC’) should adopt as early as possible, at least on an interim basis, basic regulations governing the most practical issues that would be before the Office of the Prosecutor from the start of its work. This would be in the interest of the efficient and sound operation of the Office during its critical early days. Rule 9 of the ICC Rules of Procedure and Evidence requires that the Prosecutor, in “discharging his or her responsibility for the management and administration of the Office of the Prosecutor, [...] shall put in place regulations to govern the operation of the Office”.¹

Against this background and in light of the inputs received, the preparatory team for the ICC Office of the Prosecutor set out to have prepared carefully worded and well-balanced draft Regulations for the consideration of the first Prosecutor. It concentrated on the issues that the Office of the Prosecutor would most likely face in the early weeks and months of its work. The co-ordinator of the team² defined five topics: 1) a

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¹ International Criminal Court, Assembly of States Parties, Rules of Procedure and Evidence, 9 September 2002 (<http://www.legal-tools.org/doc/8bc6f/>). Unless otherwise stated, all references to rules are to these Rules of Procedure and Evidence.

² That is, Professor Morten Bergsmo.

Code of Conduct for the Office of the Prosecutor (as elaborated in further detail in the Chapter 47 of this volume); 2) the management of preliminary examinations and the decision-making process to start investigations; 3) some aspects of carrying out investigations; 4) the management of incoming information and potential evidence; and 5) the training of members of the Office of the Prosecutor. The preparatory team prepared a first, very tentative draft which was subjected to careful scrutiny and drafting by a select group of legal experts that was constituted in the second week of March 2003.³

The expert group was composed of Mr. Tor-Aksel Busch (Director General of Public Prosecution, Norway), Mr. Peter Lewis (Business Development Director, Crown Prosecution Service, United Kingdom), Mr. Michael Grotz (Bundesanwalt beim Bundesgerichtshof, Germany), Mr. Nobuo Hayashi (Legal Officer, International Criminal Tribunal for the former Yugoslavia), the present writer, and, from the side of the preparatory team, Professor Morten Bergsmo and Dr. Markus Benzing. It was a small but highly competent group of experts. For example, Mr. Busch is perhaps the most respected prosecutor in Europe, having served as Director-General and Deputy Director-General of Public Prosecution of Norway for more than 30 years. Mr. Lewis was one of the leaders of the Crown Prosecution Service for England and Wales at the time of the expert group, and he had played an important role in the ICC negotiations as a member of the UK delegation. The present writer had served as Deputy Prosecutor in the United Nations Transitional Administration in East Timor.

The group met at the interim seat of the Court in The Hague on 26 March, 25 April and 27 May 2003, but did most of its work via e-mail communication. The tentative draft of the Regulations had been penned chiefly by Dr. Benzing, then consultant-member to the preparatory team, under the guidance of its co-ordinator. A list of issues potentially to be covered in the draft Regulations was presented to the members of the expert group. It included the following ten points:

1. Consistent approach to the keeping of case files and the recording of information on internal Office of the Prosecutor work products with a view to making them easily

³ The mandate had been outlined in letters to the experts prepared by the co-ordinator of the preparatory team and signed by the Director of Common Services (later Registrar), Judge Bruno Cathala.

accessible for the entire office (see Staker, General OTP Input, p. 6).

2. Relations with non-governmental organisations ('NGOs'). Establishment of an NGO Liaison Officer (see Stuebner, General OTP Input, p. 4).
3. Involvement of victims.
4. "Public relations": How does the Office of the Prosecutor "sell" its decisions to investigate and not to investigate to the general public? Should the prosecutorial policy be made public?
5. Witness protection during the investigation phase (Article 57(3)(c)) – criteria for when it should be sought, how application to the Pre-Trial Chamber should be made.
6. "Consistency in legal approach": Who ensures that the legal theories adopted in the charges document are consistent with the Office of the Prosecutor's general approach? Who formulates this approach?
7. Admissibility proceedings (preliminary rulings) under Article 18 of the ICC Statute.⁴
8. Rule 165 of the Rules of Procedure and Evidence, Article 70 of the ICC Statute *proprio motu* initiation of proceedings by the prosecutor (offences against the administration of justice).
9. Should the Regulations extend the grounds for disqualification of the Prosecutor and Deputy Prosecutors (Article 42(7) of the ICC Statute) to all staff of the Office?
10. Reaction of the Office of the Prosecutor to address potential miscarriages of justice: (a) a claim of miscarriage of justice by a person convicted by the Court and (b) a claim for compensation for a miscarriage of justice. Mr. Christopher K. Hall suggested (in conversation with Mr. Salim A. Nakhjavani) that an internal review procedure should prevent unreflected or *de facto* opposition to any such motion by the Office of the Prosecutor. An internal review procedure could be triggered by the discovery of new evidence by the Office, findings of misconduct of a

⁴ Statute of the International Criminal Court, 17 July 2002, in force 1 July 2002 (<http://www.legal-tools.org/doc/7b9af9/>). Unless otherwise stated, all references to articles are to the ICC Statute.

member of the Office regarding the integrity of the evidence in a case, or any other fact that might make the conviction unsafe.⁵

The members of the group also received a copy of the draft Code of Conduct that had been written by the preparatory team for the ICC Office of the Prosecutor, as described in Chapter 47 (a process led by Mr. Salim A. Nakhjavani, also a consultant-member to the preparatory team). The draft Code had been drafted on the basis of a comparative study and important input from the Secretariats of the International Association of Prosecutors and the Coalition for the International Criminal Court. The draft Code was subsequently integrated into the draft Regulations.

As Rule 9 of the Rules of Procedure and Evidence provided that the Prosecutor “shall consult with the Registrar on any matters that may affect the operation of the Registry” in preparing or amending the Regulations of the Office, the preparatory team invited input on the draft Regulations from key lawyers in the Court’s pre-Registry in early May 2003, including Mr. Phakiso Mochochoko, Dr. Alexander Muller, Ms. Brigitte Benoit, Mr. Gilbert Bitti and Mr. Shamim Razavi. This input was shared with the expert group.

The experts were invited to the swearing-in ceremony of the first Prosecutor at the Peace Palace in The Hague on 16 June 2003, as well as to the public hearing organised by the Office of the Prosecutor on 17–18 June 2003. The draft Regulations were presented as “the substantive foundation of the public hearing”,⁶ having been made available on the Court’s website in the first week of June 2003, together with other materials generated by the preparatory team.

46.2. The Master Document: The Draft Regulations

46.2.1. Overview

The draft Regulations are provided in Annex 1 to this chapter. They propose guidelines, standard operating procedures and a Code of Conduct for the Office of the Prosecutor. The document is divided into five separate and autonomous books:

⁵ Document on file with the author. It is reproduced here without modification.

⁶ From communication to the present author dated 4 June 2003 (on file with the author).

- *Book 1* (Mission and Organisation) is meant to explain the mission and mandate of the Office and sets out its internal structure.
- *Book 2* (Standards of Conduct and Training) contains a draft Code of Conduct for the staff members of the Office and makes suggestions for the internal training guidelines.
- *Book 3* (Operations Manual) regulates the core prosecutorial activity, from preliminary investigations to the actual prosecution.
- *Book 4* (Information and Evidence Management) comprises rules for an information management system and the handling of information submitted to the Office.
- *Book 5* (External Communication) concerns the relations of the Office with the media and the public.

Book 1 is subdivided into three parts:

1. The Regulations.
2. Mission of the Office of the Prosecutor.
3. Structure of the Office.

Book 2 is subdivided into two parts:

1. Code of Conduct.
2. Training.

Book 3 is subdivided into four parts:

1. Complementarity practice covers standard monitoring activities; open sources evaluation; bilateral agreements, activities, dialogue; assessment of inability, unwillingness and complementarity in the judicial process.
2. The management of preliminary examination, Article 53(1) evaluation, and start of investigation is subdivided into four sections:
 - (a) Values and principles;
 - (b) Preliminary examination and initiation of investigation *proprio motu* pursuant to Articles 13(c) and 15;
 - (c) Article 53(1) evaluation and start of investigation pursuant to Article 13(a) and (b);
 - (d) Decision to start investigation.
3. Investigation is subdivided into four sections:
 - (a) Values and principles;

- (b) General;
 - (c) Investigation plan, draft charges document, proof chart;
 - (d) Interviews.
4. Prosecution is subdivided into three sections:
- (a) Values and principles;
 - (b) Internal review procedure for the draft charges document;
 - (c) Decision to prosecute.

Book 4 is subdivided into 12 parts:

1. Values and principles.
2. Introduction.
3. Storage of evidence and information.
4. Meta-information.
5. Retrieval.
6. Disclosure.
7. Presentation of evidence to the Court.
8. Archiving and deleting stored information.
9. Data security.
10. Management of evidence away from the seat of the Court.
11. Duties of the Services Section concerning information received by the Office under Articles 13, 14 and 15.
12. National security information.

Book 5 is subdivided into three parts:

1. Media relations.
2. Information about crimes.
3. The problem of denial of massive crimes.

This comprehensive listing of divisions and subdivisions of the draft Regulations has the purpose of stressing the wide range of issues covered by the preparatory team and the expert group which were likely to happen in the everyday life of the Office of the Prosecutor. This vision of the future was only made possible by drawing on the experience of the *ad hoc* tribunals and of senior prosecutors and officials from widely different legal systems, many of whom offered advice that is reproduced in Part 1 of this book. It is true that “the experts have advised that the initial

draft Regulations for adoption on an interim basis should be limited to a few key issues [...] [so] that the guidelines will cover more and more issues as they become of relevance for the Office in the future, in the light of emerging practice”, as stated in the presentation of the Regulations published on the ICC web site prior to the public hearing held on 17–18 June 2003 in The Hague. The public hearing was called by the first Prosecutor in order to advise him on policy questions. But even these “few key issues”, considering the practical experience of several years of functioning of the *ad hoc* tribunals, could not fit in a short set of general principles, if a new institutional *ethos* of an international prosecution service was to be created.

Overall, the draft Regulations are made up of five books (including Book 2 on the Code of Conduct and Training, not covered in this chapter), 12 parts (Book 4 has only section subdivisions), 25 sections (but not all parts are divided into sections), and 99 regulations (including the 20 regulations of Book 2). Some parts, sections or regulations have been listed only as empty headings or bullet points – a sign that the project was conceived as work in progress at the time, for which input would be welcome and necessary. The original document covers 59 pages, including explanatory footnotes composed by the drafters.

It is a difficult task to choose major highlights among the regulations as they all seem essential for the sound operation of the Office. The focus will therefore be on some of the most sensitive or controversial issues (such as complementarity practice, the relationship with the United Nations Security Council and the public, and the powers of the Prosecutor during the investigation), in the order they appear within the document, while also referring the reader to a comparative list of issues under Annex 3.

46.2.2. Book 1

The Introduction to Book 1 makes two crucial points: first, and rather obviously, the Regulations are subordinated to the ICC Statute and the Rules of Procedure and Evidence; and second, they shall enable transparency of decision-making and consistency of approach in order to promote respect for the enforcement of international justice and foster complementarity. This self-restraint sought to preserve the authority and independence of the Prosecutor, as stated in the Statute.

Part 1 of Book 3 was reserved for complementarity practice but it did not go beyond the following bullet points: standard monitoring activities; open sources evaluation; bilateral agreements, activities and dialogue; and assessment of inability, unwillingness and complementarity in the judicial process. This is not surprising, considering the sensitivity of the topic. The proper functioning of this activity is crucial for the effectiveness of the Office and even the ICC. In fact, the effectiveness of the Court will be measured by the enforcement of international criminal law in domestic jurisdictions.

Parts 2, 3 and 4 of Book 3 contain more procedural provisions. In other words, their regulations present a step-by-step guide for prosecutorial tasks, from preliminary examinations and Article 53(1) evaluations, to the trials.

The prerogatives of the Office of the Prosecutor to analyse and evaluate information from different sources without the control of the Pre-Trial Chamber (Articles 13, 15 and 53(1)) – that is, prior to the start of a formal investigation – are regulated in Part 2, where separate procedures are provided for the flow of information that could fall into an investigation *proprio motu* pursuant to Articles 13(c) and 15, and for referrals from States Parties or the Security Council (Articles 53(1) and 13(a) and (b)).

Regulation 3 makes the Deputy Prosecutor (Investigations) responsible for the preliminary examination of all information that might lead to a *proprio motu* investigation by the Prosecutor. He or she shall keep a log of all conducted preliminary examinations under Article 15, which shall be regularly updated. At the same time, the Senior Manager of the Services Section, who is in charge of confirming receipt of the incoming information, shall keep a register of all communications made under Article 15.⁷

The Deputy Prosecutor (Investigations) establishes standing Article 15 Preliminary Examination Teams taking into consideration, as far as possible, an adequate representation of knowledge of the relevant legal systems and languages. Each team shall consist of persons from the Investigation and Analysis Sections, a prosecutor and a legal adviser. These two professionals shall conclusively instruct the Preliminary Examination Team on relevant legal issues.

⁷ In fact, a footnote suggests the development of a standard form giving guidance on how to submit information to the Office of the Prosecutor.

The Preliminary Examination Team's tasks derive exactly from its name to

make an assessment of the credibility and reliability of the sources of information; [...] to the extent possible, preliminarily characterise the nature of alleged crimes, identify those involved, recommend targets of a possible investigation, and assess the likelihood of a successful completion of such an investigation [...]; tentatively assess the admissibility of a possible case under article 17 and draw attention to all factors that may be relevant for the assessment of whether there are substantial reasons to believe that such investigation would not serve the interests of justice (article 53(1)(c) and rule 48), taking into account the general policy of the Office" (regulation 4.5). It may also propose to the Deputy Prosecutor (Investigations) the request for additional information as provided for in article 15(2) in order to better analyse the seriousness of the information received.

Once the Preliminary Examination Team concludes the examinations, it shall produce a written report⁸ about the preliminary examinations covering all issues listed in Regulation 4.5. The report shall contain a recommendation on further action to the Deputy Prosecutor (Investigations) and the Deputy Prosecutor (Prosecutions).

Then the Regulations foresee a number of possible directions. Should both deputies agree that the situation does not merit starting an investigation, the material shall be regarded as not constituting a reasonable basis to proceed with an investigation. Should they agree that the situation may merit starting an investigation, they set up a draft investigation plan based on the report and the recommendations of the Preliminary Examination Team. In this case, the Deputy Prosecutor (Prosecutions) designates a senior prosecutor to supervise the drafting of the investigation plan. At this point, the direction of the process shifts from investigators to prosecutors. This will give the preparation of the decision to investigate by the Prosecutor and the investigation itself a more legally focused thrust. If agreement is not reached between the two deputies as to whether the situation may merit starting an investigation, they shall submit the matter to the Prosecutor, who decides on the draft investigation plan.

⁸ That could usually amount to half a page maximum, as suggested by a footnote.

The draft investigation plan shall contain the following information (Regulation 6.5.):

- (a) an assessment of [...] a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed or is being committed (article 53(1)(a) [...]);
- (b) the relevant background of the situation, placing the alleged offences in a broader geographical, social and cultural context;
- (c) an explanation why the alleged offences warrant a full investigation against the backdrop of other alleged offences [...];
- (d) an identification of the crime base incidents [...] and a description of [...] suspects, [...] with the overall aim of the investigation;
- (e) a tentative indication of [...] charges, modes of liability and potential defences, [...], as provided for in article 31 [...];
- (f) an explanation of the role and place of these likely suspects in the relevant chains of authority;
- (g) the whereabouts, if known, of the possible suspects and the likelihood to arrest them;
- (h) an assessment of the admissibility of a possible case under article 17 [...];
- (i) a preliminary indication of resources, time and staff likely to be required to complete the investigation;
- (j) a preliminary indication of the main categories of evidence and the amount of evidence that is likely to be required to prove the possible charges;
- (k) matters of State co-operation and security;
- (l) an explanation of how the investigation and prosecution of the alleged crimes or perpetrators is expected to fit in with the broader context of cases pursued by the Office;
- (m) potential dangers to the integrity of the investigation or the life or well-being of victims and witnesses [...] once they are informed of the intention of the Chief Prosecutor to seek authorisation, in accordance with Rule 50(1) of the Rules of Procedure and Evidence;
- (n) any other matter of relevance [...].

The draft investigation plan and the report prepared by the Preliminary Examination Team shall be submitted to the Prosecutor accompanied with a “reasoned recommendation on whether authorisation to investigate pursuant to article 15(3) of the Statute should be requested before the Pre-Trial Chamber, paying specific attention to the interests of justice as specified by article 53(1) and rule 48”.

So far, the Regulations addressed the flow of information that could initiate an investigation *proprio motu* by the Prosecutor pursuant to Article 13(c) of the Statute. Now, Section 3 of Part 2 regulates the evaluation for the initiation of an investigation (Article 53(1)) of material received by the Prosecutor by means of referrals by a State Party or the Security Council acting under Chapter VII of the Charter of the United Nations (Article 13(a) and (b)). Here it is supposed that a filtering has already been done. The evaluation procedure is then more expedited than the examination stipulated for information and material made available from different and heterogeneous sources (individuals, political parties, religious organisations and so on).

The responsibility for evaluating the information made available to him or her under Article 53(1) rests solely with the Prosecutor. He or she must assess the seriousness of the factual allegations or propositions (Rule 104(1)), the reliability of the source, issues of jurisdiction (*ratione materiae, personae, loci* and *temporis*), and admissibility. The Deputy Prosecutor (Investigations) shall keep a log of all Article 53(1) evaluations⁹ (Regulation 8.1.). All incoming referrals shall also be brought to a Register by the Senior Manager of the Services Section.

The Prosecutor establishes an Article 53(1) Evaluation Team in the event of a referral by the Security Council or a State Party. This team comprises one or more prosecutors designated by the Deputy Prosecutor (Prosecutions), one or more persons designated by the Deputy Prosecutor (Investigations), the Senior Analyst and the Chief of the Legal Advisory and Policy Section. They shall report to the Prosecutor.

The duties of the Evaluation Team, according to Regulation 9.4., include the following:

⁹ This is not to be confused with the log of all conducted preliminary examinations under Article 15, also kept by the Deputy Prosecutor (Investigations) in accordance with Regulation 3.1.

make an assessment of the credibility and reliability of the sources of information indicated in the referral. [...] preliminarily characterise the nature of alleged crimes, identify those involved, recommend targets of a possible investigation, and assess the likelihood of a successful completion of such an investigation. [...] tentatively assess the admissibility of a possible case under article 17 of the Statute in cases of a referral by a State Party and draw attention to all factors that may be relevant for the assessment of whether there are substantial reasons to believe that such investigation would not serve the interests of justice (article 53(1)(c)), taking into account the general policy of the Office in that matter.

Meanwhile, Regulation 10 recommends that the Deputy Prosecutor (Investigations) seek additional information in accordance with Rule 104(2) in order to analyse the seriousness of the information received.

Once the Evaluation Team has completed its tasks, it shall prepare a written report that enables the Prosecutor to determine whether he or she shall initiate an investigation or has no reasonable basis to proceed, in accordance with Article 53(1). The evaluation report shall cover all issues listed in Regulation 9.4. It shall be submitted directly to the Prosecutor with copies to his or her deputies. If it concludes that the situation does not merit an investigation, it shall propose a recommendation on how to explain and communicate the decision to the general public. Should the report of the Evaluation Team conclude that the situation does merit an investigation – as identified by Regulation 11.4. – a Senior Prosecutor is designated by the Deputy Prosecutor (Prosecutions) to supervise the drafting of the investigation plan. The Drafting Team also comprises the members of the Article 53 Evaluation Team, a legal adviser from the Legal Advisory and Policy Section and, as may be required, additional prosecutors.

The draft investigation plan shall have the same content listed in Regulation 6.5. on the preliminary examination for the *proprio motu* investigation, as described above. It shall similarly be submitted by the Deputy Prosecutors to the Prosecutor with a reasoned recommendation on whether an investigation shall be initiated or not.

Upon conclusion of the preliminary examination for *proprio motu* investigation or Article 53(1) evaluation report for referrals, the Prosecutor is ready to take the decision “to start an investigation under article 53(1) or to request authorisation to commence an investigation from the

Pre-Trial Chamber pursuant to article 15(3)”, taking into consideration the draft investigation plan, the recommendation by his or her deputies and all other information made available to him or her on the given situation (Regulation 12.1.).

In the recurring controversy between mandatory prosecution (*Legalitätsprinzip*) and prosecutorial discretion (*Opportunitätsprinzip*), the framers of the Draft Regulations decided not to take any position beyond the ICC Treaty. Therefore, they did not overregulate the space left to the Prosecutor by Article 53(1) and (2), which represent a compromise between the two principles.¹⁰ Regulation 12.2. repeats the three factors enumerated in Article 53(1) and Rule 48 that justify the decision not to initiate an investigation, namely:

- (a) the information available to the Chief Prosecutor does not provide a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) the case is or would not be admissible under article 17 of the Statute; or
- (c) there are substantial reasons to believe that an investigation would not serve the interests of justice, after both the gravity of the crime and the interests of the victims have been taken into account.

It is clear, however, that the last ground not to investigate has a rather political or discretionary nature. In this case, the expert group noted the following:

The experts are not in a position to make a recommendation on whether the Regulations should contain a further definition of what may constitute ‘interests of justice’. Were it to be decided that such definition be given, this could comprise the following factors: (a) the start of an investigation would exacerbate or otherwise destabilise a conflict situation; (b) the start of an investigation would seriously endanger the

¹⁰ Legality and opportunity seem rather ideological standpoints with very little practical consequences, except for the fact that where the legality principle is in force, one is not allowed to openly discuss, and therefore to decide, by which criteria selection of cases will take place. The number of convictions in common law jurisdictions such as the United Kingdom and the United States, where prosecutorial discretion is the general rule and practice, is considerably higher than in Continental European jurisdictions, where there is less space for discretionary considerations.

successful completion of a reconciliation or peace process; or (c) the start of an investigation would bring the law into disrepute.

Some of the arguments speaking in favour of such inclusion may be: (1) If the criteria are not made public, the Prosecutor will be heavily criticised if he ever makes a decision based on these factors; inclusion brings transparency; (2) It could be important for the Security Council to know these factors and take them into account when deciding whether to refer a case to the ICC; (3) Pursuant to rule 105(4) and (5), the Prosecutor has to give reasons for not starting an investigation of only based on interests of justice assessments.

Regulation 12.3. offers criteria for the Prosecutor to meet the requirement of “a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed” (Article 53(1)(a)), necessary to initiate an investigation, which is approximately equivalent to the “reasonable basis to proceed with an investigation” stated in Article 15(3) as a condition for the request by the Prosecutor to the Pre-Trial Chamber for authorisation to start an investigation *proprio motu*.¹¹

46.2.3. Book 3

The Operations Manual (Book 3) continues with Part 3 (Investigation), beginning with Regulation 14, which renews the commitment of the Prosecution with the establishment of truth, and reports to Article 54(1)(a) that imposes the investigation of incriminating and exonerating circumstances equally. This feature not only makes the Prosecutor a magistrate, but also extends the prosecutorial discretion to a level not known to most common law systems.

Investigative measures in the territory of a State shall be carried out directly by the Office of the Prosecutor whenever possible, in accordance with Article 54(3)(d), or with orders of the Pre-Trial Chamber, in accordance with Article 57(3)(d), when the State is clearly unable to execute a request for co-operation, and/or with a resolution of the United Nations Security Council referring a situation to the Court.

¹¹ On the degrees of certainty dealt with in the ICC Statute, see footnote 103, under Regulation 12(3) in Annex 1.

Each investigation shall be conducted by an Investigation Team specially created for the situation, directed by a Senior Prosecutor and composed of members of the Preliminary Examination or Evaluation Teams in order to ensure continuity. Three basic tools shall guide the investigation: the investigation plan, the draft charges document and the proof chart. The investigation plan shall be inspired in the draft investigation plan (Regulations 6 and 11). It should describe the different steps of the investigation necessary to achieve the aim of the investigation, the anticipated outcome of each step and alternative strategies. The draft charges document prepared by the Investigation Team draws upon the written report by the Preliminary Examination Team or Evaluation Team and the investigation plan. It should tentatively identify a working hypothesis, the possible crime base incidents, the suspect(s), the elements of the crimes allegedly committed, and the modes of liability, as well as anticipate possible defences to be raised by the suspects. The proof chart elaborated by the Prosecutor seized of the case shall contain the evidence collected relating to the elements of crimes and the modes of liability considered likely for inclusion in the charges document. These essential documents shall be regularly updated.

Regulations 23 to 41 regulate interviews with witnesses, suspects and accused in aspects such as preparation, the previous supply of information to the witness, record of the interview, witness identification, witnesses as potential suspects, the presence of support persons, victims of sexual or gender violence, hearsay evidence, expert witness, the role of interpreters, and interview conducted by national authorities pursuant to a co-operation request under Part 9.

For good reasons, beginning with Regulation 24, specific regulations provide for interviews of suspects and accused. After all, Regulation 24.3. states that “the prosecutor ensures the admissibility of the interview as evidence at trial”. All formalities should be complied with to ensure an unimpeachable interview regarding the free will of the accused or suspect, as if he or she were in court. He or she shall be informed of his or her rights (Article 55), the defence counsel shall be present and be communicated with in advance, and the record of the interview shall be kept safe.

Part 4 (Prosecution) of the Operations Manual has three sections – values and principles, internal review procedure for the draft charges document, and decision to prosecute – but they were all left blank for future input.

46.2.4. Book 4

Book 4 regulates information and evidence management in 12 Sections and 31 regulations, taking the advantage of electronic storage and retrieval possibilities in order to ensure the integrity of evidence for trial. It establishes an Information Management System, where pieces of evidence and other information that by its nature cannot be electronically stored are registered in appropriate sheets. Regulations concerning the storage of evidence and information foresee an Evidence Registration Number for each piece, and special provisions for documentary, audio- and video-based evidence, artefacts and meta-information for every object.

The retrieval and presentation of evidence to the Court are adequately regulated under Regulations 10 to 16. An empty entry is reserved for disclosure and access for the defence counsel, but “it is suggested that a Section on disclosure be included at a later stage, once the Pre-Trial Chamber has clarified the scope of the Office’s disclosure obligations”.

The electronic storage of data presents the permanent risk of loss or corruption, whether accidental or intentional. Thus, the whole of Section 9 is dedicated to data security, creating responsibilities for the Senior Manager of the Services Section, establishing regular backups and tools for disaster recovery, and logging all access to the stored information that could be screened in the event of a suspected breach of confidentiality.

Section 10 contains provisions regulating the management of evidence away from the Court premises. It provides for instructions on packaging, labelling, transportation, storage and maintenance of the chain of custody at all times until the piece of evidence arrives in Court, all under the responsibility of an Evidence Officer, to be appointed in every investigation by the Case Controller. Regulation 24 provides for an Evidence Seizure Record and an Evidence Registration Form for all evidence collected at a particular site, which should then be sealed in an envelope or box according to its form. Potentially exonerating evidence (Regulation 25) shall be identified, and if it is not pursued, the reasons for this decision shall be recorded on the Evidence Registration Form so that the Office of the Prosecutor may respond to the eventual allegation by the defence counsel that exonerating material was not followed up, thus breaching the duty under Article 54(1)(a). The chain of custody shall be carefully kept until the piece of evidence or information reaches registration by

the Services Section upon arrival at the seat of the Court in order to ensure its credibility and authenticity.

The Services Section is responsible for the management of information received by the Office under Articles 13, 14 and 15 (which cover all forms of evidence, information and referrals). The corresponding Register is to be kept by the Senior Manager of the Section.

At this point it is perceptible that the Draft Regulations did not regulate the Office's administrative organisation – unlike the 2009 Regulations that provide for permanent divisions, units, sections and even an Executive Committee to assist and advise the Prosecutor. However, in the first days of the Office of the Prosecutor, a “Draft Policy Paper on some policy issues before the Office of the Prosecutor”¹² was presented for discussion at the public hearing held in The Hague on 17–18 June 2003. The following fragment of the presentation of the document accounts for its purpose:

The policy and structure of the Office of the Prosecutor as set out in the draft paper have been designed taking into account the specific nature of the International Criminal Court as the first permanent institution of international criminal justice and the Office as the first permanent international prosecution service. They also take into account the logistical and resource constraints that will necessarily limit the practical scope of action of the Court.

Briefly, the policy paper proposed the following organisational units:¹³ the Immediate Office of the Prosecutor, with two units – the External Relations and Complementarity Unit and the Public Information Unit. Three sections shall be directly subordinate to the Immediate Office of the Prosecutor, which also encompasses the Legal Advisory and Policy Section, the Services Section (comprising the Language Services Unit and the Information and Evidence Unit), and the Knowledge-Base Section. Then there are two divisions, headed by the highest officials in the Office

¹² ICC, Office of the Prosecutor, “Draft Paper on Some Policy Issues before the Office of the Prosecutor for Discussion at the Public Hearing in The Hague on 17 and 18 June 2003” (<https://www.legal-tools.org/doc/abb9f7/pdf/>). See also the adopted “Paper on Some Policy Issues before the Office of the Prosecutor”, 5 September 2003 (<http://www.legal-tools.org/doc/f53870/>).

¹³ ICC, “Draft Paper on Some Policy Issues”, see *supra* note 12. The document describes in detail the duties of each of these units so as to permit the perception of a sound distribution of tasks, and even considers the workload capacity for each.

immediately after the Prosecutor, the Deputy Prosecutor: the Investigation Division and the Prosecution Division. The Investigation Division comprises an Analysis Section, an Investigation Section and a Unit for Victims. Finally, the Prosecution Division contains a Prosecution and an Appeals Section.

46.2.5. Book 5

Book 5 on External Communications covers, in three parts, media relations, information about crimes, and the problem of denial of massive crimes, but only the one concerning the media was actually drafted. Regulation 1 lists the set of interests to be balanced in the relations of the Office of the Prosecutor with the media and the public in general, apparently in order of priority:

- (a) the individual right to a fair trial and the preservation of his or her dignity at all stages of the proceedings;
- (b) the victims and witnesses' right to protection of their safety, physical and psychological well-being, dignity and privacy, as well as their right to participation in the proceedings;
- (c) the right of the public to take notice and be informed about court proceedings, bearing in mind the fact that public scrutiny forms an integral part of the framework to safeguard fair trial rights;
- (d) the duty of the Court and the Office to effectively enforce the administration of justice for the most serious crimes of concern to the international community [...];
- (e) the right of the States [...] to have preserved and protected information that prejudices their national security interests.

The empty entries are not superfluous or useless. Like others in the Draft Regulations, they should remind of the importance of the topics, at least in the view of the framers of the document, for a later standard-setting exercise.

It is clear at this point that the Draft Regulations, composed prior to the swearing in of the Prosecutor, is a longer and more comprehensive document than the ones that followed it (Annexes 2 and 3). In my view, the intention of the framers was to offer the Prosecutor-to-be a set of regulations that would cover many of the issues that would be before the Pros-

ecutor from the start of the functioning of the Court, in order to ensure the independence of the Prosecutor, and to ensure accountability and transparency for an institution that would come under political attack and that even these days is considered a modality of *lawfare*.¹⁴

As we will see, although the Draft Regulations documents was not fully adopted by the first Prosecutor, it inspired the Regulations that have guided the Office to the present.

46.3. The 2003 Regulations: An Interim That Became Permanent

On 5 September 2003, the Prosecutor adopted Regulations *ad interim* in the form of an abridged version of the Draft Regulations (see the text in Annex 2 to this chapter). The document comprises two parts: Part 1 (Operations) is basically devoted to the reception and analysis of seriousness of information; and Part 2 (Information and evidence management) is divided into 11 chapters addressing:

- General provisions;
- Storage of information and evidence;
- Meta-information;
- Retrieval;
- Disclosure;
- Presentation of evidence to the Court;
- Archiving and deleting stored information;
- Data security;
- Management of evidence away from the seat of the Court;
- Duties of the Services Section concerning information received by the Office under Articles 13, 14 and 15;
- National security information.

Altogether, the document contains 39 regulations covering 19 pages, and is therefore considerably more condensed than the Draft Regula-

¹⁴ For those who use this concept, it is practically taken for granted that the ICC “has become a significant lawfare battleground”; see Orde F. Kittrie, *Lawfare: Law as a Weapon of War*, Oxford University Press, New York, 2016, p. 47, and more extensively pp. 209–25.

tions.¹⁵ Two entries were left empty: Chapter 5 (Disclosure) and Regulation 39 (Treatment of national security information) under Chapter 11. It was expected to last until 2004 (Introduction of the Regulations), when “the final Regulations will be adopted [...] in light of the experience gained by the Office in its actual operations and taking into account the comments received through the consultation process”, but it served until 2009, when the Regulations currently in force were finally adopted.

Despite the considerably shorter length and the formally different layout of titles and entries, it is clear that the Regulations *ad interim* were significantly inspired by the Draft Regulations, both in the subjects and in the text, which was sometimes adopted without change. On the other hand, it is possible to perceive a certain immediacy in the second document, as it immediately addresses issues of operations and evidence, but dedicates less attention to topics such as mission and organisation, structure, external communications and complementarity, while there is not one word about training let alone a Code of Conduct.

Part 1 (Operations) is made up of a single chapter (Reception and analysis of seriousness of information) and three sections: reception and management of referrals; reception and acknowledgement of communications under Article 15; and analysis of the seriousness of information. Thus, drawing broadly from Book 3, Part 2, Sections 2 and 3 of the Draft Regulations, Regulations *ad interim* 1 to 7 regulate separately referrals and supporting documents from States Parties and the Security Council, on the one hand, and communications from different sources that may give birth to *motu proprio* investigations by the Prosecutor, on the other.

These regulations also distribute tasks among the Information and Evidence Unit, Legal Advisory and Policy Section, and External Relations and Complementarity Unit. With regard to the Information and Evidence Unit, it shall receive, register, digitise, store and secure referrals, communications and their supporting documents; acknowledge reception and make them electronically available to the Legal Advisory and Policy Section and External Relations and Complementarity Unit, which in turn shall analyse the seriousness of the information received (Regulations 2–6). The Information and Evidence Unit shall also elaborate weekly and monthly reports on communications received, in which it will identify

¹⁵ This consisted of 59 pages with 99 regulations (including 20 regulations for the Code of Conduct, excluded from the Regulations *ad interim*).

preliminarily communications that manifestly do not provide any basis for the Office of the Prosecutor to take further action and those requiring additional analysis with a view to possible further action, as appropriate. This preliminary identification shall further be confirmed or amended by the Legal Advisory and Policy Section, as per Regulation 7.

Regarding external communications, the Information and Evidence Unit “shall respond to those [...] which manifestly do not provide any basis for further action by way of a letter acknowledging the communication and indicating that the communication, as presented, does not provide any basis upon which the Office [...] could take further action and that unless further information is submitted, the communication will be archived” (Regulation 7.2.). Moreover, the Legal Advisory and Policy Section shall identify those communications that do not provide a sufficient legal basis for the Office of the Prosecutor to proceed and shall briefly state the reasons for this determination, together with suggestions for the author of the communication to refer to other bodies or entities, where appropriate (Regulation 7.3.a.).

In the section concerning the analysis of the seriousness of the information (Regulations 8 and 9), the document provides for the assessment and recommendations by the Legal Advisory and Policy Section addressed to the External Relations and Complementarity Unit. As the Unit responsible for matters of complementarity and external relations, it will conduct a further assessment taking into account such factors as the issues of admissibility set out in Article 17 and the interests of justice in the prosecution as provided for in Article 53(2)(c). As a result of this assessment, the Unit may “seek additional information from States, organs of the UN, inter-governmental or non-governmental organisations, or other appropriate national or international authorities, entities, associations, prosecutors and experts, by way of oral and written requests or by holding meetings as appropriate” (Regulation 9.1.). Written requests addressed to States and intergovernmental organisations shall be signed by the Prosecutor.

Part 2 (Information and evidence management, Regulations 10 to 39) initiates assigning to the Information Management System the role of managing the information and evidence within the Office of the Prosecutor, considering the principle that all information and evidence, as much as possible, shall be stored electronically, and any electronically non-retrievable piece shall be registered and its particulars fully set out on a

surrogate sheet also stored electronically. It also places the responsibility for the registration, storage, retrieval, disclosure, archiving, deleting, data security concerning information and evidence on the Services Section.

For the storage of information and evidence, an Evidence Registration Number will be provided. Similarly, a Communication Received Number shall be assigned to each communication of information or additional information received under Article 15. All evidence shall have meta-information properly stored as defined in the Information Management Plan. The meta-information range shall be defined by the Information Management Plan, but it must contain a minimum of information listed in Regulation 16.1. and be regularly updated with the events contemplated in Regulation 16.2.

All evidence stored within the Information Management System shall be accessible for retrieval for the purposes of analysis of information, investigation and prosecution – as per Regulation 18. Restrictions on retrieval and access of specified documents or parts thereof, or meta-information, may apply by order of the Prosecutor, his or her deputies, or the Special Prosecutor in charge of an investigation, subject to the chain of command, on grounds of personal security, national security, confidentiality, sensitivity or any other reason specifically certified. Originals of all items shall be stored by the Services Section and never released or made available, unless otherwise decided by the Deputy Prosecutor (Investigations). Copies shall only be made available by way of reproduction of the digitised version of the evidence.

The presentation of evidence to the Court should be made electronically as a general rule (Chapter 6), with a view to enabling the Court to use the same electronic search and retrieval engines as those used by the Office of the Prosecutor. It may happen, however, that articles of evidence are presented as Court exhibits or through the testimony of a witness. In such cases, an entry in the meta-information should inform with regard to exhibition of the evidence.

Chapter 9, similarly to Section 10 of Book 4 of the Draft Regulations, is devoted to the management of evidence away from the seat of the Court. Regulation 29 confirms the prerogative of the Prosecutor or a designated subordinate to collect evidence away from the Court during field missions on the territory of a State, pursuant to Article 54, in accordance with the provisions of Section 9 of the Statute or as authorised by the Pre-Trial Chamber in accordance with Article 57(3)(d).

Regulation 30 contains provisions identical to Regulation 22 of Book 4 of the Draft Regulations concerning the Evidence Officer. The Case Controller shall appoint at least one Evidence Officer for each investigation. His or her responsibilities include receiving, properly labelling, recording and retaining possession of all evidence collected during the course of the investigation; maintaining the Evidence Seizure Record and the Evidence Registration Form for each article of evidence; and collating evidence, avoiding duplication and ensuring completeness of the collection. Regulation 31 contains provisions regarding the protection and recording of physical evidence to be collected, with a text similar to Regulation 23 of the Draft Regulations.

Provisions on how to seize and record external evidence are laid out in Regulation 32 in a text with the same content as Regulation 24 of the Draft Regulations. The Registration Form “shall record the date and time when the evidence was first collected, the exact place where it was collected and the name of the investigator by whom it was collected”, and concisely describe the evidence (Regulation 32.2.). All evidence shall be stored in appropriate packages (instead of envelopes or boxes of Regulation 24.3. of the Draft Regulations) to be sealed with tamper-proof tape, and bear a common reference number.

Regulation 33 concerns potentially exonerating evidence. Unlike corresponding Regulation 25 in the Draft Regulations, it is less strict in the requirements to record the reasons why the lead of the exonerating evidence is not pursued, as it only requires that the Investigation Team leader records in the Evidence Registration Form that the material points to further potentially exonerating material.

The rules about the chain of custody until the arrival of the physical evidence at the seat of the Court to the Services Section make the content of Regulations 34 and 35 in approximately an identical manner to Regulations 26 and 27 of the Draft Regulations. Each transfer of custody shall be entered in the Evidence Registration Form. Once the evidence item reaches the Service Section, it shall receive a new single Chain of Custody Form to be attached to each standardised evidence container, where the objects will be stored.

Chapter 10 establishes the duties of the Services Section concerning information received by the Office of the Prosecutor with the aptitude to originate an investigation. Regulation 36 states that the Senior Manager of the Services Section shall maintain a Register for all information received

by the Office in the context of referrals by State Parties, the Security Council or of situations that might give support to a *proprio motu* investigation.

46.4. The 2009 Regulations

On 23 April 2009, the Prosecutor adopted more comprehensive Regulations of the Office of the Prosecutor. They are easily available in the Legal Tools Database at <http://www.legal-tools.org/doc/a97226/> (and not included in this book due to space limitations). They contain three chapters: general provisions; administration of the Office; and operation of the Office. Chapter 2 has one section on general provisions and another on divisions, innovating in terms of content in relation to the previous regulations. Chapter 3 also initiates with a section on general provisions. Section 2 is devoted to handling of information and evidence. Section 3 concerns the preliminary examination and evaluation of information and is subdivided into three subsections, namely general provisions, preliminary examination of information, and determination of a reasonable basis to proceed. Section 4 deals with investigations and has the following three subsections: general provisions; questioning of persons; and victims and witnesses. Section 5 of Chapter 3 stipulates the regulations regarding the action of the Office of the Prosecutor before the Chambers of the Court. Section 6 concerns the trials and has a subsection with general provisions and another on appeals. All in all, the document contains 70 regulations and occupies 26 pages. It is longer than the Regulations *ad interim* and shorter than the Draft Regulations.

The chart in Annex 3 shows a comparison between the content of the three documents. Again, no matter the differences in form, there is a continuum in the three sets of regulations. The 2009 version has notably drawn on the two earlier documents and six years of experience with the ICC in full operation. The most distinguished innovations consist of bringing administrative regulations into the document, such the provisions on several divisions, sections and units; the regulations detailing how the Office of the Prosecutor operates in Court (Trials, Chambers, Appeals); and the expressed concern with vulnerable victims and witnesses. Many of these provisions repeat articles of the Statute and the Rules of Procedure and Evidence, functioning as reminders and procedural checklists about certain key moments of the trial.

Regulations 4 to 12 describe the organisation of the Office of the Prosecutor.¹⁶ The previous Regulations did not cover this aspect. The Executive Committee, made up of the Prosecutor and the Heads of Divisions, provides advice to the Prosecutor, is responsible for the development and adoption of strategies, policies and budget of the Office, provides strategic guidance on all activities of the Office and co-ordinates them.

The organisational entities consist of three divisions, two support sections and one unit. The Jurisdiction, Complementarity and Cooperation Division forms the diplomatic and international co-operation entity of the Office. It is responsible for the preliminary examination and evaluation of information pursuant to Articles 15 and 53(1) and Rules 48 and 104, and the preparation of reports and recommendations to assist the Prosecutor in determining whether there is a reasonable basis to proceed with an investigation. Further, it provides analysis and legal advice to the Executive Committee on issues of jurisdiction and admissibility, and on co-operation; it is responsible for the co-ordination and transmission of requests for co-operation, the negotiation of agreements and arrangements for the exercise of the prosecutorial powers listed in Article 54(3); and for the co-ordination of co-operation and information-sharing networks.

The Investigation Division has the following duties: the preparation of the necessary security plans and protection policies for each case to ensure the safety and well-being of victims, witnesses, Office staff, and persons at risk on account of their interaction with the Court; the provision of investigative expertise and support; the preparation and co-ordination of field deployment of Office staff; the provision of factual crime analysis and the analysis of information and evidence in support of preliminary examinations and evaluations, investigations and prosecutions.

Among the duties of the Prosecution Division the following are worth mentioning here: provision of legal advice on issues likely to arise during investigations and which may impact on future litigation; preparation of litigation strategies within the context of the trial team for the consideration and approval of the Executive Committee and their subsequent

¹⁶ The “Draft Paper on Some Policy Issues before the Office of the Prosecutor for Discussion at the Public Hearing in The Hague on 17 and 18 June 2003” did contain quite detailed language on the administrative organisation of the Office of the Prosecutor, see *supra* note 13.

implementation before the Chambers of the Court; and the conduct of prosecutions including litigation before the Chambers of the Court.

The Services Section plays a similar role for the Office of the Prosecutor as the Registry does for the entire Court. It is in charge of the Office's budget preparation, providing advice on spending control, field interpretation services during investigations, and translations within the Office; registration and storage of evidence and information; the development, introduction and maintenance of specific information management tools and practices. The Legal Advisory and Policy Section is responsible for the provision of legal advice upon request; the development, introduction and maintenance of legal research tools; the provision, upon request of the Prosecutor, of specific legal training to staff;¹⁷ and the development of the Office's legal academic network. The Gender and Children Unit is the specialised body designed to provide expertise on sexual and gender violence and violence against children pursuant to Article 42(9)¹⁸ to the Prosecutor and other units of the Office, and thus contributes to preliminary examinations and evaluations, investigations and prosecutions in these areas.

Chapter 3 concerns the operation of the Office of the Prosecutor, thus roughly corresponding to the Operations Manual of the Draft Regulations. Section 1 (General provisions) contains important regulations for the overall functioning of the Office. Regulation 13 proclaims the independence of the Office "from any external source". However, two aspects should be highlighted in relation to the independence of the Prosecution. First, unlike other jurisdictions, there is no *internal* independence, that is, the Office of the Prosecutor is a hierarchical body that acts in accordance with a given strategy in which the ultimate authority rests with the Prosecutor at the top of command line. Second, no matter what the Statute says, the independence of the Prosecution in an international court will always be subordinated to administrative and budgetary constraints. Unlike a state organisation, there is no separation of powers. The Office of the

¹⁷ A modest improvement in relation to the Resolutions *ad interim*, which did not even provide for the qualification of the staff, and a concession to the Draft Regulations, which provided for an entire Code of Conduct and Training, based on United Nations parameters and models of other international tribunals and domestic jurisdictions.

¹⁸ ICC Statute, Article 42(9), see *supra* note 4: "The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children".

Prosecutor is not an entity that acts *before* the Court, an international legal person (Article 4). It is an organ of the Court as much as the Presidency or the Registry (Article 34).

The demands of public disclosure set forth by Regulations 14 and 15 may be problematic in practice because they may have gone further than necessary, jeopardising the interests of justice. It is true that publicity is one of the milestones of modern, enlightened criminal law and procedure: that it gives legitimacy to the ‘distribution of pain’ by the democratic state; that it prevents arbitrary behaviour by the prosecution and other law enforcement officials; that it may have preventative effects in the population as a whole; and, under some circumstances, that it even protects the prosecution service and the judiciary against political pressure from powerful interests. However, a general rule imposing publicity even about the prosecutorial strategy may endanger the success of the investigation and the preservation of evidence.

Further on in Section 1, Regulation 17 refers the issue of professional conduct to the Staff Rules and Regulations and to the Administrative Instructions of the Court, certainly because at that point there was not a Code of Conduct in force within the Office of the Prosecutor. The first Prosecutor did not want to have such a Code. This could be construed as a self-imposed renunciation of independence, since the Office subordinates its staff to disciplinary and administrative rules not issued by an internal body, whereas Article 42(2) states that “the Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof”. But this remark is no longer valid after a Code of Conduct was issued by the second Prosecutor in 2013, shortly after her appointment (see Chapter 47 below).

Section 2 contains regulations concerning the handling of information and evidence. Unlike the previous sets of regulations, the rules about the chain of custody are concise (Regulation 22) and only set out principles. For the management of evidence, a unique Evidence Registration Number is created to be attached to each individual item or page. Entries shall indicate the chain of custody and the condition of confidentiality, if agreed upon by the Prosecutor with the source (Article 54(3)(e)). Preference is given to the electronic format of storage of evidence, but originals should be kept in appropriate vaults.

Section 3 regulates the preliminary examination and evaluation of information in three subsections. In order to initiate a preliminary exami-

nation, Regulation 25 is more complete in defining the ways by which the Office of the Prosecutor may be set in motion. It extracts from Article 12(3) a fourth situation besides the three sources of Article 13: when a State which is not a Party to the Statute declares to accept the jurisdiction of the Court pursuant to Article 12(3).¹⁹

In regulating the conduct of preliminary examination, Regulation 27 determines a very useful distinction not considered in previous versions of the regulations. It calls for the separation of information relating to matters manifestly outside the jurisdiction of the Court; information apparently related to a situation already under examination, investigation or prosecution, which shall be considered in the light of the ongoing activity; and information not manifestly falling into any of the above categories, which requires further examination.

Regulation 28 contains norms concerning the public disclosure specific to the preparatory activities prior to the investigation. For example, the Office of the Prosecutor shall acknowledge receipt to all who provide information. Such acknowledgement may be made publicly if the safety of protected persons is not affected. However, it should be stressed that the publicity considered here refers only to the investigation *proprio motu*, when presumably the information came from the public or civil society, who might want to challenge a decision not to investigate. The norms do not apply when the information came by means of a referral by a State Party or the Security Council.

The regulations concerning the determination of a reasonable basis to proceed (Subsection 3, Regulations 29–31) follow approximately the corresponding provisions of the Regulations *ad interim*. In acting under Article 15(3) (initiation of an investigation *proprio motu* upon authorisation of the Pre-Trial Chamber) or Article 53(1) (initiation of an investigation by the Prosecutor upon referral of a State Party or the Security Council), the Office of the Prosecutor produces an internal report analysing the seriousness of the information and considering factors such as issues of jurisdiction, admissibility (including gravity) and the interests of justice. This report shall be accompanied by a recommendation on wheth-

¹⁹ Regulation 25 reads: “1. The preliminary examination and evaluation of a situation by the Office may be initiated on the basis of: (a) any information on crimes, including information sent by individuals or groups, States, intergovernmental or non-governmental organisations; (b) a referral from a State Party or the Security Council; or (c) a declaration pursuant to article 12, paragraph 3 by a State which is not a Party to the Statute”.

er there is a reasonable basis to initiate an investigation. For the assessment of the gravity of the crimes committed, Regulation 29.2. offers the criteria of scale, nature, manner of commission and impact. These two documents shall support the decision of the Prosecutor on whether there is a reasonable basis to proceed with an investigation or not. Regulation 31 defines a special procedure for the decision of the Prosecutor not to proceed in the interests of justice (Article 53(1)(c) and (2)(c), Rules 105(4) and (5) and 106), which comprises the production of an internal report on the interests of justice addressed to the Executive Committee for consideration and approval and the immediate communication to the Pre-Trial Chamber by the Prosecutor.

Opening the Investigations Section, Regulation 32 stipulates the creation of a joint investigation team for each decision to proceed. The investigation team shall have staff of all three divisions in order to enable a co-ordinated approach throughout the investigation. The size of the team is flexible according to the degree of complexity of the situation under investigation. It should regularly report its progress and activities to the Executive Committee in order to receive strategic guidance. Once the charges are confirmed, an interdivisional trial team with similar characteristics is formed to carry out the prosecutions.

Regulations 33 and 34 assume that each situation may contain several cases or hypotheses. The whole situation will not necessarily be investigated due to time, costs and territorial constraints. Therefore, it is pinpointed that the Joint Investigation Team should review the information analysed during the preliminary examination and evaluation and identify among the different hypotheses the most serious crimes committed, using the factors indicated in Article 53(1)(a)–(c). Furthermore, the team shall focus on the main types of victimisation, including sexual and gender violence and violence against children, and which are the most representative of the scale and impact of the crimes.²⁰ Once a case is provisionally determined, the joint team shall identify the person or persons apparently most responsible, and include a tentative indication of possible charges, the form of individual criminal responsibility and potentially exonerating circumstances. Following strategic guidance from the Executive Committee, the joint team shall develop an evidence collection plan and a

²⁰ One criterion not mentioned is the prospect of a successful prosecution, considering the amount of evidence available and case law on the matter.

co-operation plan, also to be submitted for approval by the Executive Committee. A number of issues should be addressed by the plans, as listed in Regulation 35, in consultation with the Registry, the Gender and Children Unit and other bodies of the Court.

Subsection 2 contains a number of provisions concerning the questioning of persons. Regulation 36 states that, on selecting the witnesses and victims to be questioned, the joint team shall assess the reliability, safety and well-being as well as risks of traumatisation of the person, establishing contact with the Court's Victims and Witnesses Unit²¹ as appropriate. Special attention should be dedicated to vulnerable witnesses, such as victims in general, children, persons with disabilities, victims of gender and sexual crimes. These should be submitted to a physical and psychological assessment before the interview. Children have a right to special treatment, including consultation with their respective parents or equivalent. Victims shall be instructed on their rights, such as reparations and participation in the proceedings under the Statute (Article 68), be instructed on the possibility of appearing and testifying with an accompanying person (Regulation 39), and be transferred to the Victims Participation and Reparations Section (Regulation 37) for further assistance. Moreover, they should be instructed on several topics prior to questioning, such as the right not to self-incriminate (Regulation 40 and other protection measures granted by the Statute).

Following the subsection on questioning, Subsection 3 contains specific provisions concerning the security of victims and witnesses. Although the Victims and Witnesses Unit belongs to the Court under the responsibility of the Registry (Articles 43(6) and 68(4)), the interest of the Office of the Prosecutor in their well-being and safety is more than obvious. It is thus foreseen that the Office shall develop an Area-Specific Threat and Risk Assessment in consultation with the Victims and Witnesses Unit. Regulation 45 contains a list of protective measures under the responsibility of the Office to ensure the security of victims and witnesses. The subsequent regulations provide for actual protective measures, the redaction and summarisation of evidence pursuant to Article 68(5).

Regulation 49 provides for the tracing of assets during the investigation (Article 57(3)(e)), as a modality of penalty (Article 77(2)(b)), and in the context of co-operation with States (Article 93(1)(k)).

²¹ The Victims and Witnesses Unit is set up by Registry pursuant to Article 43(6).

Section 5 concerns proceedings before Chambers and is certainly an add-on in relation to the earlier versions of the Regulations, but does not have more specific provisions than their equivalent in the Statute, the Rules of Evidence and Procedure and other normative documents of the ICC.

Regulation 50 contains provisions about the degree of preparation necessary for the Office of the Prosecutor to pursue confidential hearings and filings (closed or *ex parte* sessions with a view to obtain authorisation for special measures). Strict burdens are set on the Office also by Regulations 53 and 54 for the application for a warrant of arrest or a summons to appear or to obtain protective measures for the purpose of forfeiture. As per Regulation 53(1), for example, “in preparing an application for a warrant of arrest [...], the Office shall clearly identify the crime(s) and mode(s) of liability alleged, based on solid factual and evidentiary foundations”. The Office shall carefully and permanently consider, and promptly respond to, any request for release and whether any of the alternative measures to imprisonment set out in Rule 119 may be appropriate: prohibition or restrictions to travel, prohibition to go to certain places or associate with certain persons, including victims and witnesses; prohibition to engage in certain professional activities; being available to the Court; and leaving the passport and other personal documents with the Registrar.

Regulations 51 and 52 provide for constructive relations with the defence in order to identify issues not in dispute and potentially exonerating information; to seek agreement regarding the conduct of proceedings and submission of evidence; and to consider the joint instruction of experts. These regulations provide for a good-faith adversarial system set forth, *inter alia*, by Article 67(2), which states: “In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence”.

In stating the elements for the document containing the charges, Regulation 58 takes as pattern the Office’s application under Article 58 for a warrant of arrest or a summons to appear. In other words, the Office may not issue the document containing the charges if it cannot meet the requirements of an application for a warrant of arrest or a summons to ap-

pear. Moreover, the document contains the charges clearly and the modes of liability. After all, it is the departure point for the defence to exercise its right to due process.

For the preliminary hearing in which the Pre-Trial Chamber decides whether there are substantial grounds to believe that the person committed the crime charged in accordance with Article 61(5), Regulation 59 sets out criteria for the selection of evidence. In this opportunity, the Chamber decides whether it will allow the trial sought by the Prosecutor. The defence has also its say at this moment and may object the charges, challenge the evidence, or present evidence (Article 61(6)). For this reason, Regulation 59(3) states that “the Office shall ensure that any summary evidence presented during the confirmation hearing [...] is self-sufficient and contains a concise and objective representation of the evidence or testimony, to the extent that it is relevant to the case”.

For the trial, Regulation 61 contains practical instructions assigned to the Office of the Prosecutor by the Statute or the Rules of Procedure and Evidence concerning the witnesses, such as the physical and psychological assessment of any witness deemed vulnerable prior to any determination whether he or she should testify, the consideration whether to apply for protective or special measures pursuant to Rules 87 and 88, or to give evidence by video-link or prior recording. Regulation 62 contains provisions related to the assessment of admission of guilt. It refers to Articles 64 and 65, which regulate the admission of guilt before the Trial Chamber once the accused is informed of his or her charges. Regulation 62 repeats in part Article 65 in order to remind the Office of the Prosecutor to proceed to a pre-assessment of the admission of guilt with the same rigour expected to be used by the Trial Chamber. It should particularly consider whether the admission is supported by the information and evidence gathered in the investigation. Once the Office is convinced of the informed and voluntary admission of guilt, it shall decide what evidence it shall provide in order to supplement the facts admitted by the accused.

Before the completion of the trial, the Office of the Prosecutor has the option of requesting a further hearing on sentencing pursuant to Article 76(2). A sentencing hearing is optional for the Trial Chamber, unless the Prosecutor so requests, whenever evidence and submissions made during the trial are relevant to sentencing. Regulation 63 mentions also the interests of the victims as one additional reason for the request. Complying with the good-faith principle, Regulation 64, reporting to Rule 145,

states that, at the time of sentencing, the Office shall present all relevant mitigating and aggravating factors in an impartial manner. Finally, for the sentencing, Regulation 65 provides for the forfeiture of proceeds, property and assets pursuant to Article 77(2)(b). Regulation 65 is a reminder that the Office shall give specific consideration to whether any order for forfeiture should be issued, considering, *inter alia*, the interests of the victims and any application or order for reparations under Article 75.

The last subsection and regulations basically consist of reminders for the appeals team. Regulation 66, for example, reminds that all submissions before the Appeals Chamber should be supported by the record of relevant Pre-Trial or Trial Chamber, or by other evidence introduced before the Appeals Chamber. Worth mentioning is the last Regulation 70, that legitimises the Prosecutor not only to appeal on behalf of a convicted person pursuant to Article 81(1)(b) – procedural error, error of fact or error of law – but also to apply for a *revision* on behalf of a convicted person as well. Here, the confirmation of the independence of the Office of the Prosecutor, envisaged by the framers of the ICC Statute and of the Draft Regulations even before there was a Prosecutor in place, seems more important than the grounds or restrictions for the appeal or revision by the Prosecutor in favour of the accused in the interest of justice. He or she is a magistrate committed to truth and justice, who should investigate incriminating and exonerating circumstances and, in the end, may request the acquittal, appeal in favour of the convicted person, or even propose a revision, should he or she be convinced of a judicial error.

Annex 1: Draft Regulations of the Office of the Prosecutor*

Book 1: Mission and organisation

The Rome Statute of the International Criminal Court and the Rules of Procedure and Evidence adopted by the Assembly of State Parties set out the principles applied by the Office of the Prosecutor in taking its decisions. The guidance set out in these Regulations is intended to complement those principles. The Regulations do not replace the principles of the Statute or Rules or substitute for an understanding of them.

Transparent decision making and consistency of approach are vital factors in promoting respect for the enforcement of international justice and fostering complementarity. The guidelines, standard operating procedures and Code of conduct contained in these Regulations will inculcate, maintain and demonstrate the fairness and consistency of the decision making and legal practice of the Office of the Prosecutor.

Part 1: The Regulations

Section 1: The Regulations and the mandate and objective of the Office of the Prosecutor

Regulation 1: The Regulations of the Office of the Prosecutor

- 1.1. The Chief Prosecutor of the International Criminal Court adopts Regulations for all members of the Office of the Prosecutor pursuant to the authority under article 42(2) of the Statute and rule 9 of the Rules of Procedure and Evidence of the Court.
- 1.2. The Regulations are an instrument for the effective management and administration of the Office of the Prosecutor. They establish guidelines, standard operating procedures¹ and a Code of conduct

* These draft Regulations are dated 3 June 2003. The original format has been kept to the extent possible.

¹ It has been pointed out in the consultation process on issues of general concern to the ICC-OTP that standard operating procedures (not only for the conduct of investigations, but for all major aspects of legal practice before the Chambers), should be adopted as quickly as possible, such procedures being a crucial tool for the promotion of consistency in the work of the ICC-OTP, but also for ensuring efficiency, transparency and accountability for OTP staff.

that shall be followed by all members of the Office of the Prosecutor.

- 1.3. The Regulations in their latest version are accessible for all staff on the intranet and in hard copies with the chiefs of section. The authoritative version is kept by the Chief Prosecutor. In addition, they are posted on the website of the Court in the working languages of the Court.
- 1.4. The Regulations of the Office of the Prosecutor are to be read in conjunction with, and are subject to, the Statute, the Rules of Procedure and Evidence, the Elements of Crimes, the Regulations of the Court, the Staff Regulations and the Staff Rules.
- 1.5. For the purposes of these Regulations:
 - (a) “Assembly of States Parties” means the Assembly of States Parties to the Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998;
 - (b) “Court” means the International Criminal Court;
 - (c) “Presidency” means the Presidency of the International Criminal Court;
 - (d) “Chief Prosecutor” means the Prosecutor elected in accordance with article 42(4) of the Statute;
 - (e) “Registrar” means the Registrar of the International Criminal Court elected in accordance with article 43(4) of the Statute;
 - (f) “Rules of Procedure and Evidence” means the Rules of Procedure and Evidence, adopted by the Assembly of States Parties as adopted at the First Session of the Assembly of States Parties in New York on 3-10 September 2002;
 - (g) “Statute” means the Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998;
 - (h) “Office” means the Office of the Prosecutor of the International Criminal Court;

Regulation 2: The Office of the Prosecutor

- 2.1. The Office of the Prosecutor is one of the four organs of the Court (article 34(c) of the Statute).

- 2.2. The Office of the Prosecutor is independent from all other organs of the Court, other international organisations, States Parties and non-States Parties, and intergovernmental and non-governmental organisations. A member of the Office shall not seek or act on instructions from any external source (article 42(1) of the Statute).

Section 2: Amendment of the Regulations

Regulation 3: Standing Committee

- 3.1. A Standing Committee on the Regulations is hereby established. It shall make recommendations to the Chief Prosecutor regarding amendments or additions to the Regulations, either on its own initiative or upon consideration of proposals made by any member of the Office of the Prosecutor.
- 3.2. The Standing Committee shall be composed of the Deputy Prosecutors and of one member each of the Analysis Section, the Investigation Section, the Prosecution Section, the Appeals Section, the Legal Advisory and Policy Section, the Services Section and the Knowledge-Base Section, as designated by the respective chief of the section. Once a year, the Standing Committee elects a chairperson.
- 3.3. The Standing Committee holds meetings as may be required and in any event twice per calendar year. The Chief of the Legal Advisory and Policy Section will co-ordinate the preparation of the meetings of the Committee in consultation with the Deputy Prosecutors.

Regulation 4: Amendment procedure

- 4.1. The Regulations can only be amended by the Chief Prosecutor. Before adopting or amending the Regulations, the Chief Prosecutor shall consult with the Registrar on all matters that may affect the operation of the Registry.
- 4.2. All proposals for amendments or additions to the Regulations shall be addressed to the chairperson of the Standing Committee. The Standing Committee shall consider the merit of any suggestion received. Members of the Standing Committee may also suggest amendments or additions to the Regulations.

- 4.3. The Standing Committee shall strive to make decisions by consensus. It shall submit its decisions to the Chief Prosecutor in the form of recommendations. If consensus cannot be achieved, the Committee shall so report to the Chief Prosecutor, both de-tailing the different views and explaining why consensus was not achieved.
- 4.4. An amendment to the Regulations shall not be applied retroactively to the detriment of a person under investigation or prosecution or who has been convicted.

[Part 2: Mission of the Office of the Prosecutor]

[Part 3: Structure of the Office of the Prosecutor]

Book 2: Standards of conduct and training

Part 1: Code of conduct

Regulation 1: Values and principles

The Office of the Prosecutor values and promotes the highest standards of efficiency, competency and integrity amongst its members,² at all levels of seniority. The provisions of this Part shall:

- (a) inculcate and uphold the standard of excellence expected from all members of the Office;³
- (b) establish a set of general standards of conduct for all members of the Office as well as specific, illustrative standards of conduct;
- (c) provide measures to promote compliance and rectify non-compliance with these standards of conduct.

Regulation 2: Scope of application of the Code

- 2.1 The standards of this Code apply to the Chief Prosecutor and Deputy Prosecutors, all general services and professional staff members of the Office, temporary and gratis personnel and law clerks of the Office.
- 2.2. The standards of this Code apply exclusively within the scope of the performance of individual duties and the individual exercise of inherent and delegated powers.⁴

² “Members of the Office” includes the Prosecutor, Deputy Prosecutors and all professional and general services staff within the Office. “Staff of the Office” excludes the Prosecutor and Deputy Prosecutors. This usage is consistent with the Statute and Rules (see esp. arts. 42(1), 44(1), and Rules 6, 11). The Code applies to the Prosecutor and Deputy Prosecutor, as well as all staff, thus setting an example of high standards of conduct from the most senior members of the Office. The Code applies to gratis personnel to the extent consistent with guidelines to be established by the Assembly of States Parties (art. 44(4)). Clerks should undertake to uphold the Code as a condition of their service.

³ The expression “to inculcate the standard of excellence expected from all members of the Office...” sets the Code apart from the other Chapters of the Regulations, as a statement of ethical and professional standards to which all members of the Office aspire and strive.

⁴ Every principle of the Code should be read as applying only in the performance of individual duties or the exercise of powers. This allows the principles of the Code to apply within a unitary office comprising members from diverse professions, as well as across the

- 2.3. This Code is subject to the provisions of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and the Staff Regulations and Staff Rules, and operates notwithstanding the code of conduct of the Victims and Witnesses Unit⁵ and any other national or international standards to which members of the Office may be held.⁶ This Code forms an integral part of the Regulations of the Office.

Regulation 3: General standards

- 3.1. Members of the Office shall uphold the principles and purposes of the Statute, fulfil their solemn undertaking to the Court; and adhere to the Rules of Procedure and Evidence, the Regulations of the Court, the Staff Regulations, the Staff Rules, the Financial Regulations and Rules, and the Regulations of the Office. To this end, members of the Office should be fully familiar with these texts and be aware of amendments thereto.
- 3.2. Members of the Office shall establish and promote a unified international legal culture within the Office, rooted in the principles and purposes of the Statute, without bias for the rules and methods of any one national system or legal tradition.⁷

spectrum of seniority and including the Prosecutor and Deputy Prosecutors. Ultra vires actions constitute breaches of ethical standards of faithful conduct [Regulation 6(b)], and may trigger disciplinary proceedings under related instruments. The Prosecutor's inherent and thus non-delegable powers include those set forth in arts. 15 and 53 (see Rule 11).

⁵ See Rule 17(2)(a)(v). It is intended that provisions of the Code of the Victims and Witnesses Unit relevant to the Office will be incorporated into the Regulations of the Office.

⁶ Most lawyers within the OTP will be bound by professional obligations to their national regulatory body (bar association, law society *et cetera*); certain other professions within the OTP may be bound by codes of conduct of national or international bodies. This Regulation ensures that the Code operates notwithstanding these external standards, while members of the OTP are performing duties or exercising powers within the OTP. There may be exceptional situations where this places a professional in the impossible situation of violating external standards through compliance with this Code.

⁷ The need to promote a single legal culture was underlined in expert consultations on general OTP matters. This standard is drafted to apply to all professions within the Office. The phrasing 'without favour to the rules and methods of any one national system or legal tradition' does not preclude rules or methods rooted in any one legal system from becoming part of the 'unified legal culture'. Rather, this standard requires members of the Office to act without favour (bias) to any particular system; even lawyers trained in only one system should draw their primary inspiration from the Statute, not their national practices.

- 3.3. In accordance with the standards set out in this Code, members of the Office shall, in all matters arising in the performance of their duties or the exercise of their powers, and in all their dealings within the Office and in relations to the Court, governments, organisations and individuals:
- (a) maintain the independence of the Office and refrain from seeking or acting on instructions from any external source;⁸
 - (b) conduct themselves honourably, professionally, faithfully, impartially and conscientiously;⁹
 - (c) respect the confidentiality of investigations and prosecutions;¹⁰
 - (d) endeavour to establish the truth in preliminary examinations, investigations and prosecutions, in accordance with article 54 of the Statute and Regulation 10;¹¹
 - (e) promote the effective [and expeditious] investigation and prosecution of crimes within the jurisdiction of the Court;¹²

Regulation 4: Specific standards of independence

The standard of independence¹³ includes, *inter alia*:

⁸ This standard of independence is excerpted from the general description of the Office of the Prosecutor in the Statute, which provides, “A member of the Office shall not seek or act on instructions from any external source.” (art. 42(1)).

⁹ This standard is excerpted verbatim from the solemn undertaking common to all members of the Office (see Rules 5(1)(b) and 6(1)).

¹⁰ This standard is excerpted verbatim from the solemn undertaking common to all members of the Office (see Rules 5(1)(b) and 6(1)).

¹¹ This standard of truth-seeking is excerpted from the statement of purpose supporting the duty of the Prosecutor to investigate all relevant facts and evidence, that is, “In order to establish the truth...” (art. 54(1)(a)). As the search for truth cannot be an obligation of result, the term “strive” is used to convey an obligation of means of central importance for individual choices of conduct.

¹² This standards of effective investigation and prosecution is excerpted from the statement of duties of the Prosecutor during investigation in the Statute, which provides, “The Prosecutor...shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court.” (art. 54(1)(b)). As the nature of these measures is within the discretion of the Prosecutor, the term “promote” is used to emphasize that all members of the Office should actively support the goal of effective investigation and prosecution.

¹³ See also Draft Staff Regulation 1.2, which establishes general obligations of independence. It is also assumed that the Prosecutor’s ongoing obligation of disclosure in art. 67(2) of the Statute is not extinguished at conviction.

- (a) remaining unaffected by any individual or sectional interests and in particular any pressure by any State, organ of the United Nations, intergovernmental or non-governmental organisation or the media;¹⁴
- (b) refraining from any activity which is likely to affect the confidence of others in the independence of the Office;
- (c) refraining from the exercise of other occupations of a professional nature [without the approval of the Chief Prosecutor];¹⁵
- (d) refraining from any activity which is likely to interfere with the performance of duties and the exercise of powers;
- (e) not being influenced by fear or intimidation.¹⁶

Regulation 5: Specific standards of honourable and professional conduct

The standard of honourable and professional conduct is the embodiment of the dignity of the Office through words and deeds. Honourable and professional conduct includes, *inter alia*:

- (a) dignified and courteous conduct before the Chambers of the Court, as befitting a high institution of international criminal justice;
- (b) dignified and courteous conduct in the presence of Judges, high officials of the Court, State officials, and other dignitaries;
- (c) dignified, courteous, collegial and supportive conduct towards all other members of the Office and other organs of the Court;¹⁷
- (d) respect for the rights of persons protected during investigation, dignified and courteous conduct towards the persons being in-

¹⁴ This standard is excerpted from the joint IAP/CICC Draft Code of Professional Conduct.

¹⁵ This standard is established for the Prosecutor and Deputy Prosecutors in art. 42(5), and applies to staff through Draft Staff Regulation 1.2(m).

¹⁶ This standard was recommended in expert comments on the joint IAP/CICC Draft Code of Professional Conduct.

¹⁷ This specific standard of honourable and professional conduct will be reflected through detailed internal policies on diversity as well as harassment.

vestigated and professional conduct towards the legal representatives;¹⁸

- (e) respect for the rights of accused; dignified and courteous conduct towards accused persons, and professional conduct towards their legal representatives;
- (f) respect for the rights of victims and witnesses,¹⁹ and respect for their interests and personal circumstances; dignified and courteous conduct towards victims and witnesses, professional conduct towards their legal representatives, and sensitive conduct towards victims, particularly victims of sexual and gender violence and violence against children;²⁰
- (f) compliance with measures adopted by the Chief Prosecutor or other Organs of the Court, as may be applicable, in order to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses;²¹
- (g) respect for the human rights and fundamental freedoms recognized by international law, consistent with the Statute and treatment of persons without distinctions²² founded on grounds such as gender,²³ sexual orientation, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.²⁴

¹⁸ These rights are principally provided in arts. 55, 63, 66 and 67.

¹⁹ These rights are principally provided in art. 68 (see also Rules 49, 50, 67, 76, 81, 82, 87-89, 91, 96, 99 and 112)

²⁰ The Prosecutor has the duty to respect the interests and personal circumstances of victims and witnesses, and to take into account the particular nature of crimes of sexual and gender violence and violence against children (see art. 54(1)(b)).

²¹ These measures are envisaged in art. 68(1) in fine.

²² The wording of Regulation 5 implies that such distinctions must be avoided in words and in deeds.

²³ As the Code is subject to the Statute, the definition of “gender” necessarily conforms to art. 7(3).

²⁴ The draft Staff Regulations preclude staff from discriminating “against any individual or group...” (Staff Regulation 1.2). This specific standard of conduct is at a higher threshold, excerpting prohibited grounds of discrimination from the Statute (art. 21(3)), where non-discrimination is provided as a requirement for application and interpretation of law by the Court. While not enumerated in art. 21(3), sexual orientation was added as a prohibited ground of discrimination following expert recommendations.

Regulation 6: Specific standards of faithful conduct

The standard of faithful conduct is the fulfilment of the trust reposed in the members of the Office by the Chief Prosecutor. Faithful conduct includes, *inter alia*:

- (a) subordination of personal interests to the interests of the Office, of the Court as an institution and, more broadly, [to the interests] of international justice;²⁵
- (b) acting solely within the scope of individual duties and within the [bounds][confines] of inherent or delegated powers;²⁶
- (c) due deference to the authority of the Chief Prosecutor, Deputy Prosecutors and their designated representatives[,] acting within the scope of their powers;
- (d) due deference to the decisions of collegial bodies²⁷ and of superiors[,] acting within the scope of their powers;
- (e) setting an unimpeachable example for subordinate members of the Office and providing appropriate direction, guidance and support;²⁸
- (f) full compliance with instructions received through appropriate channels of authority within the Office, and due consideration to general guidance and specific recommendations;
- (g) full compliance with arrangements and agreements binding on the Office;²⁹

²⁵ Draft Staff Regulation 1.2(e) requires that staff “discharge their functions and regulate their conduct with the interests of the Court only in view”. However, the broader “interests of international justice” are reflected in the final preambular recital of the Statute, where States Parties resolve to guarantee “lasting respect for and...enforcement of international justice”.

²⁶ This Code applies only in the performance of individual duties and the exercise of inherent or delegated powers. This specific standard of conduct establishes that *ultra vires* action would be an ethical violation, as well as possibly triggering disciplinary measures in related instruments.

²⁷ The generic term “collegial bodies” refers to taskforces, teams, committees and other professional groupings within the Office.

²⁸ As superiors may be subject to disciplinary proceedings or even summary dismissal for failing to address the misconduct of subordinates, it would be appropriate to include a further ethical standard in this regard. This standard is also complementary to standard (f), below.

- (h) respect for the principles of this Code, and concerted effort to prevent, oppose and address any departure therefrom through,³⁰ *inter alia*, the measures provided in Regulation 13.

Regulation 7: Specific standards of impartial conduct

The standard of impartial conduct is the fair-minded and moderate treatment of persons and issues, and is fully compatible with thorough investigation and analysis and with vigorous advocacy.³¹ Impartial conduct includes, *inter alia*:

- (a) respect for the presumption of innocence, particularly by avoiding expressions of opinion on the guilt or innocence of an accused in public or outside the proper context of proceedings before the Court;³²
- [(b) ensuring that the right person is prosecuted for the right offence³³];
- (c) full conformity with the applicable rules on disclosure of evidence;³⁴
- (d) refusal to engage in direct or indirect *ex parte* communication with Judges or Chambers of the Court on the merits of trial or appeal proceedings during the course of those proceedings unless otherwise authorised under the Statute or the Rules of Procedure and Evidence, or unless otherwise instructed by the relevant Chamber or Judges;³⁵

²⁹ This includes, for example, arrangements or agreements to facilitate co-operation under art. 54(3)(d).

³⁰ This standard is excerpted in part from the joint IAP/CICC Draft Code of Professional Conduct; the term “to the best of their ability” has been replaced by “concerted effort”, for concision and readability.

³¹ The statement of compatibility between impartiality and thorough and vigorous advocacy is excerpted from the Federal Prosecution Service Deskbook (Ministry of Justice, Canada).

³² This standard does not affect the responsibility of certain members of the Office to articulate professional opinions on the culpability of an accused. It aims, rather, to curtail unprofessional expositions of personal opinion, as these harm the general standard of impartiality, which should be maintained both within the Office (“in the context of proceedings before the Court”) and outside the Office (“in public”).

³³ This standard is excerpted from the Code for Crown Prosecutors (CPS, UK).

³⁴ See arts. 61(3), 64, 67, 68 and 72, and Rules 69, 72, 76-84, 112-119, 121, 126 and 152.

³⁵ The Prosecutor may be required to engage in *ex parte* consultations with the Pre-Trial Chamber, *inter alia*, under Rule 123(2) or during a confirmation hearing held in the ab-

- (e) refraining from expressions of opinion that could, objectively, adversely affect the standard of impartial conduct, whether through the communications media, in writing or in public addresses or actions, outside the context of proceedings before the Court;³⁶
- (f) requesting to be excused from any matter as soon as grounds for disqualification arise, especially those indicated in article 42(7) and rule 34(1).³⁷

Regulation 8: Specific standards of conscientious conduct

The standard of conscientious conduct is diligent and systematic perseverance towards clear goals. Conscientious conduct includes, *inter alia*:

- (a) efficient and competent completion of individual tasks;
- (b) clear and timely requests for assistance where required for the efficient and competent completion of individual tasks;
- (c) meaningful review of the work product of others, where required;
- (d) awareness of developments in international criminal law and in professional methods and standards;³⁸
- (e) regular and diligent participation in training within the Office.³⁹

sence of the person concerned, where the Pre-Trial Chamber decides that the person may not be represented by counsel under Rule 125(1). Following the confirmation hearing, members of the Office may have to engage in *ex parte* communications, *inter alia*, under art. 72(5)(d) or Rule 81(2).

³⁶ The test of ‘objective adverse effect’ is drawn from Rule 34(1)(d).

³⁷ Grounds for disqualification, as regards the Prosecutor and Deputy Prosecutors, are provided in art. 42(7) and Rule 34(1). The duty of the Prosecutor and Deputy Prosecutors to request to be excused is provided in Rule 35. There is no analogous disqualification regime applicable to staff of the Office. However, it is advisable to extend this regime, *mutatis mutandis*, to staff of the Office through the Staff Regulations and Staff Rules, as this requires a level of specificity inappropriate for the Code.

³⁸ This standard is derived, in part, from the joint IAP/CICC Draft Code of Professional Conduct. The reference to “professional methods and standards” read with the general provisions on the application of the Code, is sufficiently broad to include the several professions within the Office. As certain professional methods and standards are rooted in national systems, Regulation 3.2 would preclude bias towards methods and standards from any one national system.

Regulation 9: Specific standards of confidentiality

The standard of confidentiality is to safeguard confidences held within the Office or parts thereof. Confidentiality includes, *inter alia*:

- (a) full conformity to policies and procedures of the Office regarding confidentiality of documents, proceedings, and other matters;⁴⁰
- (b) discernment and vigilance regarding all communications that may raise issues of confidentiality, particularly communications with persons outside the Office;
- (c) immediate reporting of suspected breaches of confidentiality directly and exclusively to the Chief Prosecutor [or to the Adviser under Regulation 13], where such suspected breaches would pose a danger to the safety, well-being or privacy of a victim, witness or third person;⁴¹
- (d) containment of reported breaches of confidentiality by refraining from unnecessary discussion thereof in any context.

Regulation 10: Specific standards of truth-seeking

Seeking the truth includes, *inter alia*:

- (a) upholding the central aim of investigation and analysis, namely to provide the factual and evidentiary basis for an accurate assessment of whether there may be criminal responsibility under the Statute;⁴²

³⁹ This includes training in standards of conduct envisaged in Regulation 16.5, below.

⁴⁰ These policies and procedures will need to be developed.

⁴¹ This standard is the only ethically-binding obligation to report within the Code, on the grounds that breaches of confidentiality may be particularly and irremediably damaging to the safety, well-being and privacy of persons outside the Office, whose interests are protected in the Statute. Members of the Office would be obliged to report exclusively to the Prosecutor or the Adviser, and then contain the breach of confidentiality under subparagraph (d).

⁴² This standard is excerpted, in part, from the duties of the Prosecutor with respect to investigations, which also establish the general duty of truth-seeking (art. 54(1)(a)).

- (b) investigation of both incriminating and exonerating circumstances as a matter of equal priority and with equal diligence;⁴³
- (c) assessment of the materiality of facts and the probative value of evidence according to all relevant circumstances and irrespective of mere advantage or disadvantage to any potential case;⁴⁴
- (d) prompt reporting of concerns which, if substantiated, would tend to render a previous conviction made by the Court unsafe, bring the administration of justice into disrepute or constitute a miscarriage of justice; and full conformity to the applicable rules on disclosure of new evidence.⁴⁵

Regulation 11: Specific standards of effective investigation and prosecution

The standard of effective investigation and prosecution includes, *inter alia*,

- (a) preservation of the integrity of information and evidence held within the Office and refusal to compromise the effective retention, storage and security of information and evidence;
- (b) reasoned evaluation of facts, evidence and law, particularly in preparing and conducting the tests of reasonable basis, *prima facie* admissibility, interests of justice and reconsideration,

⁴³ This standard is excerpted, in part, from the duties of the Prosecutor with respect to investigations, which also establish the general duty of truth-seeking (art. 54(1)(a)). The Statute requires that incriminating and exonerating circumstances be investigated “equally”. This standard interprets “equally” as equality in priority and diligence. It is important to note that the Code does not create rights and obligations for non-members of the Office; as such, parties to proceedings cannot derive rights from this ethical obligation to investigate exonerating and incriminating circumstances equally (for example by re-requesting disclosure of resource allocation on Investigation Teams to see if equal attention was paid to both incriminating and exonerating circumstances).

⁴⁴ This standard is derived, in part, from the joint IAP/CICC Draft Code of Professional Conduct.

⁴⁵ The Prosecutor is empowered to bring a claim to revise a final judgment of conviction or sentence on behalf of a convicted person under art. 84(1) of the Statute. It is envisaged that internal review procedures will be established for this purpose, through which members would “report” concerns, either directly or through the chain of command.

considering applicable factors and criteria and taking into account the interests protected in the Statute in each case;⁴⁶

- (c) close scrutiny and attentive evaluation of facts, evidence and law in preparing and conducting the test of substantial grounds.⁴⁷

[Regulation 12: Adviser for standards of conduct⁴⁸

⁴⁶ This specific standard adds an ethical obligation for members of the Office preparing for and conducting certain enumerated tests of facts, evidence and law, as provided in the Statute and the Regulations of the Office. As such, the standard is broad enough to extend to investigators, analysts, lawyers and others involved in preparation and conduct of these tests. The test of reasonable basis is established in arts. 15(3) and 53(1)(a) (see especially Rule 48 as regards the relation between these articles, as well as draft Regulations on the draft investigation plan and the decision whether or not to initiate an investigation). The tests of prima facie admissibility, as it concerns the Office, is established in art. 53(1)(b) and elaborated in the draft Regulations. The test of interests of justice is established in art. 53(1)(c) and elaborated in the draft Regulations. The test of reconsideration is established in art. 53(4) (see also art. 53(3)(a)) and elaborated in the draft Regulations.

⁴⁷ This specific standard adds a heightened ethical obligation for members of the Office preparing for and conducting the test of substantial grounds, in anticipation of the need to establish substantial grounds at confirmation hearing under art. 61(5). As such, the standard is broad enough to extend to investigators, analysts, lawyers and others involved in preparation and conduct of these tests. The heightened ethical obligation is justified as the confirmation hearing represents the first public disclosure of the charges document, and thus the indictment review procedure is the final opportunity for internal review of the charges document prior to its public disclosure.

⁴⁸ The relevant expert consultation groups have expressed tentative and differing views on what role, if any, the Adviser should play. Accordingly, all Regulations on the role of the Adviser are bracketed. In principle, the role of the Adviser straddles tense boundaries between (a) the need to ensure that the standards of the Code are realised and enforced where necessary; (b) the reality that ethical and professional standards inevitably operate in a grey area, where consultative, collegial discussion, including a more detached, expert colleague such as the Adviser, is a most effective way to pre-empt problems before they arise; (c) the necessity for the Chief Prosecutor to retain full management authority over the Office while not having the time to allocate to monitor standards of conduct and assist staff in their day-to-day implementation; and (d) the consideration that disciplinary measures, properly so-called fall under the purview of other governing documents, notably the Staff Rules and Regulations of the Court. Another approach involves the appointment of several advisers, from various professions and sections of the Office, to serve on an advisory body for standards of conduct. Members could seek consultations with any adviser, who would then bring the concern to the collegial body. This has the advantage of providing additional transparency, checks-and-balances and a pool of advisers; however, this approach creates an additional layer of administration that may hamper the prompt, collegial and discreet rectification of non-compliance, and may create the impression of a discipli-

- 12.1. The Chief Prosecutor shall designate one staff member of the Office to serve as Adviser for Standards of Conduct, for a renewable fixed period determined by the Chief Prosecutor. The designated person should be of high moral character and discerning and tactful disposition, and have particular competency in professional ethics.
- 12.2. The designated person shall assume the function of Adviser in addition to the exercise of ordinary duties.
- 12.3. When acting in the capacity of Adviser, as provided in this Code, the designated person shall report exclusively and confidentially to the Chief Prosecutor.
- 12.4. The Adviser shall assist the Chief Prosecutor to promote full compliance with this Code and to reinforce standards of excellence in conduct. In particular, the Adviser shall exercise the following functions:
 - (a) consultations as provided in Regulation 13;
 - (b) reports and recommendations as provided in Regulation 14;
 - (c) recommendations for amendment of this Code, in accordance with Book 1, Part 1, Regulation 4.2.
- 12.5. The Adviser shall also ensure, in collaboration with other members of the Office:
 - (a) that prospective members of the Office are made aware of the standards of conduct expected of members of the Office, particularly through the training measures provided in Part 2, Regulation 16.
 - (b) that training on standards of conduct forms part of the induction programme for all members of the Office, and is included, where appropriate, in subsequent training programmes;
 - (c) that a general review of standards of conduct forms part of mission preparations and mission reports, indicating any particularly positive or negative patterns of conduct.⁴⁹

nary body, which would be in-consistent with the aims and purposes of this Code. It is therefore not recommended in this draft text.

⁴⁹ The additional requirement to report on “patterns of conduct” follows on recommendations from an expert consultation process that mission reports should include more than a blanket statement of compliance with the Code of Conduct.

Regulation 13: Consultations

- 13.1. The Adviser shall be directly and immediately available for consultations with any member of the Office regarding general or specific matters related to compliance with this Code, whether concerning the conduct of the member seeking consultations or the conduct of any other member of the Office.⁵⁰
- 13.2. The name of the member seeking consultations and the content of consultations shall be confidential and protected by privilege in favour of the member seeking consultations, without whose consent such information shall not be disclosed by the Adviser in the course of any proceeding or to any person, except to the Chief Prosecutor, directly and upon request, as provided in Regulation 14.⁵¹ The Chief Prosecutor alone retains full discretion to withhold or disclose such information as required for the purposes of performance appraisal or disciplinary proceedings.⁵² The Adviser shall notify the member seeking consultations of this Regulation prior to undertaking consultations.
- 13.3. In the course of consultations, the Adviser may, *inter alia*,
- (a) seek a clear description of the concerns of the member of the Office;
 - (b) review relevant rules, regulations, policies, procedures and guidelines;
 - (c) consult with the member of the Office on the application of standards of conduct;

⁵⁰ It is evident that knowingly providing false information to the Adviser, for malicious or frivolous purposes, would be subject to disciplinary proceedings for misconduct. Such action would also constitute a breach of standards of honourable conduct towards members of the Office in Regulation 5(c).

⁵¹ This exception for disclosure to the Prosecutor, in confidence and upon request, safeguards the full authority of the Prosecutor over the management and administration of the Office, as provided in Rule 9.

⁵² As performance appraisal is intended as a constructive, open and ongoing dialogue, it would be inappropriate to withhold concerns on improper conduct from the member under appraisal. As disciplinary proceedings are quasi-judicial in nature, principles of natural justice preclude the confidentiality of allegations of misconduct. Thus, the confidentiality regime provided in this Regulation applies only to potential breaches of standards of conduct not amounting to misconduct.

- (d) provide guidance to the member of the Office on the application of standards of conduct;
 - (e) inform the member of the Office of the special regime provided in the Rules of Procedure and Evidence regarding conduct of the Prosecutor and Deputy Prosecutor.⁵³
- 13.4. The Adviser may invite any member of the Office, individually or as a group, to hold such consultations as may be advisable to promote compliance with this Code. Members of the office shall offer collegial co-operation to the Adviser in this regard. Regulation 13.2 shall apply, *mutatis mutandis*, to such consultations.
- 13.5. If a member of the Office can show good cause not to first report to the Adviser, nothing in this Regulation precludes a member of the Office from reporting concerns regarding compliance with this Code directly to the Chief Prosecutor, or submitting a complaint to the Presidency, as the case may be.⁵⁴

Regulation 14: Reports and recommendations

- 14.1. The Adviser shall report regularly and directly to the Chief Prosecutor on efforts to promote compliance with this Code, and provide a general assessment of standards of conduct within the Office, including any particularly positive or negative patterns of conduct; to this end, the Adviser may seek information from any member of the Office. A report under this subsection shall not include privileged or otherwise confidential information, unless requested by the Prosecutor.⁵⁵
- 14.2. In situations of clear or flagrant non-compliance with this Code, the Adviser shall inform the Chief Prosecutor, directly and without delay.⁵⁶ Where the conduct of a Deputy Prosecutor is in question, the

⁵³ This refers to Rules 23-32.

⁵⁴ The expression “submitting a complaint to the Presidency” refers to the general complaints procedure regarding conduct of the Prosecutor and Deputy Prosecutors under Rule 26.

⁵⁵ The Prosecutor retains full authority under the preceding Regulation to request full particulars of otherwise privileged or confidential information.

⁵⁶ It is assumed that ethical situations in the “gray area” are best resolved through the informal individual or group consultations procedure in Regulation 13.4. As such, the Adviser would only report non-compliance that is “clear” (*id est* evident on the available facts) or “flagrant” (*id est* blatant or deliberate).

Adviser shall inform the Chief Prosecutor. Where the conduct of the Chief Prosecutor is in question, the Adviser shall inform the Chief Prosecutor in the presence of a Deputy Prosecutor, and, additionally, shall inform the Presidency.⁵⁷

- 14.3. The Adviser may provide recommendations to the Chief Prosecutor on measures to rectify general or specific situations of non-compliance with this Code.
- 14.4. The fact that a member of the Office has sought consultations with the Adviser regarding his or her conduct shall form the basis of a favourable inference by the Chief Prosecutor. Where such conduct results in disciplinary or other proceedings, the Chief Prosecutor shall take appropriate steps to ensure that such a favourable inference is drawn.⁵⁸

Regulation 15: Non-compliance measures taken by the Prosecutor

- 15.1. The Chief Prosecutor may take any non-disciplinary measures to rectify non-compliance with this Code. Such measures may include, *inter alia*,
- (a) instructing a member of the Office to take, or refrain from, a particular course of action;
 - (b) excusing or disqualifying a member of the Office from acting in a particular matter;
 - (c) issuing general or specific policies, procedures or guidelines on conduct;
 - (d) re-assigning tasks within the Office;
 - (e) providing for additional training or support.

⁵⁷ In the latter case, the Adviser would be triggering the general complaints procedure regarding conduct of the Prosecutor under Rule 26. The presence of a Deputy Prosecutor affords a measure of protection for the Adviser, who would have sacrificed, at least in part, the right to confidentiality for complainants envisaged in Rule 26.

⁵⁸ The terms “appropriate steps” and “a favourable inference” are used to allay any suggestion of undue influence on disciplinary or other proceedings by the Prosecutor. All inferences, whether favourable or unfavourable, are considered by the decision-makers in any disciplinary or other proceedings. By assuring members of the Office that a favourable inference will be sought regarding their conduct, the Prosecutor upholds the central role of the Adviser in the compliance mechanism of the Code, and encourages further recourse to this compliance mechanism.

- 15.2. Disciplinary measures shall be subject to the Staff Rules, Staff Regulations or the Rules of Procedure and Evidence, as the case may be.^{59]}

Part 2: Training

Regulation 16: Values and principles

The Office of the Prosecutor values the vital role of training in ensuring the highest standards of efficiency, competency and integrity, and promotes comprehensive and ongoing training for all staff members. The provisions of this Part shall:

- (a) provide for induction training and ongoing training within the Office;
- (b) establish the scope and subject matter of training within the Office;
- (c) assign clear responsibilities for the organisation and management of training within the Office.

Regulation 17: General

- 17.1. The Office offers professional in-house training on a regular basis. All staff of the Office are obliged to participate in such training, in accordance with this Part.
- 17.2. The organisation and management of the legal training is the responsibility of the Legal Advisory and Policy Section in close consultation with the Deputy Prosecutors and the Section Chiefs. Other training is organised and managed by the Senior Manager in close consultation with the Deputy Prosecutors and the section chiefs. Staff members and others with special expertise may be requested to participate as instructors for training sessions.

⁵⁹ See Draft Staff Regulations, Articles IX-XI (for staff of the Office), and Rules 23-32 (for the Prosecutor and Deputy Prosecutors). Rule 165 is also relevant, providing that the Chief Prosecutor may initiate and conduct investigations with respect to offences against the administration of justice.

Regulation 18: Induction course

- 18.1. Upon commencement of service in the Office of the Prosecutor, all staff shall take part in an induction course.
- 18.2. For professional, and, where appropriate, general services staff, the course shall include the following issues, as required:
 - (a) the main organisational features of the Court and the Office of the Prosecutor;
 - (b) jurisdictional issues;
 - (c) substantive law of the Court;
 - (d) procedural law of the Court;
 - (e) general international law;
 - (f) trial advocacy (including written and oral trial advocacy);
 - (g) appellate advocacy (including written and oral trial advocacy);
 - (h) the Code of conduct;
 - (i) respect for diversity and cultural sensitivity, and relevant internal policies;
 - (j) all forms of unlawful discrimination, harassment and other improper behaviour, and relevant internal policies;
 - (k) confidentiality and relevant internal policies.
- 18.3. The induction course shall furthermore cover all other issues addressed in the Regulations.
- 18.4. With regard to the training provided for in Sub-regulations 18.2.(a)–(e) and (h) and 18.3., the Chief of the Legal Advisory and Policy Section decides the subject matter to be covered in close consultation with the respective section chiefs of the staff members who attend a particular training course.

Regulation 19: Induction to a new situation

- 19.1. At the start of each new investigation the Investigation Team shall undergo training specifically addressing the factual and legal problems that are likely to be encountered in the specific situation.
- 19.2. The organisation and management of the training referred to in Sub-regulation 19.1. above is the responsibility of the Case Controller and the Senior Prosecutor in charge of the Investigation, in close

consultation with the Senior Manager and the Chief of the Legal Advisory and Policy Section.

Regulation 20: Ongoing education

- 20.1. All staff members shall receive ongoing education throughout their professional career at the Office of the Prosecutor.
- 20.2. Generally, all staff members shall attend training sessions at least once a year at the Office.
- 20.3. Sub-regulation 17.2. shall apply, *mutatis mutandis*, to the organisation and management of the training referred to in Sub-regulation 20.1.

Book 3: Operations manual

[Part 1: Complementarity practice]

[Issues to be considered in this Part are:

- standard monitoring activities;
- open sources evaluation;
- bilateral agreements, activities, dialogue;
- assessment of inability, unwillingness; complementarity in the judicial process.]

Part 2: The management of preliminary examination, article 53(1) evaluation, and start of investigation

Section 1: Values and principles

Regulation 1: Values and principles

The Office of the Prosecutor conducts preliminary examinations under article 15 and evaluations under article 53 of the Statute. The provisions of this Part shall:

- (a) ensure the efficient and timely implementation of preliminary examinations and evaluations;
- (b) establish a transparent and rational decision making process during preliminary examinations and evaluations that guarantees accurate, reasonable and consistent results;
- (c) enable the Chief Prosecutor to base his decision of whether to start an investigation on a reliable basis, both factually and legally.

Section 2: Preliminary examination and initiation of investigation *proprio motu* pursuant to articles 13(c), 15

Regulation 2: Preliminary examination

All information made available to the Office of the Prosecutor under article 15 of the Statute shall be analysed with a view to assessing the seriousness of its allegations or propositions. For this

purpose, the reliability of the source of the information obtained and the information itself shall be preliminarily examined to determine whether the alleged criminal conduct may fall within the jurisdiction of the Court *ratione materiae, personae, loci* and *temporis*, and whether a case is or would be admissible.

Regulation 3: Responsibility for implementation of preliminary examination; Preliminary Examinations Log; Communications Register

- 3.1. The Deputy Prosecutor (Investigations) is responsible for the preliminary examination of all information received under article 15⁶⁰ in close co-operation with the Deputy Prosecutor (Prosecutions).⁶¹ The Deputy Prosecutor (Investigations) shall keep a Log of all article 15 preliminary examinations conducted (Preliminary Examinations Log).
- 3.2. The Log shall be considered an internal document prepared by the Office of the Prosecutor in connection with the investigation or presentation of a case as specified by rule 81(1) of the Rules of Procedure and Evidence, and not be subject to disclosure.
- 3.3. The Senior Manager of the Services Section shall, upon registration of incoming information and material in accordance with Book 4 (Information and evidence management), forward a copy of such information and material to the Deputy Prosecutor (Investigations). The Senior Manager shall keep a Register of all communications made under article 15 (Communications Register). The Register

⁶⁰ After it has been electronically processed/stored by the Services Section. A standard form giving guidance on how to submit information to the Office under article 15 is being developed and intended to be made publicly available on the website of the Office.

⁶¹ The rationale behind this regulation is that the fact-workers (lawyers, investigating lawyers, analysts and investigators) in the Investigation Division should be given a primary responsibility to review all incoming information first, with a view to ensuring a sufficiently contextual and case-detached assessment. This may protect the Chief Prosecutor against attempts by prosecutors in search of “their case” to force premature decisions on the start of investigations. This must be combined with direct access by the Chief of the Analysis Section to the Chief Prosecutor. Lawyers outside the Investigation Division will assist as determined by the Deputy Prosecutor (Investigations) in consultation with the Deputy Prosecutor (Prosecutions).

shall be accessible in electronic format on a shared network drive for all members of the Office.⁶²

- 3.4. The Senior Manager shall confirm receipt of the incoming information with the person(s) or organisation(s) who provided the information in a manner that prevents any danger to the safety, well-being and privacy of those who provided the information or the integrity of investigations or proceedings⁶³ and inform them that the information will be preliminarily examined.
- 3.5. The Deputy Prosecutor (Investigations) regularly reports to the Chief Prosecutor on the developments regarding incoming information and the state of the Preliminary Examination Log.⁶⁴

Regulation 4: Preliminary Examination Teams

- 4.1. The Deputy Prosecutor (Investigations) establishes, as required, standing article 15 Preliminary Examination Teams, taking into consideration, as far as possible, the need to ensure an adequate representation of knowledge of the relevant legal systems and languages in the Team. Each Team shall consist of persons from the Investigation and Analysis Sections, a prosecutor and a legal adviser. The lawyers shall instruct the Preliminary Examination Team on relevant legal issues, in particular on questions of jurisdiction, admissibility and other relevant legal matters, such as the contextual elements of the crimes.
- 4.2. The Deputy Prosecutor (Investigations) designates a Preliminary Examination Team leader for each Team.
- 4.3. Each Preliminary Examination Team reports to the Deputy Prosecutor (Investigations) or a designated subordinate through the Team

⁶² This ensures that every member of the Office, in particular the Chief Prosecutor and other members of senior management, have direct access to incoming information at all times. The Chief Prosecutor may decide to limit access to the Register for reasons of confidentiality and security.

⁶³ This requirement is set up in analogy to rule 49(1). Even though this Regulation deals with an earlier stage of the proceedings, the situation is comparable in terms of the dangers addressed in rule 49.

⁶⁴ The Log, as opposed to the Register kept by the Senior Manager of the Services Section, contains all information on every preliminary examination conducted, including all additional material requested, and work documents, such as status reports et cetera. It thus shows the progress of all preliminary examinations.

leader. The Deputy Prosecutor (Investigations) and the Chief of the Analysis Section or their designated subordinates shall consult regularly on the work progress of the Preliminary Examination Teams.

- 4.4. The Deputy Prosecutor (Investigations) or a designated subordinate shall allocate communications submitted under article 15 to specific Teams upon receipt from the Services Section.⁶⁵
- 4.5. The Preliminary Examination Teams shall first make an assessment of the credibility and reliability of the sources of information. The Teams shall, to the extent possible, preliminarily characterise the nature of alleged crimes, identify those involved, recommend targets of a possible investigation, and assess the likelihood of a successful completion of such an investigation. The Teams shall furthermore tentatively assess the admissibility of a possible case under article 17 of the Statute and draw attention to all factors that may be relevant for the assessment of whether there are substantial reasons to believe that such investigation would not serve the interests of justice (article 53(1)(c) and rule 48), taking into account the general policy of the Office in that matter.

Regulation 5: Request for additional information

In order to analyse the seriousness of the information received, the Deputy Prosecutor (Investigations) or his or her designated subordinate, upon recommendation by a Preliminary Examination Team, may seek additional information in accordance with article 15(2) of the Statute.

Regulation 6: Preliminary examination report; draft investigation plan

- 6.1. After the Preliminary Examination Team has preliminarily examined the communication and any other material that may have been received or requested pursuant to article 15(2) of the Statute, the

⁶⁵ Given the volume of communications that is expected to reach the Office and to ensure the efficient operation of the process of preliminary examinations in accordance with the Statute, the Prosecutor may wish to install an expedited procedure to single out information that is manifestly unfounded or that refers to situations that are evidently out-side the jurisdiction of the Court.

Team shall give a written report⁶⁶ about the preliminary examination, covering all issues as specified in Regulation 4.4. The report shall be accompanied by a reasoned recommendation⁶⁷ on further action to the Deputy Prosecutor (Investigations) and the Deputy Prosecutor (Prosecutions).

- 6.2. If the Deputy Prosecutor (Investigations) and the Deputy Prosecutor (Prosecution), after reviewing the report, agree that the situation does not merit starting an investigation, the material shall be treated as not constituting a reasonable basis to proceed with an investigation.⁶⁸ Those who provided the information shall be informed of such decision in accordance with article 15(6) and rule 49(1).
- 6.3. If the Deputy Prosecutor (Investigations) and the Deputy Prosecutor (Prosecution) agree that the situation may merit starting an investigation, they shall have set up a draft investigation plan⁶⁹ based on the report and recommendations of the Preliminary Examination Team. The Deputy Prosecutor (Prosecutions) designates a Senior Prosecutor to supervise the drafting of the investigation plan (Senior Prosecutor seized of the case).⁷⁰ The drafting team also comprises the members of the Preliminary Examination Team, including a legal adviser from the Legal Advisory and Policy Section, and, as may be required, additional prosecutors.
- 6.4. If the Deputy Prosecutor (Investigations) and the Deputy Prosecutor (Prosecution) do not reach agreement, they shall submit the matter to the Chief Prosecutor, who decides whether a draft investigation plan shall be set up.

⁶⁶ A network-based standard format is in the process of being developed. This format and other Preliminary Examination Team related documents should be kept in a network directory dedicated to Preliminary Examination Team activities, from the beginning of the work of the Office. For some preliminary examinations, this report could amount to half a page maximum.

⁶⁷ Id.

⁶⁸ There should also be a standard form for the purpose of making the review process by the Deputy Prosecutors as efficient and expeditious as possible.

⁶⁹ A network-based standard format to be developed.

⁷⁰ After the review of the preliminary examination report and the decision that the situation may merit starting an investigation, the direction of the process shifts from investigators to prosecutors to give the preparation of the decision to investigate by the Chief Prosecutor and the investigation itself a more legally focused thrust.

- 6.5. The draft investigation plan shall address and elaborate on, to the extent possible and appropriate, and in a tentative manner, the following:
- (a) an assessment of whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (article 53(1)(a) of the Statute);
 - (b) the relevant background of the situation, placing the alleged offences in a broader geographical, social and cultural context;
 - (c) an explanation why the alleged offences warrant a full investigation against the backdrop of other alleged offences where such a step might not be recommendable;
 - (d) an identification of the crime base incidents to be investigated and a description of likely suspects, together with the overall aim of the investigation;
 - (e) a tentative indication of possible charges, modes of liability and potential defences, if any, as provided for in article 31 of the Statute;
 - (f) an explanation of the role and place of these likely suspects in the relevant chains of authority;
 - (g) the whereabouts, if known, of the possible suspects and the likelihood to arrest them;
 - (h) an assessment of the admissibility of a possible case under article 17 of the Statute;
 - (i) a preliminary indication of resources, time and staff likely to be required to complete the investigation;
 - (j) a preliminary indication of the main categories of evidence and the amount of evidence that is likely to be required to prove the possible charges;
 - (k) matters of State co-operation and security;
 - (l) an explanation of how the investigation and prosecution of the alleged crimes or perpetrators is expected to fit in with the broader context of cases pursued by the Office;
 - (m) potential dangers to the integrity of the investigation or the life or well-being of victims and witnesses that could arise once the victims are informed of the intention of the Chief Prosecutor to

seek authorisation, in accordance with rule 50(1) of the Rules of Procedure and Evidence;

- (n) any other matter that may be of relevance for a decision to start an investigation in the light of the specific situation.
- 6.6. The report prepared by the Preliminary Examination Team and the draft investigation plan shall be considered internal documents prepared by the Office of the Prosecutor in connection with the investigation or presentation of a case as specified by rule 81(1) of the Rules of Procedure and Evidence, and not be subject to disclosure.
- 6.7. The draft investigation plan is submitted by the Deputy Prosecutor (Investigations) and the Deputy Prosecutor (Prosecutions) to the Chief Prosecutor, together with a reasoned recommendation⁷¹ on whether authorisation to investigate pursuant to article 15(3) of the Statute should be requested before the Pre-Trial Chamber, paying specific attention to the interests of justice as specified by article 53(1)(c) and rule 48. The report of the Preliminary Examination Team shall also be submitted to the Chief Prosecutor in case it has not been submitted before.

Section 3: Article 53(1) evaluation and start of investigation pursuant to articles 13(a) and (b)

Regulation 7: Article 53(1) evaluation⁷²

All information made available to the Office by the Security Council or a State Party shall be analysed with a view to assessing the seriousness of its allegations or propositions (rule 104(1) of the Rules of Procedure and Evidence). For this purpose, the information obtained shall be preliminarily examined with a view to determining the reliability of the source, whether the alleged criminal conduct may fall within the jurisdiction of the Court *ratione materiae, personae, loci* and *temporis* and whether a case is or would be admissible.

⁷¹ A network-based standard format to be developed.

⁷² Article 53 uses the term “evaluation of information”.

Regulation 8: Responsibility for implementation of article 53(1) evaluation; article 53(1) evaluation log

- 8.1. The Chief Prosecutor is responsible for the evaluation of all referrals under article 53(1) of the Statute and rule 104(1) of the Rules of Procedure and Evidence.⁷³ The Deputy Prosecutor (Investigations) shall keep a Log of all article 53(1) evaluations conducted.
- 8.2. The Log shall be considered an internal document prepared by the Office of the Prosecutor in connection with the investigation or presentation of a case as specified by rule 81(1) of the Rules of Procedure and Evidence, and not be subject to disclosure.
- 8.3. Upon registration of incoming referrals in accordance with Book 4 (Information and evidence management), the Senior Manager of the Services Section shall forward a copy of such information and material to the Chief Prosecutor and the Deputy Prosecutor (Investigations).
- 8.4. The Deputy Prosecutor (Investigations) regularly reports to the Chief Prosecutor on the developments regarding the state of the article 53(1) evaluation Log.

Regulation 9: Article 53(1) Evaluation Team

- 9.1. The Chief Prosecutor establishes an article 53(1) Evaluation Team (Evaluation Team) in the event of a referral of a situation by the Security Council or a State Party. The Evaluation Team shall consist of one or more prosecutors designated by the Deputy Prosecutor (Prosecutions), one or more persons designated by the Deputy Prosecutor (Investigations), the Senior Analyst and the Chief of the Legal Advisory and Policy Section. The lawyers shall instruct the Evaluation Team on questions of jurisdiction, admissibility and other relevant legal matters.
- 9.2. The Chief Prosecutor designates an Evaluation Team leader.
- 9.3. The Evaluation Team reports to the Chief Prosecutor through the Team leader.
- 9.4. The Evaluation Team shall make an assessment of the credibility and reliability of the sources of information indicated in the referral.

⁷³ After it has been electronically processed/stored by the Services Section.

The Evaluation Team shall, to the extent possible, preliminarily characterise the nature of alleged crimes, identify those involved, recommend targets of a possible investigation, and assess the likelihood of a successful completion of such an investigation. The Evaluation Team shall furthermore tentatively assess the admissibility of a possible case under article 17 of the Statute in cases of a referral by a State Party and draw attention to all factors that may be relevant for the assessment of whether there are substantial reasons to believe that such investigation would not serve the interests of justice (article 53(1)(c)), taking into account the general policy of the Office in that matter.

Regulation 10: Request for additional information

In order to analyse the seriousness of the information received, the Deputy Prosecutor (Investigations) or his or her designated subordinate, upon recommendation by an Evaluation Team may seek additional information in accordance with rule 104(2) of the Statute.

Regulation 11: Article 53(1) evaluation report; draft investigation plan

- 11.1. After the Evaluation Team has examined the incoming material and any other material that may have been requested pursuant to rule 104(2) of the Rules of Procedure and Evidence and Regulation 10, the Team shall prepare a written report⁷⁴ about the article 53(1) evaluation covering all issues as specified in Regulation 9.3.
- 11.2. If the report of the Team concludes that the situation does not merit an investigation, it shall contain a recommendation on how to explain and communicate the decision to the general public.
- 11.3. The Team leader shall submit the report directly to the Chief Prosecutor with a copy to the Deputy Prosecutors.
- 11.4. If the report of the Team concludes that the situation does merit an investigation, a Senior Prosecutor is designated by the Deputy Prosecutor (Prosecutions) to supervise the drafting of an investigation

⁷⁴ A network-based standard format is in the process of being developed. This format and other Evaluation Team related documents should be kept in a network directory dedicated to Evaluation Team activities, from the beginning of the work of the Office.

plan⁷⁵ (Senior Prosecutor seized of the case) based on the report of the Evaluation Team. The drafting team also comprises the members of the article 53 Evaluation Team, a legal adviser from the Legal Advisory and Policy Section and, as may be required, additional prosecutors.

11.5. Sub-Regulations 6.5. to 6.7. are applicable *mutatis mutandis*.

Section 4: Decision to start investigation⁷⁶

Regulation 12: Decision to start or not to start investigation

- 12.1. Upon conclusion of the preliminary examination or article 53(1) evaluation, the decision to start an investigation under article 53(1) or to request authorisation to commence an investigation from the Pre-Trial Chamber pursuant to article 15(3) is made by the Chief Prosecutor,⁷⁷ taking into consideration the draft investigation plan, the recommendation by the Deputy Prosecutor (Investigations) and the Deputy Prosecutor (Prosecutions) and all other information available to him or her on the given situation. No decision is to be taken without prior establishment of a draft investigation plan.
- 12.2. The Office of the Prosecutor shall start an investigation of crimes within the jurisdiction of the Court unless one of the three factors enumerated under article 53(1) and rule 48 of the Rules of Procedure and Evidence applies. Pursuant to article 53(1) of the Statute, the Chief Prosecutor may desist from investigation, if:
- (a) the information available to the Chief Prosecutor does not provide a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - (b) the case is or would not be admissible under article 17 of the Statute;⁷⁸ or

⁷⁵ A network-based standard format to be established.

⁷⁶ This Section applies to both article 15 and 53 procedures.

⁷⁷ According to rule 11, the inherent powers of the Prosecutor under articles 15 and 53 cannot be delegated to any member of the Office other than to a Deputy Prosecutor.

⁷⁸ It is suggested that it would be problematic at this stage to give a more specific definition of the factors listed under article 17. A separate expert consultation process on this subject-matter has been established.

(c) there are substantial reasons to believe that an investigation would not serve the interests of justice, after both the gravity of the crime and the interests of the victims have been taken into account.⁷⁹

12.3. A reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (article 53(1)(a)) exists if the information available to the Chief Prosecutor contains indications that make it seem possible that crimes within the jurisdiction of the Court have been or are being committed.⁸⁰ Factors to be considered are, *inter alia*,

⁷⁹ The experts are not in a position to make a recommendation on whether the Regulations should contain a further definition of what may constitute “interests of justice”. Were it to be decided that such definition be given, this could comprise the following factors: (a) the start of an investigation would exacerbate or otherwise destabilise a conflict situation; (b) the start of an investigation would seriously endanger the successful completion of a reconciliation or peace process; or (c) the start of an investigation would bring the law into disrepute. Some of the arguments speaking in favour of such inclusion may be: (1) If the criteria are not made public, the Prosecutor will be heavily criticised if he ever makes a decision based on these factors; inclusion brings transparency; (2) It could be important for the Security Council to know these factors and take them into account when deciding whether to refer a case to the ICC; (3) Pursuant to rule 105(4) and (5), the Prosecutor has to give reasons for not starting an investigation of only based on interests of justice assessments.

⁸⁰ The question of when the “information available to the Prosecutor provides a reasonable basis to believe that a crime ... has been or is being committed” is non-discretionary (Turone, “Powers and Duties of the Prosecutor” in Cassese (ed.), *The Rome Statute*, p. 1152). The Statute sets up a legal standard of “reasonable basis”, but gives no more specific definition. It contains, however, different levels or degrees of “suspicion” in various provisions that pertain to different stages of the proceedings before the actual trial. The first would be article 15(3), requiring a “reasonable basis to proceed with an investigation” for a request for authorisation for investigation, to be read together with article 53(1)(a) (“reasonable basis to believe”). This stage is followed by articles 53(2)(a) and 58(1)(a), making the decision to prosecute/the issuance of an arrest warrant dependent on “reasonable grounds to believe that [a] person has committed a crime ...”. Finally, article 61(5) establishes that, at the charges confirmation hearing, the Prosecutor shall pre-sent “substantial grounds to believe that the person committed the crime charged”. The first two standards are of a more general nature in that, from their text, they do not require that a specific person (a “suspect”) be identified, whereas the latter three do necessitate such specification. It is suggested that the requirements described get progressively more intense, *id est* the onus on the Prosecutor increases as the proceedings evolve. Having said this, it is clear that, for the purposes of article 53(1)(a), no specific perpetrator has to be identified (even though that may be preferable from a point of view of policy at the stage of initiating an investigation) and that the evidentiary standard is less than the “substantial grounds” mentioned in article 61(5). The present formulation takes into account the wording of the UK Crown Prosecution Service Code for Crown Prosecutors concerning the “evidential test”

- (a) whether the information received contains facts that suggest that acts falling within the jurisdiction of the Court under articles 5 to 12 of the Statute have been committed;
- (b) the reliability of the source, the credibility of the information, and the incriminating weight of the material;
- (c) the availability of evidence which may be relevant for proving alleged crimes and modes of liability.

Regulation 13: Internal review of decision not to start investigation

- 13.1. Any new information or facts that may lead to a reconsideration of the decision not to investigate shall be immediately brought to the attention of the Deputy Prosecutor (Investigations).
- 13.2. The Deputy Prosecutor (Investigations) shall assess the new facts and information in the light of Regulation 12 and, if appropriate, refer the case or situation back to the competent Preliminary Examination or article 53(1) Evaluation Team.

applied in reaching a decision on whether to prosecute (*id est* a decision parallel to article 53(2) rather than 53(1)). According to this test, a prosecution should be initiated when the prosecutor is satisfied that “there is enough evidence to provide a ‘realistic prospect of conviction’”, meaning that “a jury ... is more likely than not to convict the defendant of the charge alleged”. The test under article 53(1)(a), for its application to the start of an investigation rather than a prosecution, must necessarily be less onerous. Likewise, it has to be based on the outcome of the preliminary examination. Turone, “Powers and Duties of the Prosecutor” in Cassese (ed.), *The Rome Statute*, p.1152, suggests that a “reasonable basis” exists where “there is a realistic prospect that an investigation would lead to a prima facie case about a given crime and its perpetrators” (emphasis added). In *Prosecutor v. Milošević*, Decision on Review of Indictment, 22 November 2001, it has been decided that “[a] prima facie case is a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused.” Also consider the German notion of *Anfangsverdacht* (primary suspicion), the existence of which obligates the prosecutor to investigate (section 152(2) German Code of Criminal Procedure). The Federal Supreme Court (*Bundesgerichtshof*) has held that such suspicion is given where “concrete clues exist which, according to past experience in criminal investigations, make it seem possible that a person has participated in a prosecutable crime”. Alternative formulations could be “if there is a realistic prospect that the investigation will produce evidence that will lead to a prima facie case against the potential accused” or “if there is a clear indication that a person has participated in a crime within the jurisdiction of the Court”.

Part 3: Investigation

Section 1: Values and principles

Regulation 14: Values and principles

The Office of the Prosecutor conducts investigations in accordance with Part 5 of the Statute and Chapter 5 of the Rules of Procedure and Evidence. The provisions of this Part shall:

- (a) ensure that all investigations respect the obligation to the endeavour to establish the truth in every case, as stipulated by article 54(1)(a) of the Statute;
- (b) ensure that all investigations are in conformity with the interests and personal circumstances of victims and witnesses and the rights of persons arising under the Statute, as provided in article 54(1)(b) and (c) of the Statute;
- (c) warrant the focused, timely, effective and thorough carrying out of investigations.

Section 2: General

Regulation 15: Conduct of investigations

- 15.1. All investigations shall be directed and supervised by the Senior Prosecutor seized of the case, or a prosecutor designated by him or her, in close co-operation with the Deputy Prosecutor (Investigations).
- 15.2. All investigative measures on the territory of a State shall be in conformity with Part 9 of the Statute, with arrangements entered into with a State pursuant to article 54(3)(d) of the Statute, with orders of the Pre-Trial Chamber under article 57(3)(d) of the Statute, and/or with the resolution of the United Nations Security Council referring the situation to the Court.

Regulation 16: Investigation Teams

- 16.1. For every investigation, an Investigation Team shall be established. The team shall comprise at least one member of the Preliminary Examination or Evaluation Team to ensure continuity.

- 16.2. All Investigation Teams are directed by a Senior Prosecutor or a lawyer designated by him or her. A Case Controller is designated by the Deputy Prosecutor (Investigations) in consultation with the Senior Prosecutor seized of the case. The Case Controller undertakes the management and co-ordination tasks which the Senior Prosecutor, or his or her designated subordinate, does not perform, and does so in close co-operation with the Senior Prosecutor. The Case Controller may delegate operational and logistical matters to other Team members from the Investigation Section.

Regulation 17: [role of investigators]

Regulation 18: [role of analysts]

Section 3: Investigation plan; draft charges document; proof chart

Regulation 19: Documents as investigation management tools

Investigation plans, draft charges documents and proof charts are essential management tools to ensure focused and professional investigations. Every Investigation Team shall make active use of all three documents. They shall be regularly updated by every Investigation Team.

Regulation 20: Investigation plan

- 20.1. All investigations are conducted following an investigation plan. The investigation plan is developed from the draft investigation plan provided for in Regulations 6 and 11, as submitted to the Chief Prosecutor for decision to start an investigation.
- 20.2. The investigation plan describes the different steps of the investigation which are necessary to achieve the aim of the investigation, the anticipated outcome of each investigative step and alternative strategies.
- 20.3. The investigation plan shall be considered an internal document prepared by the Office of the Prosecutor in connection with the investigation or presentation of a case as specified by rule 81(1) of the Rules of Procedure and Evidence, and not be subject to disclosure.

20.4. The Senior Prosecutor seized of the case shall ensure that the investigation plan and its updates are brought to the attention of all members of the Investigation Team. The Senior Prosecutor or a lawyer he or she designates shall brief the Investigation Team on the legal basis for the investigation and the implications of this basis for the conduct of the investigation.

Regulation 21: Draft charges document

- 21.1. A tentative draft charges document shall be prepared by the Investigation Team as early as possible under the supervision of the Senior Prosecutor seized of the case or the lawyer he or she designates, drawing on the written report by the Preliminary Examination or article 53(1) Evaluation Teams and the investigation plan. As a working hypothesis, the draft charges document shall preliminarily identify possible crime base incidents, the suspect(s), the elements of the crimes allegedly committed by the suspect(s), and the modes of liability under which the suspects may be charged. The draft charges document shall be regularly updated and refined in the course of the investigation.
- 21.2. The draft charges document shall also anticipate possible defences in relation to suspects.
- 21.3. The Investigation Team shall bear in mind the responsibility of the Office to contribute to focused and expedient proceedings by limiting cumulative charging to a reasonable measure.
- 21.4. The legal theories concerning crimes and modes of liability in the draft charges document shall be consistent with the general approach to these questions taken by the Office.⁸¹ The Legal Advisory and Policy Section shall ensure that there is consistency in the legal approach taken by all Teams.
- 21.5. The draft charges document shall be considered an internal document prepared by the Office of the Prosecutor in connection with the investigation or presentation of a case as specified by rule 81(1)

⁸¹ A principled and consistent approach to material legal questions contributes to achieving certainty and predictability in the work of the Office. A coherent standard approach to these issues should be developed within the Office (maybe under the co-ordination of the Legal Advisory and Policy Section) in accordance with which all legal submissions should be made.

of the Rules of Procedure and Evidence, and not be subject to disclosure.

Regulation 22: Proof chart

- 22.1. A proof chart shall be set up at the start of every investigation by the Senior Prosecutor seized of the case and maintained by the member of the Investigation Team he or she designates. It shall be updated on a weekly basis. The chart shall be kept in the Investigation Team directory on the network of the Office. Once per month, or when the Deputy Prosecutor (Investigations) or the Deputy Prosecutor (Prosecutions) so decides, an updated version of the chart shall be printed and securely displayed in the operations area of the Investigation Team, clearly indicating the new evidence made available since the previous version of the chart.
- 22.2. The proof chart shall contain the evidence made available relating to the elements of crimes and the modes of liability which are considered likely for inclusion in the charges document. It shall be linked to the draft charges document.
- 22.3. All evidence included in the chart shall be clearly marked by its type, such as witness statements or documents. Links between different pieces of evidence shall be clearly denoted.
- 22.4. Investigation Team work product in the form of evidentiary assessments of and commentary on pieces of evidence shall be kept separately. This work product shall be considered an internal document prepared by the Office of the Prosecutor in connection with the investigation or presentation of a case as specified by rule 81(1) of the Rules of Procedure and Evidence, and not be subject to disclosure.

Section 4: Interviews

Subsection 1: Witness interviews

Regulation 23: General

- 23.1. Witness interviews are conducted either by the Office under articles 57 (3)(d) or 99(4) or by national authorities in accordance with Part 9 of the Statute.

23.2. The prosecutor and all other members of the interviewing team shall ensure that the rights of the witness under the Statute are respected.

Regulation 24: Preparation of interview

24.1. Investigators and analysts shall prepare the interview under the direction of a prosecutor, taking into consideration the investigation plan and all other available material.⁸²

24.2. The interviewing team shall keep the interview structured and the witness focused on the relevant facts.

24.3. The prosecutor shall ensure the admissibility of the interview as evidence at trial.

Regulation 25: Start of interview

25.1. Prior to the beginning of the interview, the witness shall be informed of the following:

- (a) The person of the interviewer and his or her role in the investigation;
- (b) The fact that the witness may be called to testify before the Court and that, if called as witness, his or her identity may have to be disclosed to the Court, the accused, and to defence counsel for the accused;
- (c) The fact that the witness cannot be compelled to incriminate himself or herself or his or her spouse, child or parent who is an accused person, in accordance with rule 75 of the Rules of Procedure and Evidence;
- (d) The fact that a copy of the witness statement may be transmitted to a State pursuant to a request made by that State under article 93(10)(b)(i)a. of the Statute and the possible protective measures available in that case;⁸³

⁸² A “witness interview checklist” should be prepared, enumerating relevant subjects-matters to question about.

⁸³ Neither the rules nor the Statute give any guidance as to whether the witness has to consent to the transmission.

- 25.2. Prior to the beginning of the interview, or, as appropriate, in the course of the interview, the witness shall be informed of the following:
- (a) The mandate of the Court, the Office and the Court's and Office's powers and authorities;
 - (b) The procedures available to the Court for ensuring the protection of confidential information provided to the Court, as well as for the protection and security of the witness;
 - (c) The nature and scope of the investigation in the context of which the witness is being questioned, as appropriate, and why the witness is being approached;
 - (d) That fact that the Office cannot provide assistance concerning resettlement issues et cetera for witnesses and/or their relatives.
- 25.3. No inducement of whatever kind shall be offered to the witness in exchange for his assent to being questioned or otherwise.

Regulation 26: Record of interview

- 26.1. In accordance with rule 111 of the Rules of Procedure and Evidence, a record of questioning shall be made.⁸⁴
- 26.2. Any identifying information about the witness other than his or her name, such as names of persons mentioned by the witness, addresses, telephone numbers et cetera, shall not be included in the record, but in the Witness Identification Form (see Regulation 27).
- 26.3. The record shall note the date, time and place of, and all persons present during the questioning (rule 111 of the Rules of Procedure and Evidence).
- 26.4. All records shall be taken in the first person singular. They shall contain, to the extent possible, the following information:
- (a) the sequence of events witnessed by the person making the statement, in chronological order;
 - (b) identification details of all perpetrators;
 - (c) a comprehensive description of all crimes witnessed;
 - (d) a description of the scene of the crime;

⁸⁴ Standard form.

- (e) actual words spoken by the suspects and by other people in the presence of the suspects;
 - (f) a description of any documents or other evidence that the witness may bring to the interview, along with an explanation of their relevance;
 - (g) the ability of the witness to see or hear things mentioned in the record;
 - (h) any other information that may assist in determining the credibility of the statement.
- 26.5. The record shall be initialed on each page by the person recording and conducting the questioning, the person questioned, the interpreter,⁸⁵ and, if present, his or her counsel and, where applicable the judge or the prosecutor present.
- 26.6. The interviewer is responsible for the safekeeping of the original record and, if applicable, all documents and other evidence provided by the witness, and shall ensure registration with the Information and Evidence Unit.

Regulation 27: Witness Identification Form

- 27.1. For each witness, a confidential Witness Identification form shall be created.
- 27.2. The Witness Identification Form shall be kept separate from the record at all times. Information contained in the Form shall not be disclosed absent the express consent of the Senior Prosecutor seized of the case.
- 27.3. The Witness Identification Form shall contain:
- (a) identifying and contact information, such as: name, place and date of birth, gender, nationality, mother tongue, languages spoken, present and former address(es), phone and fax number(s) present and former occupation(s);
 - (b) testimony related information, such as: possession of valid passport, passport details, travel details, security related details, support related details;

⁸⁵ A requirement not prescribed by rule 111(1).

- (c) details concerning documents or other evidence that the witness has provided.

27.4. The Witness Identification Form shall be signed by a member of the interviewing team.

Regulation 28: Witness as potential suspect

If during the interview facts are made known on the basis of which there are grounds to believe that the witness has committed a crime within the jurisdiction of the Court, he or she shall be immediately treated as a suspect for the purpose of these Regulations, in particular be informed of his or her rights under article 55(2) of the Statute.

Regulation 29: Support persons

- 29.1. Generally, only members of the interviewing team should be present at the interview.
- 29.2. If necessary, the witness shall be offered a support person (for example a family member, a religious adviser, counsellor or victims assistance worker) to be present during the interview.
- 29.3. The role of the support person is limited to giving mental support to the witness. He or she may not participate in or otherwise interfere with the interview process. The support person shall be informed of her function prior to the interview.
- 29.4. The presence of the support person at the interview shall be noted in the record.

Regulation 30: Victims of sexual or gender violence

- 30.1. [general]
- 30.2. [audio- and video-recording, rule 112(4)]

Regulation 31: Hearsay evidence

Hearsay evidence is to be clearly identified as such in the record. The record shall explain the source (author or originator) of the hearsay evidence referred to by the witness.

Regulation 32: Expert witness

- 32.1. Records of interviews with expert witnesses shall include the person's qualifications and experience.
- 32.2. If professional terminology is used by the expert witness, he or she shall be asked to add an everyday explanation of the words and terms used.

Regulation 33: Interpreters

- 33.1. The role of the interpreter is to assist the interviewer. The interviewer controls the interview process at all times.
- 33.2. The interpretation must be verbatim. Paraphrasing is to be avoided.
- 33.3. The witness shall be instructed to speak only when the interpreter has finished the interpretation. [The interpreter should only translate the words of the witness and interviewer.]
- 33.4. Off-the-record conversation between the interpreter and the witness shall be kept to a minimum. The contents of all conversations must be shared with the interviewer. During breaks, neither the witness, nor the interpreter, nor any member of the interviewing team, shall discuss any matters material to the interview.
- 33.5. In case of uncertainty about a response, the interviewer shall immediately request clarification.

[Regulation 34: Interview in a unique investigative opportunity]

Regulation 35: Interview by national authorities pursuant to a request under Part 9

A request to a State for co-operation and assistance in form of testimony (article 93(1)(b)), shall specify the formal requirements for the interviewing as provided in the Statute, the Rules of Procedure and Evidence and this Section.

[Regulation 36: Record of questioning for subsequent presentation at trial]

Subsection 2: Interview of suspects and accused

Regulation 37: Preparation of interview

- 37.1. Investigators and analysts shall prepare the interview under the direction of a prosecutor, taking into consideration the investigation plan and all other available material.⁸⁶
- 37.2. All necessary arrangements with defence counsel (s) shall be made as early as possible.
- 37.3. The interviewing team shall try to anticipate the potential arguments of the suspect or accused and to develop strategies of how to deal with them.
- 37.4. The interviewing team shall keep the interview structured and the witness focused on the relevant facts.
- 37.5. The prosecutor shall ensure the interview is conducted in a manner which will not lead to admissibility problems at trial.

Regulation 38: Start and conduct of interview

- 38.1. A suspect shall be informed of his rights under article 55(2) prior to being questioned. It shall be noted in the record that the suspect has been informed of his or her rights.
- 38.2. In addition, the suspect or accused shall be informed of the following:
 - (a) The mandate of the Court [and the Court's powers and authorities] and the Office;
 - (b) The nature and scope of the investigation in the context of which the witness is being questioned, as appropriate;
 - (c) The person of the interviewer and his or her role in the investigation.

Regulation 39: Record of the interview

- 9.1. The interview shall be audio- or video-recorded in accordance with rule 112.

⁸⁶ A "suspect and accused interview checklist" should be prepared, enumerating relevant subjects-matters to question about.

- 39.2. The suspect or accused shall be informed, in a language he or she fully understands and speaks, that the questioning is to be audio- or video-recorded, and that he or she may object. The fact that this information has been provided and the response given by the suspect or accused shall be noted in the record. All other procedures as specified in rule 112(1) shall be followed.
- 39.3. If the person objects, a record of the questioning shall be made in accordance with rules 112(1)(a) and 111 of the Rules of Procedure and Evidence.⁸⁷
- 39.4. The record shall note the date, time and place of, and all persons present during the questioning (rule 111 of the Rules of Procedure and Evidence).
- 39.5. All records shall be taken in the first person singular. They shall contain, to the extent possible, the following information:
- (a) the sequence of events witnessed by the suspect or accused making the statement, in chronological order;
 - (b) identification details of all perpetrators, if appropriate;
 - (c) a comprehensive description of all crimes witnessed;
 - (d) details of exonerating information and circumstances;
 - (e) a description of the scene of the crime;
 - (f) any other information that may assist in determining the credibility of the statement.
- 39.6. The record shall be initialled on each page by the person recording and conducting the questioning, the person questioned, the interpreter,⁸⁸ and, if present, his or her counsel and, where applicable the judge or the Prosecutor present.
- 39.7. The interviewer is responsible for the safekeeping of the original record and, if applicable, all documents and other evidence provided by the witness, and shall ensure registration with the Information and Evidence Unit.

⁸⁷ Standard form.

⁸⁸ A requirement not prescribed by rule 111(1).

[Subsection 3: Other contacts with accused and suspects than when formally interviewed]

[Regulation 40: At the request of the accused/suspect]

[Regulation 41: At the request of the Office of the Prosecutor]

Part 4: Prosecution

[Section 1: Values and principles]

[Section 2: Internal review procedure for the draft charges document]

[Section 3: Decision to prosecute]

Book 4: Information and evidence management

Section 1: Values and Principles

Regulation 1: Values and principles

The provisions of this Section shall:

- (a) ensure the complete availability of all evidence and other information that can be stored electronically for any reason of retrieval;
- (b) ensure the preservation of the integrity of evidence for trial;
- (c) contribute to the efficient and timely implementation of preliminary examinations and evaluations, investigations, and prosecutions.

Section 2: Introduction

Regulation 2: General

- 2.1. All evidence and other information shall be stored electronically for any reason of retrieval.
- 2.2. Each piece of evidence and other information that can not be electronically stored shall be registered and described within the Information Management System (IMS) on a surrogate sheet.
- 2.3. Unless otherwise indicated, the duties and responsibilities identified in Sections 2 to 12 of this Book are those of the Services Section.
- 2.4. All information and material received by the Office, including the additional information sought by it, for preliminary examination under article 15 of the Statute and for article 53(1) evaluation under rule 104 of the Rules of Procedure and Evidence, shall be subject to Section 11 of this Book.

Section 3: Storage of evidence and information

Regulation 3: Evidence Registration Number

- 3.1. Every piece of evidence shall be marked with a unique Evidence Registration Number. Documentary evidence shall carry a separate Evidence Registration Number for each page of the document.
- 3.2. The Evidence Registration Number shall contain no additional [meta-]information in itself.
- 3.3. An Evidence Registration Number shall be given to the evidence as soon as possible. The Evidence Registration Number shall be recorded on any other document that in any way relates to the evidence (for example the Evidence Registration Form).
- 3.4. No item which is or may become of evidential value is to be considered as evidence at any stage of the proceedings until it is given an Evidence Registration Number. No copy of any such item shall be made that does not have an Evidence Registration Number.

Regulation 4: Storage of documentary evidence

- 4.1. Every document shall be scanned to create electronic images as early as possible. Every document shall be electronically processed (for example by way of Optical Character Recognition) to ensure that the entire content of the document is free-text-searchable.
- 4.2. It is the responsibility of the Case Controller to ensure that documents collected by his or her Team are scanned within a defined time span agreed upon with the Deputy Prosecutor (Investigations).
- 4.3. This Regulation shall apply to any document collected or received by the Investigation Team or by any third person on behalf of the Investigation Team during the entire investigation.
- 4.4. [All documentary evidence [to be used in trial] that is in languages other than one of the working languages of the Court shall be translated into at least one of the working languages of the Court. [The translation of documentary evidence in languages other than one of the working languages of the Court shall be registered with its own Evidence Registration Number as well as be scanned and processed for free-text-search.]

Regulation 5: Storing of audio- and video-based evidence

All audio- and video-based evidence, whether collected by the Investigation Team or on its behalf by any third person or otherwise

received, shall be digitalised and stored within the IMS as early as possible. A security copy of the original source shall be produced and shall be located alongside the original within the vault. The Evidence Custodian is responsible for a proper long-term archiving of all audio and video based evidence.

Regulation 6: Registration of artefacts and other evidence

Physical objects that cannot be scanned by reason of their natural consistency shall be registered within the IMS and shall be given additional meta-information in accordance with Section 4 of this Book.

Section 4: Meta-information

Regulation 7: Storing of meta-information

- 7.1. At the time of scanning, every piece of evidence which is electronically stored within the IMS shall be assigned additional electronic data (“meta-information”).
- 7.2. Items of evidence without meta-information will not be treated as evidence. The Services Section shall refuse the storage of physical and/or electronic pieces of evidence that lack meta-information.

Regulation 8: Range of meta-information

- 8.1. The range of meta-information shall be determined by the Deputy Prosecutor (Investigations) in close consultation with the Deputy Prosecutor (Prosecutions). As a minimum, every piece of evidence shall carry the following meta-information:
 - (a) the date and time of collection or receipt, in accordance with Section 10 of this Book;
 - (b) the place of collection described in as much detail as possible (for example site, house, room, cabinet, binder);
 - (c) the name of the person collecting the item;
 - (d) if applicable, the person from whom the item was collected;
 - (e) if applicable, whether it is national security information (Section 12 of this Book).
- 8.2. In addition, if applicable, meta-information shall be given on

- (a) the production and location of every working copy, if any, of the documentary item, in accordance with Regulation 11.3.;
 - (b) every occasion, if any, on which the item was presented in court, in accordance with Regulation 12.;
 - (c) every occasion, if any, on which the item was introduced through a witness, as well as the identity of the witness, in accordance with Regulation 13.
- 8.3. Documents in languages other than one of the working languages of the Court shall carry an abstract in at least one of the working languages of the Court. If a translation of the document exists, the translation shall be part of the meta-information.⁸⁹
- 8.4. Audio and video evidence shall carry meta-information regarding the names of persons shown or recorded on the evidence as well as information with regard to the date, time and place of the creation of the recording.

Regulation 9: Changes to meta-information

- 9.1. Stored meta-information shall not be changed nor be deleted without the permission of the Case Controller. Additional meta-information may be added during the investigation.
- 9.2. Once evidence has been presented in court or disclosed, the meta-information of such evidence must not be changed nor deleted without notification to the Court and/or the party or parties to whom it was disclosed. Additional meta-information can be added in the course of the trial.

Section 5: Retrieval

Regulation 10: Retrieval of stored information

- 10.1. All stored material shall be accessible for all investigation and prosecution purposes. Restrictions on retrieval of or access to docu-

⁸⁹ The rationale of this regulation is that the translation of a document should not only be stored as a document in its own right (with its own Evidence Registration Number), but also as meta-information of the original. Even though the original and the translation would normally be hyperlinked, thus facilitating easy cross-reference, the storing of the translation as meta-information ensures that the translation is never lost and always accessible, for example in case the translation document is corrupted.

ments may be ordered for reasons of security or confidentiality by the Senior Prosecutor seized of the case or a designated subordinate.

- 10.2. All material requiring special security or confidentiality measures shall be identified before storage within the IMS. In case of doubt, a decision on scanning may be made by the Deputy Prosecutor (Investigations).

Regulation 11: Working copies

- 11.1. Working copies of all evidence shall only be made available by way of reproduction of the electronically stored image of the evidence or, in case of an audio or video recording, of the digitalised version of the recording. The original of all items shall be stored by the Services Section. The Section shall not release any originals unless otherwise ordered by the Deputy Prosecutor (Investigations).
- 11.2. The Services Section shall set up a uniform filing and document management system. The Section shall ensure that a uniform working copy file exists in relation to each investigation. The organisation of the file shall be linked to the organisation of the electronic copies of the documents. As far as possible, the master and sub-files in the working copy version shall mirror the directories and sub-directories in the electronic version.
- 11.3. The production and the location of a working copy shall be noted as meta-information of the document.

[Section 6: Disclosure⁹⁰]

Section 7: Presentation of evidence to the Court

Regulation 12: Registration of exhibit information

The fact that a piece of evidence will be or has been presented in court shall be registered as meta-information of the stored evidence. In case a piece of evidence is presented in court more than once, a

⁹⁰ It is suggested that a Section on disclosure be included at a later stage, once the Pre-Trial Chamber has clarified the scope of the Office's disclosure obligations.

separate registration for every subsequent presentation shall be made.

Regulation 13: Registration of witness relations

The witness through which a piece of evidence will be introduced or has been introduced shall be registered as meta-information of the evidence. Every additional introduction shall be registered separately.

Regulation 14: Electronic presentation

Unless otherwise ordered by the Court, all documents shall be presented electronically, with a view to enabling the Court to use the same electronic search and retrieval functions as those used by the Office of the Prosecutor.

Section 8: Archiving and deleting stored information

Regulation 15: Archiving of information

All information presented in court at the pre-trial or trial stages of the proceedings shall be archived in electronic form together with the other records and particulars of the case. Exemptions may be ordered by the Senior Prosecutor seized of the case for reasons of security and confidentiality.

Regulation 16: Deletion of stored information

No stored information may be deleted. The Deputy Prosecutor (Investigations) may order deletion of information in the case of documents containing personal information concerning an accused after acquittal only if the information clearly has no relevance for other cases and other investigations.

Section 9: Data security

Regulation 17: Responsibilities

The Senior Manager of the Services Section is responsible for the security and confidentiality of the information stored in the IMS.

He works in close consultation with the Chief of the Information Technology and Communication Services Section (ITCSS) and with the Chief of the Security Section on all questions regarding information security.

Regulation 18: Auditing and logging

All access to stored information shall be logged by the system. The log files shall be audited by the Chief Prosecutor in the event of a suspected breach of confidentiality. Log files shall be accessible only for the Chief Prosecutor him- or herself or an especially designated subordinate.

Regulation 19: Backup and disaster recovery

- 19.1. The IMS shall reach an agreement with the ITCSS on regular backups of the entire information and data stored in the IMS by ITCSS. Backup material shall be stored securely and not on the premises of the Court.⁹¹
- 19.2. Agreement shall also be reached on a complete and exhaustively tested disaster recovery system.

Regulation 20: Other security measures

For all other matters of data security, the common provisions of the Court shall apply.

Section 10: Management of evidence away from the seat of the Court

Regulation 21: General

- 21.1. Pursuant to article 54 of the Statute, the Chief Prosecutor may collect evidence during field missions on the territory of a State in accordance with the provisions of Section 9 of the Statute or as authorised by the Pre-Trial Chamber under Article 57(3)(d). All such evidence collection is subject to this Section.

⁹¹ The exact shape of this regulation largely depends on the question whether the Court will use a common system or whether the OTP will run its own separate system.

- 21.2. The Regulations on management of evidence away from the seat of the Court are to ensure the integrity of all evidence collected. Proper collection and handling includes packaging, labelling, transportation, storage and maintenance of the chain of custody at all times.

Regulation 22: Evidence Officer

- 22.1. For every investigation, at least one Evidence Officer shall be appointed by the Case Controller. The Evidence Officer is responsible for receiving, properly labelling, recording and retaining possession of all evidence collected and for maintaining the Evidence Seizure Record Form, and the Evidence Registration Form for each item of evidence.
- 22.2. The Evidence Officer is further responsible for collating the evidence and keeping the collection of evidence focused both in order to avoid duplication and to ensure completeness.

Regulation 23: Protection and recording of physical evidence to be collected

- 23.1. All evidence shall be protected from external influences that endanger the preservation of the evidence. It shall be handled with all due care.
- 23.2. If possible, evidence shall be photographed or videotaped in situ before collection begins and prior to any disturbance by the Investigation Team. The location and position of the evidence shall be recorded in a detailed sketch before collection.
- 23.3. The actual collection of evidence shall be documented by photographs or video-taped. If the necessary equipment is not available, clear and comprehensive written notes shall be made. The Evidence Officer shall safely store the photographs, video-tapes and/or notes.

Regulation 24: Registration and collection of evidence; Evidence Seizure Record Form; Evidence Registration Form

- 24.1. For all evidence collected at a particular site, an Evidence Seizure Record Form shall be kept by the Evidence Officer. All items collected shall be included in the Form. A signed [carbon] copy of the Evidence Seizure Record Form may be used as a receipt for the per-

son in charge of the premises (for example, the owner or tenant) and shall be provided to him or her.

- 24.2. For every individual item of evidence, an Evidence Registration Form shall be maintained. It shall contain the date and time when the object was first collected, the exact place where it was collected and the name of the investigator by whom it was collected. The item shall be concisely described in the Form.
- 24.3. Upon collection all evidence shall be sealed in an envelope or box. The envelopes and boxes shall be sealed with a tamper-proof tape. The person sealing the envelope or box shall sign over the tape. The Evidence Officer shall then register the item in the Evidence Registration Form and sign it. The envelope or box, the Evidence Seizure Record Form and the Evidence Registration Form shall bear a common reference number, in case any one of them is accidentally detached from the others.

Regulation 25: Potentially exonerating evidence

During evidence collection, all care shall be taken to identify exonerating evidence. The Evidence Officer shall ensure that potentially exonerating evidence is properly identified and labelled as such in the Evidence Registration Form. If any material points to further potentially exonerating material, this potential shall be recorded. If the lead is not pursued further, the reasons for this decision shall be recorded on the Evidence Registration Form.⁹²

Regulation 26: Chain of custody

- 26.1. All evidence shall be accounted for at all times. It shall constantly be in the possession of the collector or the individual authorised to have possession of the item. Such possession includes storage of the material in secure premises. The Case Controller shall ensure that all members of the Investigation Team are aware of the procedures for transfer of custody.

⁹² Records should be kept to be in a position to adequately react to a allegation by the Defence that exonerating material was not followed up thus breaching the duty under article 54(1)(a).

- 26.2. Every transfer of custody shall be recorded in the Evidence Registration Form. The entry shall indicate the date and time of the transfer, the person from whom the physical evidence was released, the person who received the item and the reasons for which the custody was transferred. The persons involved shall sign the Form every time custody is transferred. The person transferring custody shall ensure that the name of the recipient is clearly legible in the Form, and the person receiving the custody shall check that all seals are intact.
- 26.3. The person who has custody of the evidence shall keep the envelope or box containing such evidence on him or her, in direct line of sight or ensure that it is kept in a secure area to which no one else has access. If the seal becomes damaged, the cause of the damage shall be investigated and, if necessary, the content checked against the list to ensure that nothing is tampered with. The person in custody of the physical evidence shall prevent any improper handling of the envelope or box during loading/un-loading which may damage the seals.

Regulation 27: Registration upon arrival at the seat of the Court

Upon arrival at the seat of the Court, all physical evidence shall be handed over to the Services Section without delay for processing in accordance with Sections 2 and 3. The last person to have custody of the evidence shall ensure that the Evidence Registration Form and the Evidence Seizure Record Form are complete. The evidence will not be accepted for storage unless the documentation has been properly completed. The person handing over the evidence shall advise the Services Section of any special handling requirements or health precautions.

Section 11: Duties of the Services Section concerning information received by the Office under article 13, 14 and 15

Regulation 28: Register

- 28.1. The Senior Manager of the Services Section shall keep a Register of all information received by the Office under article 15, or by way of referral by a State Party pursuant to articles 13(a) and 14(2) or the

Security Council under article 13(b), including the additional information sought by the Office under article 15(2) and rule 104.

- 28.2. Information received under article 15 shall be defined as all material by means of which the provider of such material wishes to bring the alleged commission of crimes to the attention of the Office.
- 28.3. In cases of doubt whether material received fulfils the criteria provided for in Sub-regulation 28.2., the material shall be forwarded to the Deputy Prosecutor (Investigations) for assessment after scanning and before any meta-information is assigned pursuant to Regulation 29.
- 28.4. The Senior Manager of the Services Section shall strive to reach agreement with other Organs of the Court as to how incoming material is forwarded to the Office by other Organs.

Regulation 29: Meta-information

Every piece of information received under article 15 shall be assigned the following meta-information by the Senior Manager of the Services Section or a designated subordinate:

- (a) the name of the person or entity providing the information;
- (b) the date of dispatch and of receipt;
- (c) the country where the criminal conduct allegedly took place.

Section 12: National security information

Regulation 30: Definition

For the purposes of the Regulations, national security information shall be

- (a) all information of a State, irrespective of its form [and of whether it was provided by the State concerned, by a third party or otherwise acquired,] the disclosure of which would, in the opinion of that State, prejudice its national security interests;
- (b) all information, irrespective of its form, that has been obtained by the Office subject to an agreement that it would not be disclosed at any stage of the proceedings in accordance with article 54(3)(e).

[Regulation 31: Treatment of national security information]

[inclusion within meta-information]

[agreement not to disclose, article 54(3)(e)]

[disclosure only if ordered by the Deputy Prosecutor (Investigations)]

Book 5: External communication

Part 1: Media relations

Regulation 1: Values and principles

In its relations to the media and the public in general the Office takes into account and balances five principal interests:

- (a) the individual's right to a fair trial and the preservation of his or her dignity at all stages of the proceedings;
- (b) the victims and witnesses' right to protection of their safety, physical and psychological well-being, dignity and privacy, as well as their right to participation in the proceedings;
- (c) the right of the public to take notice of and be informed about court proceedings, bearing in mind the fact that public scrutiny forms an integral part of the framework to safeguard fair trial rights;
- (d) the duty of the Court and the Office to effectively enforce the administration of justice for the most serious crimes of concern to the international community as a whole, as mandated by the Statute;
- (e) the right of States under the Statute to have preserved and protected information that prejudices their national security interests.

Regulation 2: General

The Public Information Adviser is responsible for all public relations of the Office of the Prosecutor.

Regulation 3: Public statements

- 3.1. No public statement shall be made on any matter concerning information received by the Office, preliminary examinations, article 53(1) evaluations, trial and appellate proceedings, personnel questions or any other matter of an internal nature without the approval of the Chief Prosecutor or the Public Information Adviser.

- 3.2. The Public Information Adviser shall be informed immediately of all requests from media organisations, including television and radio programmes, wire services, news magazines and papers regarding information, interviews, research for in-depth stories or other matters.

Regulation 4: Events likely to attract international, national or regional attention

The section chiefs, Case Controllers and Senior Prosecutors shall inform the Public Information Adviser of any issue that might attract international, national or regional media interest.

[Part 2: Information about crimes]

[Part 3: The problem of denial of massive crimes]

Annex 2: Regulations *ad interim* for the Office of the Prosecutor*

Introduction

The Regulations are adopted by the Prosecutor of the International Criminal Court ('the Chief Prosecutor') in accordance with article 42(2) of the Statute and Rule 9 of the Rules of Procedure and Evidence of the Court. They are adopted *ad interim* to guide the decisions and practice of the Office pending adoption of the final Regulations. The final Regulations will be adopted in 2004 in light of the experience gained by the Office in its actual operations and taking into account the comments received through the consultation process.

The Regulations of the Office are an instrument for the effective management and administration of the Office of the Prosecutor. They establish standard operating procedures and a code of conduct that are mandatory for all members of the Office of the Prosecutor.

They are subordinated to and should be read in conjunction with the Rome Statute of the International Criminal Court, the Rules of Procedure and Evidence, and the Elements of Crimes.

Part 1: Operations

Chapter 1: Reception and analysis of seriousness of information

Section I. Reception and management of referrals

Regulation 1: Reception of referrals

The Information and Evidence Unit (IEU) shall receive, register, digitise, store and secure referrals on crimes within the jurisdiction of the Court and supporting documents received by the Office of the Prosecutor in the context of a referral of a situation made by the Security Council or a State Party, in accordance with applicable Regulations on information and evidence management.

* These Regulations *ad interim* were signed by ICC Prosecutor Luis Moreno Ocampo and entered into force on 5 September 2003. The original format has been kept to the extent possible.

Regulation 2: Management of referrals

- 2.1. The Head of the IEU shall acknowledge reception of the referral, shall immediately inform the Chief Prosecutor of the referral received and shall make electronically available the referral and supporting documents to the Legal Advisory and Policy Section (LAPS) and to the External Relations and Complementarity Unit (ERCU).
- 2.2. LAPS and ERCU shall analyse the seriousness of the information received in accordance with Section 3.

Section 2. Reception and acknowledgement of communications under article 15

Regulation 3: Reception of communications

The Information and Evidence Unit (IEU) shall receive, register, digitise, store and secure all information on crimes within the jurisdiction of the Court received by the Office of the Prosecutor under article 15 (“communications”), in accordance with applicable Regulations on information and evidence management.

Regulation 4: General requirements for acknowledgments and responses to referrals and communications

- 4.1 Acknowledgments and responses shall be sent, whenever possible, to the address designated by the author of the communication or, in the absence of a designated address, to the address from which the communication was sent.
- 4.2. Acknowledgments and responses shall be sent in the working language of the Court adopted by the author of the communication, or in the working language of the Court deemed otherwise appropriate by the Head of the Information and Evidence Unit.
- 4.3. All correspondence shall be sent in such a way as to prevent any danger to the safety, well-being and privacy of those who provided the information contained within the communication.
- 4.4. All acknowledgments and responses to communications shall be approved by the Head of the Information and Evidence Unit or by the person designated by him or her.

Regulation 5: Report on communications by IEU

- 5.1. IEU shall, on a weekly basis or as required by the number of communications received or reasons of urgency, prepare a report of communications received, in which it will preliminary identify:
 - (a) those communications that manifestly do not provide any basis for the Office of the Prosecutor to take further action; and
 - (b) those communications requiring additional analysis in order to assess whether further action may be appropriate.
- 5.2. In the case of communications referred to in 5.1.(b), the IEU shall seek to identify other communications that refer to the same situation or event.
- 5.3. The report shall be made electronically available to ERCU, LAPS and the Public Information Unit (PIU).

Regulation 6: Status report

- 6.1. In addition to its initial weekly report, IEU shall prepare a monthly status report on communications, indicating the number of communications received, assessments conducted and responses provided, together with other information as may be appropriate to the needs of the Office of the Prosecutor.
- 6.2. The status report shall be accessible to the members of the Office of the Prosecutor. The status report may be publicised by the Chief Prosecutor in a manner that prevents any danger to the safety, well-being and privacy of those who provided the information contained within the communication or any identifiable victim or witness of crimes potentially within the jurisdiction of the Court.

Regulation 7: Review by LAPS

- 7.1. LAPS shall confirm or amend the preliminary identification made by IEU in accordance with Regulation 5. LAPS may, *inter alia*, decide that certain communications listed under Regulation 5.1.(b) do not require further action. LAPS shall electronically refer back to IEU those communications providing no basis for further action.
- 7.2. IEU shall respond to those communications which manifestly do not provide any basis for further action by way of a letter acknowledging the communication and indicating that the communication,

as presented, does not provide any basis upon which the Office of the Prosecutor could take further action and that unless further information is submitted, the communication will be archived.

- 7.3. With respect to communications referred to in Regulation 5(1)(b), LAPS shall:
- (a) identify those communications that do not provide a sufficient legal basis for the Office of the Prosecutor to proceed. LAPS shall briefly state the reasons for this determination and, where appropriate, shall seek to identify other bodies or entities to which the author of the communication may be referred. This legal analysis shall be made electronically available to IEU, which shall acknowledge the communication concerned and provide a summary prepared by LAPS of its legal assessment; and
 - (b) identify those communications that require further analysis, in accordance with Section 3.

Section 3. Analysis of the seriousness of information

Regulation 8: Assessment by LAPS and ERCU

- 8.1. LAPS shall analyse relevant legal issues, taking into account the factors set out in article 53 and Rule 48. It shall assess, in particular, whether the information provides a reasonable basis to believe that a crime has been or is being committed which would meet the subject-matter and other jurisdictional requirements of the Statute. LAPS shall make its assessment together with appropriate recommendations electronically available to ERCU.
- 8.2. ERCU shall conduct a further assessment of issues taking into account, in particular, the factors set out in article 53, paragraphs (b) and (c), and Rule 48 and shall make recommendations to the Chief Prosecutor, as appropriate, including whether he should seek additional information, in accordance with article 15.2 and Rule 104.
- 8.3. If the Chief Prosecutor decides that additional information is required, Regulation 9 shall apply.

Regulation 9: Seeking additional information

- 9.1. ERCU shall, as appropriate, seek additional information from States, organs of the United Nations, inter-governmental or non-governmental organisations, or other appropriate national or international authorities, entities, associations, prosecutors and experts, by way of oral and written requests or by holding meetings as appropriate.
- 9.2. ERCU shall keep a register with all requests for additional information made by the Office under article 15, paragraph 2 or Rule 104, paragraph 2. It shall contain a list of requests made by the Office, the text of the requests and relevant information on answers received. The register shall be accessible to all members of the Office. Information on requests of a confidential nature shall only be available to Office members on a need to know basis in accordance with the applicable Regulations on data protection.
- 9.3. Requests for additional information shall be made by the Head of ERCU or by the person authorised by him or her. Written requests to States and inter-governmental organisations shall be signed by the Chief Prosecutor..

Part 2: Information and evidence management

Chapter 1: General Provisions

Regulation 10: Definitions

For the purposes of this Part,

“evidence” shall be construed broadly to include any item with potential evidentiary value in a potential or ongoing investigation or prosecution;

“free-text-searchable” shall mean the facility to search electronically for all occurrences of a defined or partially-defined alphanumeric string of data within a particular document;

“Information Management System” (IMS) shall mean the electronic system designated for the management of information and evidence within the Office;

“meta-information” shall mean additional electronic data appended to the electronic record of information or evidence, and serving to identify its key characteristics; and

“vault” shall mean the secure storage facility of the Office of the Prosecutor designated for the physical storage of information and evidence.

Regulation 11: General provisions

- 11.1. All information and evidence shall be stored electronically, if possible.
- 11.2. Any information or evidence that cannot be stored electronically shall be registered and its particulars fully set out on a surrogate sheet stored within the IMS, in accordance with Chapter 3 of this Part.
- 11.3. All information and evidence received by the Office, including any additional information sought by the Office under article 15 of the Statute and Rule 104 of the Rules of Procedure and Evidence, shall be subject to Chapter 11 of this Part.
- 11.4. Unless otherwise indicated, the Services Section shall have responsibility for the duties and functions provided in Chapters 2 to 11 of this Part.

Chapter 2: Storage of information and evidence

Regulation 12: Evidence Registration Number

- 12.1. Each incoming article of evidence shall be marked with a unique Evidence Registration Number (ERN) as soon as possible.
- 12.2. The ERN shall, by its structure, allow immediate distinction between situations being investigated by the Office of the Prosecutor, but shall not, in itself, contain any information that may potentially identify any individual victim, witness, suspect, accused or third party.
- 12.3. No item which is or may be of evidential value shall be considered as evidence at any stage of the proceedings until it has been assigned an ERN in accordance with this Regulation. An item without

an assigned ERN shall not be copied, reproduced in any form, or distributed outside the Services Section.

**Regulation 13: Communication Received Number;
General Correspondence Number**

- 13.1. Each communication of information or additional information received under article 15 of the Statute shall be marked with a Communication Received Number.
- 13.2. All other correspondence received by the Office shall be marked with a General Correspondence Number.

Regulation 14: Electronic storage of evidence

- 14.1. All evidence registered by the Services Section shall, subject to Chapter 11 (National security information), have a digital representation taken and stored within the IMS. Documentary evidence shall, to the extent possible, be processed to allow the contents to be searchable. Non-documentary evidence shall be digitised using up-to-date digitisation methods and technologies.
- 14.2. All evidence and other information received by the Services Section in digital form shall, subject to measures taken in relation to the management of virus infected material, be stored in its original format and assigned the minimum meta-information specified in regulation 16.1. Where such evidence is documentary in nature, an alternative version of the evidence shall be created and each page shall be itemised and be assigned an ERN. Non-documentary digital evidence shall be stored in its original format and assigned an ERN for each distinguishable electronic item and may be subject to such additional handling requirements as may be required by the Case Controller for the investigation in question, in consultation with the Services Section.
- 14.3. Where a digital representation of evidence cannot be created, a surrogate sheet shall be completed and stored within the IMS in accordance with Regulation 14 and shall be assigned additional meta-information in accordance with Chapter 3 of this Part.

Chapter 3: Meta-information

Regulation 15: Storing of meta-information

- 15.1 The meta-information to be stored for all evidence shall be defined in the Information Management Plan, but shall nonetheless include the minimum requirements for compulsory meta-information assigned to all evidence in accordance with Regulation 16.1.
- 15.2. Items of evidence without the minimum meta-information shall not be treated as evidence by the Office. The Services Section shall refuse the storage of physical and electronic articles of evidence that lack the requisite range of meta-information, as set out in Regulation 16, below.

Regulation 16: Range of compulsory and other meta-information

- 16.1. The range of meta-information shall be determined by the Deputy Prosecutor (Investigations) in close consultation with the Deputy Prosecutor (Prosecutions) and be documented within the Information Management Plan. As a minimum, the electronic record of each article of evidence or group of articles of evidence shall include the following compulsory meta-information:
 - (a) the date and time of collection or receipt, in accordance with Chapter 9 of this Part;
 - (b) the place of collection described in as much detail as possible within a nested hierarchy of locations;
 - (c) the name of the person collecting the item;
 - (d) an indication of the source of the item, or where this is impossible, a statement as to the context of the source or a statement that the source is unknown; and
 - (e) if applicable, whether the item consists in whole or in part of national security information in accordance with the Statute, Rules of Procedure and Evidence and Chapter 11 of this Part.A reference to a singular item shall include a reference to multiple items.
- 16.2. In addition, from time to time and where applicable, meta-information shall be updated to accurately specify:

- (a) the production and location of each working copy of a documentary item, in accordance with Regulation 19;
 - (b) each occasion on which the item was presented in court, in accordance with Regulation 20;
 - (c) each occasion on which the item was introduced through a witness, as well as the identity of the witness, in accordance with Regulation 21;
 - (d) each occasion when the item, a digital representation of the item, or any meta-information relating to the item was disclosed to a person or entity outside the Office of the Prosecutor, and details of the recipient of the disclosure.
- 16.3. Documents written in languages other than one of the working languages of the Court shall include an abstract in at least one of the working languages of the Court. If a translation of the document exists, the translation shall form part of the meta-information.
- 16.4. Any information that is produced for the purpose of an investigation, including audio-based and video-based evidence and translations shall be submitted to the Services Section with the following minimum meta-information:
- (a) the name(s) of the person(s) shown or recorded on the evidence or information;
 - (b) the date, time and place of the production of the evidence or information;
 - (c) the names and relevant contact details of the responsible persons involved in the production of the evidence or information.

Regulation 17: Alterations to meta-information

- 17.1. Meta-information stored compulsorily in accordance with Regulation 16. shall not be altered or deleted without the permission of the Case Controller. Additional meta-information may be added during the course of the investigation.
- 17.2. Once evidence has been presented in court or disclosed in accordance with the provisions of the Statute and Rules of Procedure and Evidence, the compulsory meta-information associated with such evidence shall not be altered or deleted without notification of the Court and, if applicable, the party or parties to whom such evidence

was disclosed. Additional meta-information may be added during the course of further investigations or trial [and may be disclosed in accordance with the provisions of the Statute and the Rules of Procedure and Evidence].

Chapter 4: Retrieval

Regulation 18: Retrieval of stored information

- 18.1. All information and evidence stored within the IMS shall be accessible to members of the Office for the purposes of analysis of information, investigation and prosecution. The Chief Prosecutor, Deputy Prosecutor (Investigations), Deputy Prosecutor (Prosecutions) or Special Prosecutor in charge of an investigation, or a designated subordinate, may order and, subject to the chain of command, apply or lift restrictions on retrieval and access of specified documents, or parts thereof, or meta-information thereof, for reasons of security of a victim, witness or third party, protection of national security information, confidentiality, sensitivity or any other reason specifically certified by the Chief Prosecutor.
- 18.2. All information or evidence requiring special handling measures on grounds of personal security, national security, confidentiality or sensitivity shall be identified before storage within the IMS. In case of doubt, the Deputy Prosecutor (Investigations) shall decide whether the material should be scanned prior to storage.

Regulation 19: Working copies

- 19.1 Working copies of all information or evidence shall only be made available by way of reproduction of the digitised version of the evidence. The originals of all items shall be stored by the Services Section. The Section shall not release any originals unless otherwise ordered by the Deputy Prosecutor (Investigations).
- 19.2. The Services Section shall establish a uniform filing and document management system. The Section shall ensure that a uniform working copy file exists in relation to each investigation. The organisation of the file shall be linked to the organisation of the electronic copies of the documents.

[Chapter 5: Disclosure]

Chapter 6: Presentation of evidence to the Court

Regulation 20: Registration of exhibit information

The fact that an article of evidence will be or has been presented as a court exhibit shall be registered as meta-information for that article of evidence. Should an article of evidence be introduced as a court exhibit more than once, a separate entry of meta-information shall be required for each instance of introduction.

Regulation 21: Registration of witness relations

The fact that an article of evidence will be introduced or has been introduced through the testimony of a witness shall be registered as meta-information for that article of evidence. Should an article of evidence be introduced through witness testimony more than once, a separate entry of meta-information shall be required for each instance of introduction.

Regulation 22: Electronic presentation

Unless otherwise ordered by the Court, all evidence shall be presented to the Court electronically, with a view to enabling the Court to use the same electronic search and retrieval functions as those used by the Office of the Prosecutor.

Chapter 7: Archiving and deleting stored information

Regulation 23: Archiving of information

All information presented to the Court at the pre-trial or trial stages of the proceedings shall be archived in electronic form together with the other records and particulars of the case. The Special Prosecutor in charge of an investigation may order exemptions to archiving for reasons of security of a victim, witness or third party, protection of national security information, confidentiality, sensitivity or any other reason specifically certified by the Chief Prosecutor.

Regulation 24: Deletion of stored information

Stored information shall not be deleted. Exceptionally, the Deputy Prosecutor (Investigations) may order deletion of personal information concerning an accused after acquittal if the Deputy Prosecutor (Investigations) is satisfied that the information in question is clearly without relevance to any case pending before any chamber of the Court or to potential investigations or prosecutions by the Office or an investigation or subsequent prosecution by a State Party to which the Chief Prosecutor has deferred in accordance with article 18(2) of the Statute.

Chapter 8: Data security

Regulation 25: Responsibilities

The Senior Manager of the Services Section shall have responsibility for all measures relating to the security and confidentiality of the information and evidence stored within the Office of the Prosecutor. He shall consult closely with the Chief of the Information Technology and Communication Services Section (ITCSS) and with the Chief of the Security Section on all questions relevant to information security.

Regulation 26: Auditing and logging

All access to stored information or evidence shall be logged by the IMS. The log files shall be audited by the Chief Prosecutor in the event of a suspected breach of confidentiality. Log files shall be accessible only by the Chief Prosecutor in person, or by a specifically designated subordinate.

Regulation 27: Backup and disaster recovery

- 59.1. The Chief Prosecutor shall reach an agreement with the ITCSS on the regular backup of all information and data stored in the IMS by the Services Section. Backup material shall be stored securely and not on the premises of the Court.
- 59.2. Agreement shall also be reached on a complete and exhaustively-tested disaster recovery system.

Regulation 28: Other security measures

For all other matters of data security, the common provisions of the Court shall apply.

Chapter 9: Management of evidence away from the seat of the Court

Regulation 29: General

Pursuant to article 54 of the Statute, the Chief Prosecutor or a designated subordinates may collect evidence during the course of field missions on the territory of a State in accordance with the provisions of Section 9 of the Statute or as authorised by the Pre-Trial Chamber in accordance with article 57(3)(d). All such evidence collection shall be subject to this Chapter.

Regulation 30: Evidence Officer

- 30.1. The Case Controller shall appoint at least one Evidence Officer for each investigation. The Evidence Officer shall have responsibility for receiving, properly labelling, recording and retaining possession of all evidence collected during the course of the investigation and for maintaining the Evidence Seizure Record Form and the Evidence Registration Form for each article of evidence.
- 30.2. The Evidence Officer shall further have responsibility for collating evidence, focusing the collection of evidence, avoiding duplication in collection and ensuring completeness of collection.
- 30.3. The Evidence Officer shall comply with specific provisions in the Information management plan for an investigation that are relevant to evidence collection.

Regulation 31: Protection and recording of physical evidence to be collected

- 31.1. All evidence shall be protected from external influences that may endanger the preservation of the evidence. Members of the Office shall handle all evidence with due care.
- 31.2. If possible, evidence shall be photographed or videotaped *in situ* prior to collection begins and to any disturbance by the Investiga-

tion Team. In any case, the location and position of the evidence shall be recorded in a detailed sketch prior to collection.

- 31.3. The actual collection of evidence shall be documented by photographs or videotaped. If the necessary equipment is not available, clear and comprehensive written notes shall be taken. The Evidence Officer shall ensure the safe storage of all photographs and videotapes and any notes taken in accordance with this Regulation.

Regulation 32: Registration and collection of evidence; Evidence Seizure Record Form; Evidence Registration Form

- 32.1. The Evidence Officer shall maintain an Evidence Seizure Record Form for all evidence collected at a particular site. All articles of evidence collected shall be described in the Evidence Seizure Record Form. A signed, carbon copy of the Evidence Seizure Record Form shall, if possible, be provided as a receipt to the person having custody over the evidence seized by the Evidence Officer or another member of the Investigation Team.
- 32.2. An Evidence Registration Form shall be maintained for each single article of evidence or each collection of evidence from a discrete source. It shall record the date and time when the evidence was first collected, the exact place where it was collected and the name of the investigator by whom it was collected. The evidence, or the collection of evidence, shall be concisely described in the Evidence Registration Form.
- 32.3. All evidence recorded on an Evidence Registration Form shall be sealed in appropriate packaging upon collection. The packaging shall be sealed with tamper-proof tape. The person sealing the packaging shall sign clearly over the tape. Each package, each Evidence Seizure Record Form and each Evidence Registration Form shall bear a unique reference number. The reference numbers of the package shall be recorded on the Evidence Registration Form, and the reference number of the Evidence Registration Form shall be recorded on the package. The Evidence Officer shall sign the Evidence Registration Form certifying the accuracy of the all information recorded and the effective preservation of all evidence.

Regulation 33: Potentially exonerating evidence

During evidence collection, all care shall be taken to identify exonerating evidence. The Evidence Officer shall ensure that exonerating evidence is properly identified and labelled as such in the Evidence Registration Form. If the Investigation Team leader is satisfied that any material points to further potentially exonerating material, this fact shall be recorded.

Regulation 34: Chain of custody

- 34.1. All evidence shall be accounted for at all times. Each article of evidence shall remain constantly in the possession of the collector or the individual authorised to have possession of the article. Such possession includes storage of the material in secure premises. The Case Controller shall ensure that all members of the Investigation Team are aware of the procedures for transfer of custody.
- 34.2. Prior to registration by the Services Section, each transfer of custody shall be recorded on the Evidence Registration Form. The meta-information relating to chain of custody shall indicate the date and time of the transfer, the person from whom the physical evidence was released, the person who received the evidence and the reasons for which the custody was transferred. The persons releasing and receiving custody of the evidence shall certify within the system each time custody is transferred. The person releasing custody shall ensure that the name of the recipient is clearly legible on the Evidence Registration Form, and the person receiving custody shall ensure that all seals are intact.
- 34.3. The person having custody of the evidence shall keep the package or packages containing such evidence on his or her person, in his or her direct line of sight or otherwise ensure that such evidence is kept in a secure area to which no other person has access. If the seal on a package becomes damaged, the cause of the damage shall be investigated and reported to the Team leader. Should the Team leader find it necessary, the contents of the package shall be checked against the Evidence Registration Form to ensure that the contents have not been tampered with or otherwise disturbed. The person in custody of the physical evidence shall prevent damage to

the seals by ensuring the proper handling of the package during loading or unloading.

Regulation 35: Registration upon arrival at the seat of the Court

- 35.1. Upon arrival at the seat of the Court, all physical evidence shall be delivered by the person having custody of the evidence to the Services Section without delay for processing in accordance with Chapters 2 and 3 of this Part. The last person to have custody of the evidence shall ensure that the Evidence Registration Form and the Evidence Seizure Record Form are completed, and that effective transfer to the services section is made. The Services Section shall not accept any evidence for storage unless and until all relevant documentation has been properly completed. The person releasing custody to the Services Section shall advise the Services Section of any special handling requirements or health precautions.
- 35.2 The Services Section shall, upon transfer of custody, transfer the items into standardised evidence storage containers. All forms associated with the evidence shall be assembled within each storage container. A new single Chain of Custody Form shall be created and attached to each standardised evidence container. A Chain of Custody Form shall list the name of the member of the Services Section who first received the evidence and all names of persons, and dates associated with all transfers of possession of the batch of evidence.
- 35.3 Transfers of possession of original evidence shall only take place in relation to a whole standardised container. Signature to the Chain of Custody Form shall certify that the entire batch is complete and in the correct, numbered order at the time and date of transfer.

Chapter 10: Duties of the Services Section concerning information received by the Office under articles 13, 14 and 15

Regulation 36: Register

- 36.1. The Senior Manager of the Services Section shall maintain a Register of all information received by the Office under article 15, or by way of referral by a State Party pursuant to articles 13(a) and 14(2) of the Statute, or the Security Council under article 13(b) of the

Statute, including any additional information sought by the Office under article 15(2) of the Statute and Rule 104.

- 36.2. Information received under article 15 of the Statute shall be defined as all material by means of which the provider of such material wishes to bring the alleged commission of crimes to the attention of the Office.
- 36.3. In cases of doubt as to whether material received fulfils the criteria provided for in Sub-regulation 36.2., the material shall be forwarded to the Legal Advisory and Policy Section for assessment after scanning and before any meta-information is assigned pursuant to Regulation 37.
- 36.4. The Senior Manager of the Services Section shall strive to reach agreement with other Organs of the Court as to how incoming material is forwarded to the Office by other Organs.

Regulation 37: Meta-information

Each piece of information received under article 15 shall be assigned the following meta-information by the Senior Manager of the Services Section or by a designated subordinate:

- (a) the name of the person or entity providing the information;
- (b) the date of dispatch and of receipt; and
- (c) the country where the allegedly criminal conduct took place.

Chapter 11: National security information

Regulation 38: Definition

For the purposes of the Regulations, national security information means:

- (a) all information of a State, irrespective of its form [and of whether it was provided by the State concerned, by a third party or otherwise acquired,] the disclosure of which would, in the opinion of that State, prejudice its national security interests;
- (b) all information, irrespective of its form, that has been obtained by the Office subject to an agreement that such information would not be disclosed at any stage of the proceedings in accordance with article 54(3)(e).

[Regulation 39: Treatment of national security information]

Approval of the Chief Prosecutor

1. The Chief Prosecutor of the International Criminal Court, acting under article 42, paragraph 2 of the Rome Statute of the International Criminal Court and pursuant to Rule 9 of the Rules of Procedure and Evidence, hereby approves these Interim Regulations for the Office of the Prosecutor.
2. These Interim Regulations shall enter into force from the 5th day of September 2003.
3. These Interim Regulations shall be subject to amendment or withdrawal on the written instructions of the Chief Prosecutor.

[original signed by]

Mr. Luis Moreno-Ocampo, Chief Prosecutor

5 September 2003

Annex 3: Comparative Table of Key Provisions of the Office of the Prosecutor Regulations*

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS					
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content	
INTRODUCTION					
1	Mission of the Regulations	Preamble	Introduction	–	
		Complementary principles set out in the Statute applied by the OTP in taking decisions. Transparency, consistency of approach, foster complementarity, fairness.			
2	Source	1.1.1.	Introduction Article 42(2) of the Statute and RoPE 9	1.1.	Article 42(2) of the Statute and RoPE 9
3	Term	–	Introduction 2004, upon adoption of the final Regulations	–	–

* **Remarks: (1)** The table follows the order of the Draft Regulations, since they cover the largest number of issues and offer more sub-divisions. **(2)** This is not an exhaustive chart; not all matters dealt with in each document are listed. **(3)** As the numbering of regulations in the Draft Regulations starts from 1 in each of its five Books, the location of subject-matter is identified with the Roman numeral, referring to the Book, followed by the Arabic numeral, referring to the number of the regulation in that Book; e.g., III.3.3.-4. = Regulations 3.3. and 3.4. in Book 3; 1.1.5. = Regulation 1.5. in Book 5. **(4)** The column “Subject-matter” does not necessarily follow the titles of the regulations or other divisions adopted by the documents. **(5) IMS:** Information Management System. **RoPE:** Rules of Procedure and Evidence. **IEU:** Information and Evidence Unit. **LAPS:** Legal Advisory and Policy Section. **ERCU:** External Relations and Complementarity Unit. **ExCom:** Executive Committee. **VWU:** Victims and Witnesses Unit (of the Registry). **OTP** or “**Office**”: Office of the Prosecutor. **SC:** United Nations Security Council.

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COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS						
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003		INTERIM REGULATIONS 2003		REGULATIONS IN FORCE 2009
		Location and Content		Location and Content		Location and Content
4	Purpose	I.1.2.	Effective management and administration of the OTP. Establish guidelines, standard operating procedures and a Code of Conduct.	Introduction	Effective management and administration of the OTP. Establish standard operating procedures and a Code of Conduct.	1.1. Govern the operation of the Office in relation to its management and administration.
5	Interpretation	I.1.4.	To be read in conjunction and subject to: the Statute, RoPE, Elements of Crimes, Regulations of the Court, Staff Regulations and Staff Rules.	Introduction	Subordinated and to be read in conjunction with the Statute, RoPE, and Elements of Crime.	1.2. Subject to: the Statute, RoPE, Regulations of the Court, Regulations of the Registry, Staff Rules and Regulations.
6	Authorised languages	-	-	-	-	1.3. Adopted in English and French. Translations in the official languages of the Court are equally authentic.
7	Use of terms	I.1.5.	Several terms of general usage are defined.		-	2 Several terms of general usage are defined.
8	Independence	I.2.2.	Independence from other organs of the Court and from external sources.	-	-	13 Prosecutor shall ensure that the Office and its members do not seek or act on instructions from external sources.
9	Amendments	I.3-4.	A Standing Committee is established to make recommendations to the Chief Prosecutor.			3 Proposals shall be presented in writing to the Prosecutor by a Head of Division or Support Section.

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS						
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content		INTERIM REGULATIONS 2003 Location and Content		REGULATIONS IN FORCE 2009 Location and Content
10	OTP Mission	Part 2	Blank			
11	OTP Structure	Part 3	Blank			
12	Views of the Victims	-	-	-	-	16 OTP shall seek and receive the views of the victims at all stages of its work, be mindful and take into account its interests, in coordination with the Victims Participation and Reparations Section of the Registry.
ADMINISTRATION OF THE OFFICE						
13	Administration of the Office – Executive Committee – ExCom	-	-	-	-	4 Composed of the Prosecutor and Heads of the three Divisions. Provides advice to the Prosecutor; responsible for the development and adoption of the strategies, policies and budget; provides strategic guidance on all activities, and coordinates them.
14	Duty Roster of Officers	-	-	-	-	19 To be established by the Office, Divisions and Support Sections for urgent matters arising outside working hours.

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COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS					
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003		REGULATIONS IN FORCE 2009	
		Location and Content	Location and Content	Location and Content	Location and Content
15	Relations with the Registry	-	-	-	20 The Office shall seek institutional arrangements with the Registry for services within its mandate, taking into account the independence of the Office and the neutrality of the Registry.
16	Divisions and Sections	-	-	-	5 Three Divisions, Two Support Sections.
17	Expert advice on sexual and gender violence, violence against children and other issues	-	-	-	6 Provided by the Gender and Children Unit, Special Gender Adviser and advisers on other matters shall provide additional expertise to the Prosecutor and ExCom.
18	Jurisdiction, Complementarity and Cooperation Division – Duties	-	-	-	7 Responsible for the preliminary examination and evaluation of information pursuant to articles 15 and 53(1), and preparation of reports and recommendations to assist the Prosecutor in determining whether there is a reasonable basis for an investigation. Provision of analysis and legal advice to ExCom on issues of jurisdiction and admissibility. Provision of legal advice to ExCom on co-operation.

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS					
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content	
19	Investigation Di- vision – Duties	–	–	–	8 Preparation of security plans and protection policies for all involved. Provision of investigative expertise. Preparation and co-ordination of field deployment of Office staff. Provision of factual crime analysis and analysis of information and evidence.
20	Prosecution Di- vision – Duties	–	–	–	9 Provision of legal advice on issues likely to arise during investigations and which may impact on future litigation. Preparation of litigation strategies. The conduct of prosecutions including litigation before the Court. Co-ordination and co-operation with the Registry on trial issues.
21	Services Section – Duties	–	See approximately IV.28, 29	See approximately 36,37	10 Budget preparation. Provision of advice on spending control. Field interpretation services and transla-

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COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS				
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content
				tions within the Office. Registration and storage of evidence and information. Development, introduction and maintenance of specific information management tools and practices.
22	Legal Advisory Section – Duties	–	–	Provision of: legal advice to Prosecutor, ExCom and Heads of Division. Development, introduction and maintenance of legal research tools. Specific legal training to Office staff etc.
23	Gender and Children Unit	–	–	Comprised of staff with legal and other expertise. Shall provide advice to the Prosecutor, ExCom and Divisions.
CODE OF CONDUCT				
24	Code of Conduct	II.1-15. See Chapter 47 of this volume	–	OTP shall ensure compliance with the Staff Rules and Regulations and Administrative Instructions of the Court in order to ensure that its staff members uphold the highest standards of efficiency, competence and integrity.

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS						
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content		
TRAINING						
25	Training values and principles	II.16. Highest standards of efficiency, competence and integrity. Promotion of comprehensive and ongoing training.	–	–	18	OTP shall provide comprehensive and ongoing training in order to ensure the highest stands of efficiency, competence and integrity.
26	In-house training	II.17. Offered on a regular basis. Obligatory to all staff. Responsibility of the Legal Advisory and Policy Section in consultation with other organs.	–	–	–	–
27	Induction course for newcomers	II.18. Minimum content with Regulation 18.2.	–	–	–	–
28	Induction to a new situation	II.19. At the start of a new investigation. Responsibility of the Case Controller and Senior Prosecutor in charge.	–	–	–	–
29	Ongoing education	II.20. At least once a year. Responsibility of Legal Advisory and Policy Section.	–	–	–	–

PRELIMINARY EXAMINATION FOR A *PROPRIO MOTU* INVESTIGATION AND EVALUATION TO START AN INVESTIGATION UPON REFERRAL

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS					
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003		REGULATIONS IN FORCE 2009	
		Location and Content	Location and Content	Location and Content	Location and Content
30	Complementarity Practice	III Part I Empty titles: Standard monitoring activities. Open sources. Bilateral agreements, activities, dialogue. Assessment of inability, unwillingness. Complementarity in the judicial process.	–	–	–
31	Preliminary examination and evaluation – unified procedure	–	–	25	Initiated on the basis of: any information on crimes sent by individuals or groups, States, inter-governmental or non-governmental organisations; referral of a State Party or the SC; declaration by a State which is not Party to the Statute, pursuant to article 12(3).
32	Registration of all incoming information	–	–	26	One only Register set up for crimes, referrals and declarations as well as supporting documents.
33	Preliminary Examination and article 53(1) evaluation for <i>proprio motu</i> investigations – Values and Principles	III.1. Ensure efficiency, establish a transparent and rational decision making, enable Chief Prosecutor to base his or her decision whether to investigate or not factually and legally.	–	–	–
34	Preliminary Ex-	III.2. All information brought to the	3	IEU receives, registers, digitises,	–

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	amination for <i>proprio motu</i> investigations		OTP under article 15 shall be analysed with a view to assessing the seriousness of its allegations, reliability of the source and admissibility of the case.	stores and secures all information received by the Office under article 15.		
35	Preliminary Examination – disfunctions	–	–	–	27	Matters manifestly outside the jurisdiction of the Court; information apparently related to a situation already under examination, investigation or prosecution by the Office; matters not manifestly outside the jurisdiction of the Court and not related to situations already under analysis or investigation and therefore deserving further examination.
36	Log of article 15 Preliminary Examinations	III.3.1-2.	Article 15 Preliminary Examinations Log, kept and updated by the Deputy Prosecutor (Investigations).			
37	Communications Register	III.3.3-4.	Article 15 Communications Register, kept by Senior Manager of Services Section, electronically accessible. Confirms receipt.			

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003		REGULATIONS IN FORCE 2009	
		Location and Content		Location and Content	
38	Report to the Chief Prosecutor	III.3.5.	Duty of the Deputy Prosecutor (investigations) to report regularly.		
39	Preliminary Examination for article 15	III.4.	Deputy Prosecutor (investigations) establishes Preliminary Examination Team, indicates composition, team leader. Duties: assess credibility and reliability of sources; characterise crimes; identify perpetrators etc.		
40	Additional Information	III.5.	May be sought by the Deputy Prosecutor (Investigations) upon recommendation of Preliminary Examination Team.		
41	Preliminary Examination Report	III.6.1.	Shall cover all issues specified in Regulation 4.5 (not 4.4!). Accompanied by recommendation on further action.		
42	Draft Investigation Plan	III.6.3,4,7.	If Deputies agree that situation merits an investigation, Deputy Prosecutor (Prosecutions) creates a Drafting Investigation Team under su-		

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS						
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003	INTERIM REGULATIONS 2003	REGULATIONS IN FORCE 2009		
		Location and Content	Location and Content	Location and Content	Location and Content	Location and Content
43	Draft Investigation Plan – Contents	III.6.5.	Long list of matters relevant for a decision to start an investigation.			
44	Recommendation to seek authorisation from the Pre-Trial Chamber to investigate	III.6.7.	Draft Investigation Plan is submitted by Deputies to Chief Prosecutor with a reasoned recommendation on whether authorisation to investigate should be requested before the Pre-Trial Chamber.			
45	Evaluation of Referrals	III.7.	All information shall be analysed regarding the seriousness of the allegations, reliability of the source, issues of jurisdiction and admissibility.	1	IEU shall receive, digitise, store and secure referrals and supporting documents.	
46	Evaluation Log of Referrals	III.8.1,4.	Kept and regularly updated by the Deputy Prosecutor (Investigations), who shall regularly report to the Chief Prosecutor.			
47	Register of incoming Referrals	III.8.3.	Senior Manager of the Services Section keeps the Regis-			

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003		REGULATIONS IN FORCE 2009	
		Location and Content	INTERIM REGULATIONS 2003 Location and Content	Location and Content	Location and Content
48	Article 53(1) Evaluation Team. Management of Referrals	<p>ter and forwards copies to the Chief Prosecutor and Deputy Prosecutor (Investigations).</p> <p>Established by the Chief Prosecutor in the event of a referral by the SC or a State Party. Duties: analyse all information regarding the seriousness of the allegations, reliability of the source, characterize crimes, identify perpetrators, issues of jurisdiction and admissibility.</p> <p>III.9.</p>	2	Head of IEU acknowledges receipt of referrals and informs Chief Prosecutor. LAPS and ERCU shall analyse seriousness of information received.	
49	Additional Information	<p>May be sought by the Deputy Prosecutor (Investigations) upon recommendation of Evaluation Team.</p> <p>III.10.</p>	9	Conducted by ERCU. Written requests to States and inter-governmental organisations signed by Chief Prosecutor.	
50	Evaluation Report, Draft Investigation Plan	<p>Evaluation Team prepares an Evaluation Report about article 53(1) covering items specified in Regulation 9.3. If the Report concludes that the situation merits an investigation, then the Deputy Prosecutor (Prosecutions) designates a Senior Prosecutor to supervise</p> <p>III.11.</p>	8	LAPS analyses relevant issues pursuant to article 53; assesses whether the information provides a reasonable basis for a crime. Assessment and appropriate recommendations shall be made available to ERCU, which conducts further assessment, in particular of issues set out in article 53(b) and	

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS						
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content		
			the drafting of a Draft Investigation Plan.	(c), and makes appropriate recommendations to the Chief Prosecutor, including whether he/she should seek additional information.		
51	Decision to start an investigation or not	III. 12.	Possible if new information or facts capable of leading to a reconsideration of the decision not to investigate arrives at the Office. Sets out a procedure.	–	29	The Office issues an internal report analysing the seriousness of the information and issues of jurisdiction, admissibility and the interests of justice. The report shall be accompanied by a recommendation on whether there is a reasonable basis to initiate an investigation.
52	Internal Review of Decision not to start an investigation	III. 13.				
INVESTIGATION						
53	Investigation: Values and Principles	III. 14.	Establish the truth, interests of the victims, effectiveness of investigation.			

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content	
54	Conduct of Investigations	III.15. Directed and supervised by a Senior Prosecutor seized of the case, or prosecutor designated by him or her. Measures in the territory of a State must obey the Statute, orders of the Pre-Trial Chamber, or SC Resolution.			
55	Investigation Teams	III.16. Directed by a Prosecutor or a lawyer designated by him or her. At least one member of the Preliminary Examination or Evaluation Team. A Case Controller is designated by the Deputy Prosecutor (Investigations) to manage and coordinate tasks.		32	Joint team to be formed with staff from the three Divisions. Upon confirmation of the charges, an interdivisional trial team is formed to carry out the prosecutions.
56	Role of Investigators	III.17. Blank			
57	Role of Analysts	III.18. Blank			
58	Documents as investigation tools	III.19. Investigation Plans, Draft Charges, Proof Charts. Shall be regularly updated.			
59	Selection of cas-	-	-	33	OTP reviews information analysed

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003	INTERIM REGULATIONS 2003	REGULATIONS IN FORCE 2009	
		Location and Content	Location and Content	Location and Content	Location and Content
	es within a situation				during preliminary examination and evaluation and identifies most serious crimes within the situation. In selecting potential cases, Office considers factors set out in article 53(1)(a)–(c) in order to assess issues of jurisdiction, admissibility (including gravity) and interests of justice.
60	Identification of a provisional case hypothesis	–	–	34	Joint team determines a provisional case hypothesis (or hypotheses), identifying the incidents to be investigated, persons who appear to be the most responsible, a tentative indication of possible charges, forms of individual criminal responsibility and potentially exonerating circumstances. The joint team selects incidents reflective of the most serious crimes and the main types of victimisation – including sexual/gender/children – and which are the most representative of the scale and impact.
61	Investigation Plan	III.20.	All investigations follow an Investigation Plan. It is developed from the Draft Investiga-	35	Following strategic guidance from ExCom, the joint team develops an evidence collection plan and a co-

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003		REGULATIONS IN FORCE 2009	
		Location and Content	INTERIM REGULATIONS 2003 Location and Content	Location and Content	REGULATIONS IN FORCE 2009 Location and Content
		tion Plan submitted to the Chief Prosecutor for a decision to start an investigation.			operation plan. The Office prepares additional plans related to administration, security and communication.
62	Tentative Draft Charges Document	III.21. Prepared by the Investigation Team. Drawn on the written Report by the Preliminary Examination or Article 53(1) Evaluation Teams and the Investigation Plan. Identifies suspects, elements of the crimes allegedly committed, modes of liability, anticipates possible defences.			
63	Proof Chart	III.22. Contains evidence made available relating to the elements of crimes and modes of liability likely for inclusion in the Draft Charges Document.			
64	Selection of persons to be questioned	-	-	36	Assessments: reliability, safety, well-being, risks of re-traumatisation, level of risk involved for the security. If necessary, consider additional security measures with the VWU. Face-to-face psychological evaluation prior

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS						
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content		
65	Witness Interviews – Conduction	III.23. Conducted by the Office or national authorities, Interviewing team ensures the rights of the witness are respected.	–	–	39.1.	The Office shall strive to provide a safe and agreeable environment to conduct questioning and to keep the number of persons present to a minimum.
66	Interview preparation	III.24. Preparation takes into consideration the Investigation Plan. Interview carried out in a way to ensure its admissibility as evidence in Court. Interview checklist recommended.				
67	Information to witness prior to beginning of interview	III.25.1. <i>Inter alia</i> : identification and role of the interviewer, <i>nemo tenetur se detegere</i> , the fact that he/she may be called to testify before the Court.	–	–		
68	Information to witnesses prior to or in the course of the interview	III.25.2. <i>Inter alia</i> : the mandate and power of the Court and the Office, measures for the protection and security of witnesses, nature and scope of the investigation, why the witness has been approached.			40	<i>Inter alia</i> : identity and role of each person present, nature and mandate of the Court and role of the Office, rights identified in article 55(1) including <i>nemo tenetur se detegere</i> , the voluntary nature of the questioning, the nature and scope of the investigation and the

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				context of which the person is being questioned and why he or she has been approached, the procedures which may follow including the possibility to be requested to appear before the Court, the possibility of protective measures.	
69	Information to Victims	-	-	37	Procedures for participation, access to reparations, existence and role of the Victims Participation and Reparations Section of the Registry.
70	Questioning of persons under the age of 18	-	-	-	The Office shall obtain consent from guardians or other relevant adult and take into account the best interest of the person pursuant to article 68.
71	Record of interview	III.26. Excludes identity information other than name of witness. Contains a list of contents of the record.			
72	Witness Identification Form	III.27. Confidential, kept separate from the record of questioning. List of contents.			
73	Witness as Po-	III.28. Should suspicion arise, he or		41	Article 55(2) applies. Person shall

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	tential Suspect				be informed of his or her rights under article 55, and the possibility to obtain assistance.
74	Support persons	III.29. Only if necessary: a family member, a religious adviser, counsellor or victims assistance worker. May not participate or interfere in the interview.		39.2.	As in the Draft Regulations.
75	Victims of sexual or gender violence	III.30. Blank			
76	Hearsay evidence	III.31. To be clearly identified as such in the record, that shall also indicate the source.			
77	Expert Witness	III.32. Record shall include qualifications and experience of the witness. Shall be asked to explain technical terms.			
78	Interpreters	III.33. His or her role is to assist the interviewer, who controls the interview. Should translate only the words of the witness and interviewer. Off-the-record conversation with the		42	Less detailed than in the Draft Regulations. Interpretation shall be provided by interpreters competent in a language the person questioned fully understands and speaks and in the working lan-

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		interpreter should be avoided. Contents of all conversations must be shared with interviewer.			guage(s) used by the interviewer.
79	Compensation for Expenses	-	-	43	No inducement shall be offered. OTP establishes mechanisms to ensure persons are compensated for expenses incurred and earnings lost as a result of their co-questioning, without prejudice of expenses payable by the Registrar pursuant to its regulations.
80	Interview in a unique investigative opportunity	III.34.	Blank		
81	Interview by National authorities pursuant to Part 9	III.35.	Request to a State shall specify the formal requirements of the interview as provided in the Statute, RoPE and these Regulations.		
82	Record of questioning for subsequent presentation at trial	III.36.	Blank		

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS					
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 <i>Location and Content</i>	INTERIM REGULATIONS 2003 <i>Location and Content</i>	REGULATIONS IN FORCE 2009 <i>Location and Content</i>	REGULATIONS IN FORCE 2009 <i>Location and Content</i>
83	Interview of Suspects and Accused – Preparation	III.37.	To be prepared considering the Investigation Plan and all material available. Necessary arrangements with Defence as early as possible. Interviewing team should try to anticipate potential arguments of the suspect. Interviewing team shall keep interview structured and focused. Prosecutor shall ensure the interview does not give pretext to admissibility problems at trial.		
84	Start and Conduct of Interview of Suspects and Accused	III.38.	Information to suspect or accused prior to beginning of interview: his or her rights under the Statute, the mandate of the Court and the OTP; nature and scope of the investigation; identification of the interviewer and his or her role.		
85	Record of Interview of Suspects and Accused	III.39.	Interview shall be audio- or video-recorded following the procedure of RoPE 11.2. If the person objects, record shall be in writing according to RoPE		

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS					
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003		REGULATIONS IN FORCE 2009	
		Location and Content	Location and Content	Location and Content	Location and Content
		111. Contents of the written record at 39.5.			
86	Other contacts with the accused and suspects	III.40. 41.	Blank		
87	Security of Victims and Witnesses	-	-	45	Article 68(1). List of practical measures, <i>inter alia</i> : database with relevant info on persons who have provided evidence and info to the Office, ensure discreet and secure contact with witnesses, collect security information.
88	Record of protective measures in force	-	-	46	The Office shall maintain and regularly update an accurate record of all protective measures in practice.
89	Tracing of assets	-	-	49	Recommends that the Office, in its investigations, pays particular attention to the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, in particular for the ultimate benefit of victims.
PROSECUTION					

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS						
No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content		
90	Prosecution Val-ues and Princi-ples	III Part 4, Section 1	Blank			
91	Prosecution: In-ternal Review Procedure for the Draft Charges Document	III Part 4, Section 2	Blank			
92	Decision to Pros-ecute	III Part 4 Section 3	Blank			
INFORMATION AND EVIDENCE MANAGEMENT						
93	Information and Evidence Man-agement – Val-ues and Princi-ples	IV.1.	Ensure availability; preserve integrity; contribute to effi- cient and timely implementa- tion of Preliminary Examina- tions and evaluations, investi- gations and prosecutions.			
94	Use of terms re- lated to infor- mation and evi- dence manage- ment	–	–	10	Defines items used in Part 2 con- cerning information and evidence management.	
95	Information and	IV.2.	Preferably stored electronical-	11	As in the Draft Regulations.	23.1.4. The Office shall maintain an evi-

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content
	Evidence – Storage	If not possible, then registered and described within the IMS. Info and evidence management are responsibility of the Services Section.		ence database. Originals shall be stored separately. Electronically stored evidence shall receive additional metadata.
96	Evidence Registration Number	IV 3. Every piece of evidence shall have one as soon as possible.	12 ERN – Evidence Registration Number as soon as possible. As in the Draft Regulations.	23.2. OTP shall insure the proper registration and storage of all information and evidence collected during all stages of the proceedings. A unique Evidence Registration Number shall be attached to each individual item or page.
97	Storage of Documentary Evidence	IV 4. Every document shall be scanned and made free-text-searchable. Responsibility of the Case Controller. Translation into one of the working languages.	14.1. As in the Draft Regulations, less detailed.	
98	Audio- and Video-Based Evidence	IV 5. Shall be digitised and stored within the IMS as soon as possible. Security copy. Responsibility of the Evidence Custodian.	14.1-2. Not specifically regulated; in general, material received in a non-digital form and non-documentary evidence shall be digitised whenever possible.	
99	Artefacts and other evidence	IV 6. Physical objects by natural consistency not scannable. Shall be registered within the	14.3. A surrogate sheet shall be completed and stored within the IMS and be assigned additional meta-	

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 <i>Location and Content</i>	INTERIM REGULATIONS 2003 <i>Location and Content</i>	REGULATIONS IN FORCE 2009 <i>Location and Content</i>		
100	Storing of Meta-information	IV.7. At the time of scanning, every piece of evidence electronically stored within the IMS shall be assigned meta-information.	15 Content to be defined in the Information Management Plan, but shall contain the minimum compulsory data.			
101	Range of Meta-information	IV.8. Lists the minimum content. Provisions on documents in languages other than the working languages and audio and video evidence.	16 As in the Draft Regulations. It adds the minimum range for audio-based and video-based evidence and translations.			
102	Changes to Meta-information	IV.9. Update or insertion of additional information during investigation shall proceed under permission of Case Controller.	17 As in the Draft Regulations.			
103	Retrieval of stored information	IV.10. All stored material shall be accessible for all investigational and prosecution purposes. Restrictions may be ordered for security or confidentiality.	18 As in the Draft Regulations, with more details.			
104	Working copies	IV.11. Originals shall not be released. Copies only to be made by way of reproduction of the electronically stored	19 As in the Draft Regulations.			

COMPARATIVE TABLE OF KEY PROVISIONS OF THE OFFICE OF THE PROSECUTOR REGULATIONS					
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		Location and Content	Location and Content	Location and Content	Location and Content
		image of the evidence. In case of audio or video recording, copies are made of the digitised version of the recording.			
105	Presentation of evidence to the Court – Registration of Exhibit	IV.12. Every presentation of evidence in Court shall be registered as meta-information of the stored evidence.	20	As in the Draft Regulations.	
106	Presentation of evidence to Court by witness – Registration	IV.13. Every introduction in Court of evidence by a witness shall be registered as meta-information of the evidence.	21	As in the Draft Regulations.	
107	Electronic presentation of evidence in Court	IV.14. All documents shall be presented in Court electronically in order to use the same search and retrieval functions as those used by the OTP.	22	As in the Draft Regulations.	
108	Archiving of information	IV.15. All information presented in Court in all stages of proceedings shall be archived in electronic form.	23	As in the Draft Regulations.	
109	Deletion of stored information	IV.16. No information may be deleted except by order of the Deputy Prosecutor (Investigations) for documents contain-	24	As in the Draft Regulations.	

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003	INTERIM REGULATIONS 2003	REGULATIONS IN FORCE 2009	Location and Content	Location and Content
110	Data security – responsibilities	IV.17.	Responsibility of the Chief of Services Section for the security and confidentiality of information in the IMS, in consultation with the Chief of the ITCSS and the Chief of the Security Section.	25	As in the Draft Regulations.	
111	Access to data – logging and auditing	IV.18.	All access shall be logged by the system. The logs shall be audited by the Chief Prosecutor in the event of a suspected breach of confidentiality.	26	As in the Draft Regulations.	
112	Back-up and disaster discovery	IV.19.	The IMS shall reach agreement with ITCSS on regular backups of the entire data stored in the IMS. Back-up material shall be stored securely and not in the premises of the Court.	27	As in the Draft Regulations.	
113	Other data security measures	IV.20.	For all other matters of data security, common provisions of the Court apply.	28	As in the Draft Regulations.	
114	Management of	IV.21.1.	Chief Prosecutor may collect	29	As in the Draft Regulations.	

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content	
	evidence away from the Court – Power of the Prosecutor	evidence on territory of a State in accordance with Section 9 of the Statute, or as authorised by the Pre-Trial Chamber.			
115	Management of evidence away from the Court – Power of Prosecutor – purpose of regulations	IV.21.2. Ensure the integrity of all evidence collected. Proper collection including handling, packaging, labelling, transportation, storage and maintenance of the chain of custody at all times.	–		
116	Evidence Officer	IV.22. Appointed by the Case Controller. Responsible for receiving, properly labelling, recording and retaining possession of all evidence collected, maintaining the Evidence Seizure Record Form and the Evidence Registration Form, collating and keeping the collection of evidence.	30 As in the Draft Regulations.		
117	Protection and recording of physical evidence	IV.23. Shall be protected from external influences, handled with care, photographed or videotaped <i>in situ</i> before collection.	31 As in the Draft Regulations.		

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content	
118	Registration and collection of evidence: Evidence Seizure Record Form and Evidence Registration Form	IV.24. Evidence Seizure Record Form shall be kept by the Evidence Officer for all evidence collected at a particular site. A receipt shall be provided to the person in charge of the premises. An Evidence Registration Form shall be maintained for every individual item of evidence. It shall contain meta-information on the item. Upon collection, all evidence shall be sealed in an envelope or a box with a tamper-proof tape.	32 As in the Draft Regulations, except that the packing in envelopes is no longer foreseen.		
119	Potentially exonerating evidence	IV.25. Evidence Officer shall ensure that potentially exonerating evidence is properly identified and labelled as such in the Evidence Registration Form. If any material points to further exonerating material, this shall be recorded. If the lead is not pursued further, the reasons for this decision shall be	33 Similar to the Draft Regulations. Regarding material that points to further potentially exonerating material, the regulation satisfies that the fact is recorded, without requiring any justification for the failure in further pursuits.		

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003		REGULATIONS IN FORCE 2009	
		Location and Content	Location and Content	Location and Content	Location and Content
120	Chain of custody	IV.26. Evidence shall always be traceable. Always in the possession of the collector or the person authorised to have its custody. Every transfer shall be recorded in the Evidence Registration Form. The person who receives it shall make sure the seal is not tampered with. The person in custody shall prevent any improper handling of the box or envelope.	34 As in the Draft Regulations.	22	The OTP shall ensure uninterrupted chain of custody of documents and all types of evidence. The maintenance of the chain of custody shall be recorded and managed.
121	Registration upon arrival at the seat of the Court	IV.27. Upon arrival at the Court, all physical evidence shall be handed over to the Services Section for processing. Last person in custody shall insure that Evidence Registration Form and Evidence Seizure Form are complete.	35.1. As in the Draft Regulations.	22.2.	Shall be handed over without delay.

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content		
122	Management of physical evidence in the Services Section upon transfer of custody	-	35.2-3.	Services Section shall transfer items into standardised containers. A new single Chain of Custody Form shall be created and attached to container, with content indicated in the regulation.		
123	Duties of the Services Section: Register	IV.28.	36	As in the Draft Regulations.		
124	Duties of Services Section: meta-information	IV.29.	37	As in the Draft Regulations.		
125	National Security Information: Definition	IV.30.		As in the Draft Regulations.		

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content
126	Treatment of National Security Information	IV.31. Blank		
PROCEEDINGS BEFORE THE CHAMBERS				
127	Confidential or <i>ex parte</i> hearings and filings before the Chamber	-	-	50 The Office shall consider whether any other less restrictive alternative may suffice and clearly state the legal and factual basis for the request.
128	Relations with the Defence	-	-	51 OTP shall constructively engage with the Defence, especially identify issues not in dispute, facilitate the identification of potentially exonerating information, seek agreement regarding the conduct of proceedings and submission of evidence, and consider the joint instruction of experts.
129	Relations with legal representatives of victims	-	-	52 Constructively engage, in order to promote the efficient conduct of proceedings.
130	Application for a	-	-	53 Article 58. Office shall clearly

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content
	warrant of arrest or a summons to appear			identify crimes and modes of liability alleged, based on solid factual and evidentiary foundations.
131	Protective measures for the purpose of forfeiture	-	-	In particular during the preparation of an application pursuant to article 58, the Office shall consider requesting measures for the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes pursuant to articles 57(3)(e) and 98(1)(k).
132	Provisional detention and application for release	-	-	OTP shall carefully consider and promptly respond to any request to a Chamber for release of a person, giving due consideration to whether the requirements of article 58(1) for a warrant of arrest are still met.
133	Document containing the charges			The charges document shall be based on the application for a warrant of arrest or summons to appear (article 58 and regulation 53). It shall clearly state the mode or modes of liability which the Prosecutor alleges renders the person individually responsible and liable

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003	INTERIM REGULATIONS 2003	REGULATIONS IN FORCE 2009	Location and Content
		Location and Content	Location and Content	Location and Content	
134	Selection of evidence for the Confirmation Hearing			59	for punishment. The Office shall bring sufficient, relevant and credible evidence establishing substantial grounds for the confirmation of charges pursuant to article 61(5). The evidence presented shall be self-sufficient.
135	Withdrawal and amendment of charges	-	-	60	The Office may amend or withdraw the charges pursuant to article 61(4) and (9).
TRIALS					
136	Testimony of witnesses at trial	-	-	61	Previous physical and psychological assessment of any witness deemed vulnerable. OTP shall consider <i>inter alia</i> applying for protective or special measures, giving of evidence by audio or video-link or the use of pre-recorded testimony.
137	Assessment of admission of guilt	-	-	62	OTP makes its own assessment of any admission of guilt by an accused pursuant to article 64(8)(a) and 65. It shall consider whether the admission is informed, voluntar-

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content	
138	Hearing on sentencing	-	-	-	63-65 OTP shall consider whether to request further hearing on sentencing pursuant to article 76(2) taking into account the evidence and submissions presented by participants, and interests of victims. It shall present all relevant mitigating and aggravating factors, impartially. It shall consider whether any order for forfeiture pursuant to article 77(2)(b) is appropriate, taking into account the interests of victims and any application or order for reparations.
APPEALS AND REVISION					
139	Appeals – Presentation of the record before	-	-	-	66 The Office shall ensure all submissions made before the Appeals Chamber are supported by the rec-

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003		REGULATIONS IN FORCE 2009	
		Location and Content	Location and Content	Location and Content	Location and Content
140	the Appeals Chamber Appeals – applications for suspensive effect	-	-	67	ord of the relevant Pre-Trial or Trial Chamber or by other evidence properly introduced. Appeals of article 82 (against decisions other than conviction, acquittal and sentence) do not of itself have suspensive effect, unless the Appeals Chamber so orders, upon request (article 82(3)). OTP may request.
141	Appeal or Revision by the Office on behalf of a convicted person	-	-	70	Prior to filing an appeal on behalf of the convicted person (article 81(1)(b)) or an application for revision (article 84(1)), OTP shall seek to consult with the convicted person or his or her legal representative.
MEDIA RELATIONS					
142	Media relations: values and principles	V.1.	-	14	Office shall make public policy papers that reflect the key principles and criteria of the Prosecutorial Strategy.

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No.	SUBJECT-MATTER	DRAFT REGULATIONS 2003 Location and Content	INTERIM REGULATIONS 2003 Location and Content	REGULATIONS IN FORCE 2009 Location and Content		
143	Issues to be shared with the public	–	–	–	14	OTP shall make public its Prosecutorial Strategy and contribute to the Court's Strategic Plan.
144	Publicity of activities under article 15 (<i>proprio motu</i>)	–	–	28	Acknowledgement to the provider of the information. OTP may decide to make it public. Prosecutor may decide to publicise the Office's activities regarding the examination of information on crimes under article 15 or a decision under article 15(6) not to investigate.	
145	Public Information Adviser	V.2.	Officer responsible for all public relations.	–	–	–
146	Public Statements	V.3.	No public statement without approval of the Chief Prosecutor or the Public Information Adviser concerning in-	–	–	OTP shall disseminate information on its activities to, and respond to enquiries from States, international organisations, victims, non-

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		formation received by the Office, Preliminary Examinations, article 53(1) evaluations, trial and appellate proceedings, personnel questions or any internal matter. The Public Information Adviser shall be informed immediately of all requests from media organisations.		governmental organisations and the general public, with focus on affected communities, in coordination with the Registry.	
147	Events likely to attract international, national or regional attention	V.4. Section Chiefs, Case Controllers and Senior Prosecutors shall inform the Public Information Adviser of any issue that might attract international, national or regional media interest.			
148	Information about crimes	V Part 2 Blank			
149	The Problem of denial of massive crimes	V Part 3 Blank			

The Origins and Development of the Code of Conduct

Salim A. Nakhjavani*

47.1. Introduction

The Code of the Conduct of the Office of the Prosecutor (‘OTP’) of the International Criminal Court (‘ICC’) had its genesis in consultation and drafting processes initiated in August 2002 by the preparatory team for the ICC-OTP led by Morten Bergsmo, a component of the Court’s Advance Team. The process of its development can be understood as an important step in the harmonisation and professionalisation of a nascent international prosecution service by means of an innovative, virtues-based set of standards of conduct.

The adoption of Regulations by the Prosecutor is an explicit requirement of the Rules of Procedure and Evidence of the Court.¹ The principled decision by Morten Bergsmo in early 2003 to embed a Code of Conduct within draft Regulations of the Office of the Prosecutor can be understood, I think fairly, as an expression of what Jens Meierhenrich terms “one of the most remarkable aspects of the institutional development of the OTP”, namely “an early interest in the standardization of behavior”.²

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¹ See Milan Markovic, “The ICC Prosecutor’s Missing Code of Conduct”, in *Texas International Law Journal*, 2011, vol. 47, no. 1, pp. 201–36; ICC, Rules of Procedure and Evidence, adopted by the Assembly of States Parties, 3–10 September 2002, ICC-ASP/1/3, Rule 9 (‘RPE’) (<http://www.legal-tools.org/doc/8bcf6f/>).

² Jens Meierhenrich, “The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory”, in Martha Minow, C. Cora True-Frost

However, the lapse of six years from the initial publication of the Regulations *ad interim* adopted by Prosecutor Luis Moreno Ocampo on 5 September 2003 to the promulgation of the Regulations on 23 April 2009 – though “not entirely surprising”³ – prompts the question of why the Code of Conduct was delayed a further four years until its promulgation by Prosecutor Fatou Bensouda on 5 September 2013⁴ – after a full decade of gestation.

The final Code is easily accessible in the Legal Tools Database at <http://www.legal-tools.org/doc/3e11eb/> (and not reproduced here due to space limitations). The draft Code published as part of the 2003 Regulations appears as Annex 1.

In that intervening decade, the Court’s public record discloses multiple and regrettable instances where the Office of the Prosecutor faced adverse judicial comment with regard to the professional or ethical conduct of its members,⁵ or those acting on its behalf.⁶

and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints*, University of Michigan Press, Ann Arbor, 2015, p. 118.

³ *Ibid.*

⁴ International Criminal Court, Code of Conduct for the Office of the Prosecutor, entry into force 5 September 2013, OTP2013/024322 (‘Final Code’) (<http://www.legal-tools.org/doc/3e11eb/>). For clarity, the expression ‘IAP/CICC Draft Code’ refers here to the joint draft prepared by the Secretariats of the International Association of Prosecutors and the Coalition for the International Criminal Court in 2002; ‘Draft Code’ refers to the version included in the draft Regulations of the ICC-OTP and dated 27 August 2003 (see Annex 1 to this chapter); and ‘Final Code’ refers to the version adopted by the Prosecutor and published in the Official Journal on 5 September 2013.

⁵ Markovic, 2011, pp. 212–34, see *supra* note 1. See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401, 13 June 2008 (<http://www.legal-tools.org/doc/e6a054/>); ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, ICC-01/04-01/06, 16 September 2009 (<http://www.legal-tools.org/doc/e1ee1a/>); ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517-Red, 8 July 2010 (<http://www.legal-tools.org/doc/cd4f10/>); ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Decision on the press interview with Ms Le Fraper du Hellen, ICC-01/04-01/06-2433, 12 May 2010 (<http://www.legal-tools.org/doc/3b613a/>); see also Arman Sarvarian, *Professional Ethics at the International Bar*, Oxford University Press, Oxford, 2013, pp. 190–242.

I cannot claim here that a Code of Conduct, enforceable from the outset, would have made the slightest difference, for subsequence is no good proof of cause. After all, professional conduct is driven by a community of practice characterised by conscious knowledge, volition, action and reflection on lived experience, not merely a set of written rules. What I hope to offer, though, is one historical perspective on the principles upon which the Code was drafted, its rationale and structure.

47.2. Rationale for a Code of Conduct

As late as 2012, the year before the Code entered into force, there was very little examination of international prosecutorial accountability in the scholarly discourse. At the time, Frédéric Mégret offered several compelling observations for this phenomenon, including the prevalence of a “can do no wrong” attitude among international prosecutors:

Powerfully vindicated by either victory or a sense of supra-national legitimacy, and dealing with some of the worst crimes conceivable, it is not hard for these judicial institutions, and the Prosecutors within them who represent the “international public interest” to get a sense that misconduct is beyond them.⁷

Yet the reality of prosecuting what Mégret rightly labels “the worst crimes conceivable” – by an inherently diverse corps of prosecution staff in international or internationalised setting, facing a compound of resource and enforcement constraints not often encountered in the day-to-day work of prosecutions at the domestic level – also explains why effective, binding ethical and professional standards of conduct would have been *indispensable* from an early stage. By 2004, during the period of a “five-fold” increase in the Office of the Prosecutor’s full-time staff,⁸ Meierhenrich’s empirical research suggests that a natural tendency to entropy was shaping institutional culture by default, in the absence of an effective harmonising or unifying force. As one staff member commented: “Every-

⁶ For example, ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Redacted Decision on Intermediaries, ICC-01/04-01/06-2434-Red2, 5 July 2012 (<http://www.legal-tools.org/doc/8b5694/>).

⁷ Frédéric Mégret “Accountability and Ethics”, in Luc Reydam, Jan Wouters and Cedric Ryngaert, *International Prosecutors*, Oxford University Press, Oxford, 2012, p. 417.

⁸ Meierhenrich, 2015, p. 114, see *supra* note 2.

one fell back on their previous jurisdiction's legal culture or on whatever they thought was the right thing to do in the context".⁹

Two other reasons favoured the early adoption of harmonised standards of conduct for the Office of the Prosecutor. First, professional ethics are often cast in the sharpest relief in "hard cases", where the law is uncertain and principle and policy arguments come to the fore.¹⁰ Despite a relatively detailed statutory framework, the ICC was a creature of compromise, and its practical working within an adolescent international legal order generated marked uncertainty and even conflict between applicable legal rules. Second, only the most inexperienced or fragmented thinking would seek to divorce the structured exercise of discretion from the work of prosecution, whether at the national or international levels. Without marginalising differences at the levels of terminology and process, the dichotomy between *prosecutorial discretion* and *mandatory prosecution* or the *Legalitätsprinzip* tends to mask the practical reality that the principled exercise of choice is, to varying degrees, a feature of prosecution services in all major legal traditions of the world.¹¹ With the complex responsibility to frame, to select, to prioritise and to refine legal characterisations of facts comes a set of fundamental beliefs, attitudes, habits of thought and action, learnt and practised over time and in diverse contexts, which are inseparable from the act of legal characterisation itself and its occasionally world-shaping effects.

It was perhaps for this latter reason, above other considerations, that the ICC-OTP preparatory team set the drafting of a Code of Conduct as an institutional priority at an early stage. The Code, it was felt, was an important means of cultivating coherence between the *being* of prosecutors and *doing* of prosecutions. This required a statement of higher-order normative standards going beyond the content envisaged for the Regulations

⁹ *Ibid.*, p. 112.

¹⁰ Writing in the context of judicial decision-making and not legal professional ethics, see Ronald Dworkin, "Hard Cases", in *Harvard Law Review*, 1975, vol. 88, no. 6, pp. 1057–109.

¹¹ Mirjan R. Damaška, "The Reality of Prosecutorial Discretion: Comments on a German Monograph", in *American Journal of Comparative Law*, 1981, vol. 119, no. 1, pp. 119–38; Marianne Wade, "Book Review: The European Prosecution Service", in *Criminal Law Forum*, 2005, vol. 16, p. 392; Shawn Marie Boyne, *The German Prosecution Service: Guardians of the Law?* Springer, Heidelberg, 2014, pp. 91–149. See also Alison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", in *American Journal of International Law*, 2003 vol. 97, no. 3, pp. 510–52.

of the Office, which would be concerned with structures and work processes. Properly framed and applied, the drafters hoped that the Code would serve as a catalyst to unify the vision and harmonise the activities of the inherently diverse membership of a unitary and permanent Office – one charged with unique responsibilities to uphold international justice in a world shaped by increasingly complex political, economic, social and moral crises and evolving collective patterns of response.

47.3. Development and Refinement (2002–2013)

In the months following the entry into force of the ICC Statute, two parallel processes unfolded that contributed to the drafting of the Code of Conduct. First, in 2002 the Secretariats of the International Association of Prosecutors ('IAP') and the Coalition for the International Criminal Court ('CICC') jointly prepared and later submitted to the preparatory team a draft Code of Professional Conduct, drawing on the experience of the *ad hoc* tribunals as well as best practices identified from the codes of several national prosecuting services. This draft was accompanied by underlying research in the form of supporting materials. Second, one of the expert consultation processes initiated by the preparatory team, and described in Chapter 48 of this volume, focused its efforts on the substance of the Regulations of the Office of the Prosecutor, which were intended to include the Code of Conduct as a component chapter.

The IAP/CICC draft Code was modelled on available international guidelines and standards, including the UN Guidelines on the Role of Prosecutors, the International Criminal Tribunal for the former Yugoslavia's Standards of Professional Conduct for Prosecution Counsel, recommendations of the Council of Europe, and standards adopted by the International Association of Prosecutors. The nature of ethical challenges arising at the *ad hoc* tribunals served as an implicit point of reference. The preparatory team was distinctly concerned with building an organisation that would be resilient in the face of such challenges. Morten Bergsmo, who had been the first lawyer to be employed by the ICTY-OTP, brought to bear his reflections embedded in first-hand observation over more than eight years of work processes and challenges in the functioning of the ICTY-OTP.

The IAP/CICC draft Code enumerates specific duties of competence, diligence and co-operation; duties to the Court; duties in investigation and prosecution; obligations to disclose evidence; and duties towards

victims and witnesses, the accused and defence counsel. It also establishes ethical obligations in respect of offences against the administration of justice and certain duties to prevent, oppose and report breaches of ethical standards. Additional articles deal with grounds for disqualification of prosecutors in individual cases and duties in respect of pre-judgment publicity and relations with the media.

The approach to ethics in the IAP/CICC Code was partly deontological and partly value based. For example, the text sets out specific rules in connection with disclosure obligations, in four distinct contexts: the duty to the accused (in person) to disclose favourable evidence “in accordance with the Rules and the requirements of a fair trial”;¹² a duty to defence counsel to “disclose [...] as soon as practicable, all evidence in [the prosecutor’s] possession or control that may demonstrate the innocence or mitigate the guilt of the accused”;¹³ a duty during investigations to “ensure that all necessary and reasonable enquiries are made and the result disclosed in accordance with the requirements of a fair trial, whether they point to the guilt or innocence of the suspect”;¹⁴ and finally to “defer to the judgment of the Pre-Trial Chamber on all issues of disclosure”.¹⁵ In contrast to these prescribed duties owed to specific individuals and organs of the Court, or during given phases of proceedings, the IAP/CICC Code also included appeals to higher-order values, including a duty on prosecutors to “assist the Court [...] to do justice for the international community, the victims and the accused”.¹⁶ While timely, well-intentioned and well-grounded in the prevailing international norms, the IAP/CICC draft also revealed the necessity of coherence with a broader range of values, particularly those shaping institutional culture, heightened consistency in approach, and more efficient legal drafting.

Having reviewed the IAP/CICC draft, which was accompanied by a set of supporting materials, a five-week process was initiated in March 2003 within the precursor of the Legal Advisory Section to research and prepare a first draft of the ICC-OTP Code. This process was characterised

¹² Secretariats of the International Association of Prosecutors and Coalition for the International Criminal Court, Draft Code of Professional Conduct for Prosecutors of the International Criminal Court, 2002, Article 12(1) (‘IAP/CICC Draft Code’).

¹³ *Ibid.*, Article 13(6).

¹⁴ *Ibid.*, Article 8(6).

¹⁵ *Ibid.*, Article 9(2).

¹⁶ *Ibid.*, Article 7(4).

by a reconceptualisation of approach to the Code on principally *aretaic* lines, a concept developed in the following section. A substantial period of refinement followed. The finalised draft Code was submitted with draft Regulations for the consideration of Prosecutor Moreno Ocampo as part of the briefing process leading to his swearing-in and formal assumption of duties in June 2003. Internal deliberations took place, along with revisions to the draft Code and Regulations, as directed by the Immediate Office of the Prosecutor.

Among the substantive concerns expressed at this stage in the development of the draft Code was the appropriate level of detail for an ethics code, and particularly the role envisaged for an in-house adviser or counsellor for standards of conduct. This had been a central feature of the compliance mechanism of the draft Code.

Under this model, members of the Office of the Prosecutor were to have access and, in some cases, be required to report potential ethical breaches, to an experienced colleague of high moral character, nominated by the prosecutor but outside one's ordinary management reporting line, who would offer confidential advice, consultation and guidance to colleagues on the practical application of standards of conduct. This was premised on the principle that while ethical compliance is the duty of the individual prosecutor, for which subordinates are accountable to superiors, the ethical challenges in international criminal practice may well be particularly complex, unfamiliar, or arise in highly sensitive or otherwise charged contexts. For this reason, it was felt that individual staff members should have ready access to appropriate support in a manner that would guard against 'groupthink' and safeguard the independence of the Office. The draft Code envisaged that the person playing this advisory role would report periodically and directly to the Prosecutor, but without identifying individual staff members, focusing on positive and negative trends and practices within the Office. In this way, a culture of ethical compliance would grow and be reinforced over time, as individual and institutional practices that sustained an ethical culture were promoted, and deficiencies addressed through the provision of training, support and guidance as necessary.

But would a person in such a role be perceived as a 'spy' or 'threat' by colleagues? Or would the establishment of this function, by contrast, diffuse authority best concentrated in the Immediate Office of the Prosecutor or otherwise intrude on the non-delegable powers of the Prosecutor him- or herself? Or rather, would the function empower individual staff

members to take individual and collective responsibility for building a culture of ethical compliance? Would this role somehow signal lack of confidence in managing prosecutors or have a disintegrative effect on team dynamics? How would this internal mechanism relate to formal staff disciplinary processes, governed by other instruments? Should ethical concerns about the conduct of senior staff, including the prosecutor him- or herself, be subject to the same or different processes? Could compliance mechanisms be abused or deployed maliciously? And how would an international civil servant acting in an ethics advisory role within the Office navigate multiple and potentially competing obligations concerning the use and disclosure of facts gleaned through ostensibly ‘preventative’ consultations? In essence, the question on which the drafters were asked to reflect at this stage was: how is it going to happen? Would the implementation of binding ethical standards somehow ‘tie the hands’ of the prosecutor?

In the end, the final Code does not include an advisory or counselling function, and relies on reporting through the ordinary line-management function.

A table comparing and contrasting selected provisions of the IAP/CICC Code, the draft Code and the final Code appears in Annex 2 to this chapter. Some of the salient characteristics of the draft and final Codes are considered below.

47.4. Some Salient Characteristics of the Draft Code

The professional ethics of lawyers and prosecutors, at least in civil law, common law and mixed jurisdictions, have typically been framed in terms of *deontology*: a set of specific, even idiosyncratic rules for specific contexts. A deontological approach to legal ethics presupposes a certain commonality of legal culture, training of legal practitioners and longstanding customs of practice – all of which to clothe the rules with meaning. The Office of the Prosecutor had no such common frame of reference beyond the ICC Statute itself, and in keeping with the principles of the Statute, its membership would necessarily be diverse, drawn not only from the ranks of prosecutors or jurists but from multiple professions, nations, legal systems, backgrounds, forms of training and accreditation, and established systems of professional conduct.

Thus, the draft Code was explicitly *aretaic* (or virtues-based) rather than deontological in character. The explicit assumption of the draft Code was that qualities of character, whether patent or latent in an individual to various degrees, are concepts universal to the human race. This was no naive claim or outburst of idealism: it was well understood from the outset that, for example, what might constitute ‘honest’ conduct for a prosecutor in a given set of circumstances, in one culture or legal tradition, might well differ from another. But the drafters were convinced that the virtue itself – *honesty* – expresses an ideal common to all humanity, to which members of the Office of the Prosecutor could strive, individually and collectively. A virtues-based code, then, would set a standard towards which the Office would progress, not an expectation of perfection against which to measure and condemn the imperfect. The virtues expressed in the draft Code, to allude to the preamble of the Statute, were understood as *intrinsic* to the “delicate mosaic”, as qualities to be evoked, explored, refined and nurtured, rather than merely assumed or imposed.

The central concepts of the draft Code were drawn from three sources within the directly applicable legal texts: the solemn undertaking prescribed by the Statute for the prosecutor,¹⁷ and common to all members of the Office:¹⁸ to conduct themselves “honourably, professionally, faithfully, impartially and conscientiously” and to “respect the confidentiality of investigations and prosecutions”, together with the statutory wording “[i]n order to establish the truth [...]”¹⁹ and “not [to] seek or act on instructions from any external source”.²⁰ The organising framework of the draft Code, in turn, sets out ethical obligations to uphold the *virtues* or *qualities of character* derived from the Statute, and supplements these with illustrative, potential spheres of application, not exhaustive rules. Thus, a prosecutor or investigator would be expected to act honourably *in the fullest sense*, and supported to do so, as an intrinsic attribute of character to be refined over time and through a process of continuous learning.

¹⁷ Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, Article 45 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

¹⁸ ICC, Assembly of States Parties, Staff Rules of the International Criminal Court, ICC-ASP/4/3, 3 December 2005, Rules 5(1)(b) and 6(1) (‘Staff Rules’) (<http://www.legal-tools.org//10f5c7/>).

¹⁹ ICC Statute, Article 54(1)(a), see *supra* note 17.

²⁰ *Ibid.*, Article 42(1).

Notably, both these features of the draft Code – its central concepts and organising framework – have been retained in the final version.²¹

As described elsewhere, multiple and parallel expert consultation processes were initiated by the preparatory team. One such exercise revealed the extent to which intrinsic biases or personal preferences for the norms, assumptions, working methods and even terminology of a dominant legal tradition had a disintegrative effect on institutional culture, interpersonal dynamics, clarity and persuasiveness of legal argument and operational choices of the prosecution services of the *ad hoc* tribunals (see several chapters in Part 1). On the basis of this learning, the draft Code introduced, among its General Standards, an explicit ethical obligation concerning *institutional legal culture*:

Members of the Office shall establish and promote a unified international legal culture within the Office, rooted in the principles and purposes of the Statute, without bias for the rules and methods of any one national system or legal tradition.²²

An explanatory note accompanied the text:

The need to promote a single legal culture was underlined in expert consultations²³ on general OTP matters. This standard is drafted to apply to all professions within the Office. The phrasing, ‘without bias for the rules and methods of any one national system or legal tradition’ does not preclude rules or methods rooted in any one legal system becoming part of the ‘unified legal culture’. Rather, this standard requires member of the Office to act without bias for any particular system; even lawyers trained in only one system should draw their primary inspiration from the Statute, not their national practices.²⁴

Conceived in this way, this standard is, in part, an expression in a specific context of the longstanding principle of impartiality applicable to all international civil servants: “their duties are not national but exclusively international”.²⁵ Yet it goes further, because it makes explicit the duty

²¹ See <http://www.legal-tools.org/doc/3e11eb/>.

²² Draft Code, § 74.3., see *supra* note 4.

²³ Final Code, Section 4(8)(f), see *supra* note 4.

²⁴ *Ibid.*, note 14.

²⁵ See ICC, Assembly of States Parties, Staff Regulations of the International Criminal Court, 12 September 2003, ICC-ASP/2/Res.2 (<http://www.legal-tools.org//3542d3/>), Regu-

to seek unity *within* diversity as a pattern of both individual and collective thought and action.

The final Code reflects the same values in stating that the Office of the Prosecutor and all its members are primarily guided the principle of “a shared culture rooted in the principles and purposes of the Statute, without bias for the rules and methods of any national system”.

Another institutional priority reflected in the draft Code, cross-cutting multiple ethical standards, was a concern for promoting attitudes that would favour the building of capacity in oneself and others, particularly subordinates. So, for instance, the duty of conscientious conduct was construed as “diligent and systematic perseverance towards clear goals”, including as a specific illustrative example, “meaningful review of the work product of others, where required”. Similarly, the duty of faithful conduct, being “the fulfilment of the trust reposed in the members of the Office by the Chief Prosecutor” included “setting an unimpeachable example for subordinate members of the Office, and providing appropriate direction, guidance and support”.

The final Code places significantly less emphasis on these aspects, limiting the responsibility to provide an “impeccable example” to the (chief) prosecutor and deputy prosecutors,²⁶ and excluding entirely a duty of meaningful review of the work of others. It may be that there was no need to elevate a core professional management competency to a higher-order ethical norm. Yet applying the concept of conscientiousness to the collective, relational context, one that extends beyond individual work product, recognises that each individual both affects and is affected by the environment in which she works. One’s own diligence, and the systematic character of a professional endeavour will often, if not always, depend on healthy patterns of conduct being reinforced at all levels of hierarchy, and within and between teams.

The final Code is also notable in its scheme of organisation: it proceeds systematically from the general to the specific. It first identifies *five fundamental rules* and a number of general principles in Chapter 1. It re-

lation 1.1.(a) read with Staff Rule 101.1., see *supra* note 18. See also United Nations Charter, Article 100, read with Article 1.1. of the UN Staff Rules. See also Frédéric Mégret, “What Is International Impartiality”, in Vesselin Popovski (ed.), *International Rule of Law and Professional Ethics*, Routledge, New York, 2016, p. 104.

²⁶ Final Code, Article 15, see *supra* note 4.

tains from the draft Code, in Chapter 2, illustrative examples of qualities of character – honesty, faithfulness, conscientiousness and so on – drawn from the applicable legal instruments, including the solemn undertaking of the members of the Office of Prosecutor. It continues in Chapter 3 by setting out specific normative duties, including the regulation of conflicts of interests, and, in a final substantive Chapter, ethical standards intrinsic to the *categories of working relationships* (for example, with colleagues in the Office, organs of the Court, with victims and witnesses and with defence counsel). This triple emphasis on ethical capacities evoked in the individual conscience, expressed in community with colleagues and channelled into relationships at the level of the Court as an institution is a distinctive, holistic feature of the approach adopted in the final Code to shaping institutional culture.

47.5. Conclusion

This brief review has touched on the four forces principally responsible for shaping the development of the ICC Office of the Prosecutor’s Code of Conduct. It was the product of the willing effort of a non-governmental organisation coalition whose work contributed to the establishment of the Court; of individual experts whose collective insight, offered voluntarily, lent form and content to essential aspects of the draft Regulations of the Office; of the foresight and collective efforts within the preparatory team to establish a universalised, virtues-based framework to guide behaviour and to contribute to establishing a genuinely international, professional legal culture within a nascent Office; and of the patient refinement of the text over a decade under the direction of the ICC-OTP Legal Advisory Section.

In order to suit the requirements of an evolving institution, though, the text of the Code needed airing at a much earlier stage, creating the space for a systematic process of refinement through learning in action. The most compelling conclusion, to my mind, is that a combination of unwarranted timidity and the well-documented centralising tendencies that took root in the Office of the Prosecutor from 2003²⁷ presented an obstacle to the immediate operation of the Code, even on a provisional basis.

Fourteen years on, what is in place is a well-structured Code, innovative in many respects, and an emerging body of practice. The efficacy

²⁷ See Meierhenrich, 2011, pp. 112–16, *supra* note 2.

of that Code will require systematic monitoring and a system of compliance-building based first on educative means, and disciplinary measures in the last resort. Such processes will usually pass unseen outside the walls of the Office. This is appropriate in all but those particularly serious cases engaging the public interest and the public trust. Thankfully, walls do have ears, at least from within.

Annex 1: Draft Code of Conduct (2003)*

Part 3: Standards of conduct and training

Chapter 1: Code of conduct

Regulation 72: Values and principles

The Office of the Prosecutor shall value and promote the highest standards of efficiency, competency and integrity amongst its members,¹ at all levels of seniority. The provisions of this Part shall:

- (a) inculcate and uphold the standard of excellence expected from all members of the Office;²
- (b) establish a set of general standards of conduct for all members of the Office as well as specific, illustrative standards of conduct;
- (c) provide measures to promote compliance and rectify non-compliance with these standards of conduct;
- (d) contribute to the promotion of a professional and constructive working environment.

Regulation 73: Scope of application of the Code

73.1 The standards of this Code apply to the Chief Prosecutor and Deputy Prosecutors, all general services and professional staff

* Version 27 August 2003. The formatting of the chapter is faithful to the original, except the footnote numbering.

¹ “Members of the Office” includes the Chief Prosecutor, Deputy Prosecutors and all professional and general services staff within the Office. “Staff of the Office” excludes the Chief Prosecutor and Deputy Prosecutors. This usage is consistent with the Statute and Rules (see esp. articles 42(1144(1), and rules 6, 11). The Code applies to the Chief Prosecutor and Deputy Prosecutors, as well as all staff, thus setting an example of high standards of conduct from the most senior members of the Office. The Code applies to *gratis* personnel to the extent consistent with guidelines to be established by the Assembly of States Parties (article 44(4)). Clerks should undertake to uphold the Code as a condition of their service.

² The expression “to inculcate and uphold the standard of excellence expected from all members of the Office” sets the Code apart from the other Chapters of the Regulations, as a statement of ethical and professional standards to which all members of the Office aspire and strive.

members of the Office, consultants, temporary and *gratis* personnel and clerks of the Office.

- 73.2. The standards of this Code apply within the scope of the performance of individual duties and the individual exercise of inherent and delegated powers.³
- 73.3. This Code is subject to the provisions of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and the Staff Regulations and Staff Rules, incorporates by reference those provisions of the code of conduct of the Victims and Witnesses Unit applicable to members of the Office⁴ and operates notwithstanding any other national or international standards to which members of the Office may be held.⁵ This Code forms an integral part of the Regulations of the Office.

Regulation 74: General standards

- 74.1. Members of the Office shall uphold the principles and purposes of the Statute and adhere to its provision, fulfil their solemn undertaking to the Court; fulfil their undertaking of confidentiality to the Office of the Prosecutor; and adhere to the Rules of Procedure

³ Every principle of the Code should be read as applying in the performance of individual duties or the exercise of powers. This allows the principles of the Code to apply within a unitary office comprising members from diverse professions, as well as across the spectrum of seniority and including the Chief Prosecutor and Deputy Prosecutors. *Ultra vires* actions constitute breaches of ethical standards of faithful conduct [Regulation 77(b)], and may trigger disciplinary proceedings under related instruments. The Chief Prosecutor's inherent and thus non-delegable powers include those set forth in articles 15 and 53 (see rule 11). Aspects of the standards of confidentiality provided in this Code continue to apply after separation from service as part of "policies and procedures of the Office regarding confidentiality", as set out in Regulation 80(a). In particular, the continuing duty of confidentiality is unequivocally provided in the confidentiality undertaking for staff of the Office of the Prosecutor (regarding the binding quality of undertakings, see Regulation 74.1.).

⁴ See rule 17(2)(a)(v). It is envisaged that issues such as the treatment of child victims and witnesses will be regulated in detail by the code of conduct of the Victims and Witnesses Unit and are thus excluded from the present Code.

⁵ Most lawyers within the Office will be bound by professional obligations to their national regulatory body (bar association, law society etc.); certain other professions within the Office may be bound by codes of conduct of national or international bodies. This Regulation ensures that the Code operates notwithstanding these external standards, while members of the Office are performing duties or exercising powers within the Office. There may be exceptional situations where this places a professional in the impossible situation of violating external standards through compliance with this Code.

and Evidence, the Regulations of the Court, the Staff Regulations, the Staff Rules, the Financial Regulations and Rules, and the Regulations of the Office. To this end, members of the Office should be fully familiar with these texts and be aware of amendments thereto.

- 74.2. Members of the Office shall establish and promote a unified international legal culture within the Office, rooted in the principles and purposes of the Statute, without bias for the rules and methods of any one national system or legal tradition.⁶
- 74.3. In accordance with the standards set out in this Code, members of the Office shall, in all matters arising in the performance of their duties or the exercise of their powers, and in all their dealings within the Office and in relations to the Court, governments, organisations and individuals:
- (a) maintain the independence of the Office and refrain from seeking or acting on instructions from any external source;⁷
 - (b) conduct themselves honourably, professionally, faithfully, impartially and conscientiously;⁸
 - (c) respect the confidentiality of investigations and prosecutions;⁹
 - (d) endeavour to establish the truth in analysis of information, investigations and prosecutions, in accordance with article 54 of the Statute and Regulation 10;¹⁰

⁶ The need to promote a single legal culture was underlined in expert consultations on general OTP matters. This standard is drafted to apply to all professions within the Office. The phrasing ‘without favour to the rules and methods of any one national system or legal tradition’ does not preclude rules or methods rooted in any one legal system from becoming part of the ‘unified legal culture’. Rather, this standard requires members of the Office to act without bias for any particular system; even lawyers trained in only one system should draw their primary inspiration from the Statute, not their national practices.

⁷ This standard of *independence* is excerpted from the general description of the Office of the Prosecutor in the Statute, which provides, “A member of the Office shall not seek or act on instructions from any external source.” (article 42(1)).

⁸ This standard is excerpted *verbatim* from the solemn undertaking common to all members of the Office (see rules S(1)(b) and 6(1)).

⁹ This standard is excerpted *verbatim* from the solemn undertaking common to all members of the Office (see rules 5(1)(b) and 6(1)).

¹⁰ This standard of *truth-seeking* is excerpted from the statement of purpose supporting the duty of the Chief Prosecutor to investigate all relevant facts and evidence, that is, “In order to establish the truth...” (article 54{1}(a)). As the search for truth cannot be an obligation

- (e) promote the effective investigation and prosecution of crimes within the jurisdiction of the Court;¹¹

Regulation 75: Specific standards of independence

The standard of independence¹² includes, in particular:

- (a) remaining unaffected by any individual or sectional interests and in particular any pressure by any State, organ of the United Nations, intergovernmental or non-governmental organisation or the media;¹³
- (b) refraining from any activity which is likely to affect the confidence of others in the independence of the Office;
- (c) refraining from the exercise of other occupations of a professional nature without the approval of the Chief Prosecutor;¹⁴
- (d) refraining from any activity which is likely to interfere with the performance of duties and the exercise of powers;
- (e) not being influenced by fear or intimidation.¹⁵

of result, the term “strive” is used to convey an obligation of means of central importance for individual choices of conduct.

¹¹ This standards of effective investigation and prosecution is excerpted from the statement of duties of the Chief Prosecutor during investigation in the Statute, which provides, “The Prosecutor...shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court.” (article 54(1)(b)). As the nature of these measures is within the discretion of the Chief Prosecutor, the term “promote” is used to emphasize that all members of the Office should actively support the goal of effective investigation and prosecution.

¹² See also Draft Staff Regulation 1.2, which establishes general obligations of independence. It is also assumed that the Chief Prosecutor’s ongoing obligation of disclosure in article 67(2) of the Statute is not extinguished at conviction.

¹³ This standard is excerpted from the joint IAP/CICC *Draft Code of Professional Conduct*.

¹⁴ This standard is established for the Chief Prosecutor and Deputy Prosecutors in article 42(5), and applies to staff through Draft Staff Regulation 1.2(n).

¹⁵ This standard was recommended in expert comments oo the joint IAP/CICC Draft Code of Professional Conduct.

Regulation 76: Specific standards of honourable and professional conduct

The standard of honourable and professional conduct is the embodiment of the dignity of the Office through words and deeds. Honourable and professional conduct includes, in particular:

- (a) dignified and courteous conduct before the Chambers of the Court, as befitting a high institution of international criminal justice;
- (b) dignified and courteous conduct in the presence of Judges, high officials of the Court, State officials, and other dignitaries;
- (c) dignified, courteous, collegial and supportive conduct towards all other members of the Office and other Organs of the Court;¹⁶
- (d) building constructive professional relationships, consulting frankly and openly with colleagues and refraining from backbiting in any context;
- (e) respect for the rights of persons protected during investigation, dignified and courteous conduct towards the persons being investigated and professional conduct towards their legal representatives;¹⁷
- (f) respect for the rights of accused; dignified and courteous conduct towards accused persons, and professional conduct towards their legal representatives;
- (g) respect for the rights of victims and witnesses,¹⁸ and respect for their interests and personal circumstances; dignified and courteous conduct towards victims and witnesses, professional conduct towards their legal representatives, and sensitive conduct towards victims, particularly victims of sexual and gender violence and violence against children;¹⁹
- (h) compliance with measures adopted by the Chief Prosecutor or other Organs of the Court, as may be applicable, in order to protect the

¹⁶ This specific standard of honourable and professional conduct will be reflected through detailed internal policies on diversity as well as harassment.

¹⁷ These rights are principally provided in articles 55, 63, 66 and 67.

¹⁸ These rights are principally provided in article 68 (see also rules 49, 50, 67, 76, 81, 82, 87-89, 91, 96, 99 and 112).

¹⁹ The Chief Prosecutor has the duty to respect the interests and personal circumstances of victims and witnesses, and to take into account the particular nature of crimes of sexual and gender violence and violence against children (see article 54(1)(b)).

safety, physical and psychological well-being, dignity and privacy of victims and witnesses;²⁰

- (i) respect for the human rights and fundamental freedoms recognized by international law, consistent with the Statute and treatment of persons without distinctions²¹ founded on grounds such as gender,²² sexual orientation, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.²³

Regulation 77: Specific standards of faithful conduct

The standard of faithful conduct is the fulfilment of the trust reposed in the members of the Office by the Chief Prosecutor. Faithful conduct includes, in particular:

- (a) subordination of personal interests to the interests of the Office, of the Court as an institution and, more broadly, to the interests of international justice;²⁴
- (b) acting solely within the scope of individual duties and within the bounds of inherent or delegated powers;²⁵

²⁰ These measures are envisaged in article 68(1) *in fine*.

²¹ The wording of Regulation 76 implies that such distinctions must be avoided in words and in deeds.

²² As the Code is subject to the Statute, the definition of “gender” necessarily conforms to article 7(3).

²³ The draft Staff Regulations preclude staff from discriminating “against any individual or group...” (Staff Regulation 1.2). This specific standard of conduct is at a higher threshold, excerpting prohibited grounds of discrimination from the Statute (article 21(3)), where non-discrimination is provided as a requirement for application and interpretation of law by the Court. While not enumerated in article 21(3), sexual orientation was added as a prohibited ground of discrimination following expert recommendations.

²⁴ Draft Staff Regulation 11(e) requires that staff “discharge their functions and regulate their conduct with the interests of the Court only in view”. However, the broader “interests of international justice” are reflected in the final preambular recital of the Statute, where States Parties resolve to guarantee “lasting respect for and...enforcement of international justice”.

²⁵ This Code applies only in the performance of individual duties and the exercise of inherent or delegated powers. This specific standard of conduct establishes that *ultra vires* action would be an ethical violation, as well as possibly triggering disciplinary measures in related instruments.

- (c) due deference to the authority of the Chief Prosecutor, Deputy Prosecutors and their designated representatives, acting within the scope of their powers;
- (d) due deference to the decisions of collegial bodies²⁶ and of superiors, acting within the scope of their powers;
- (e) full compliance with instructions received through appropriate channels of authority within the Office, and due consideration to general guidance and specific recommendations;
- (f) setting an unimpeachable example for subordinate members of the Office and providing appropriate direction, guidance and support;²⁷
- (g) full compliance with arrangements and agreements binding on the Office;²⁸
- (h) respect for the principles of this Code, and concerted effort to prevent, oppose and address any departure therefrom through, *inter alia*, the measures provided in Regulation 84.²⁹

Regulation 78: Specific standards of impartial conduct

The standard of impartial conduct is the fair-minded and moderate treatment of persons and issues, and is fully compatible with thorough investigation and analysis and with vigorous advocacy.³⁰ Impartial conduct includes, in particular:

- (a) respect for the presumption of innocence, particularly by avoiding expressions of opinion on the guilt or innocence of an accused in

²⁶ The generic term “collegial bodies” refers to taskforces, teams, committees and other professional groupings within the Office.

²⁷ As superiors may be subject to disciplinary proceedings or even summary dismissal for failing to address the misconduct of subordinates, it would be appropriate to include a further ethical standard in this regard. This standard is also complementary to standard (f) below.

²⁸ This includes, for example, arrangements or agreements to facilitate co-operation under article 54(3)(d).

²⁹ This standard is excerpted in part from the joint IAP/CICC *Draft Code of Professional Conduct*; the term “to the best of their ability” has been replaced by “concerted effort”, for concision and readability.

³⁰ The statement of compatibility between impartiality and thorough and vigorous advocacy is excerpted from the *Federal Prosecution Service Deskbook* (Ministry of Justice, Canada).

public or outside the proper context of proceedings before the Court;³¹

- (b) seeking to ensure that the right person is prosecuted for the right offence;³²
- (c) full conformity with the applicable rules on disclosure of evidence, including refraining from any action whatsoever that may tend to evade the disclosure obligations of the Office;³³
- (d) refusal to engage in direct or indirect *ex parte* communication with Judges or Chambers of the Court on the merits of trial or appeal proceedings during the course of those proceedings unless otherwise authorised under the Statute or the Rules of Procedure and Evidence, or unless otherwise instructed by the relevant Chamber or Judges;³⁴
- (e) refraining from expressions of opinion that could, objectively, adversely affect the standard of impartial conduct, whether through the communications media, in writing or in public addresses or actions, outside the proper context of proceedings before the Court;³⁵
- (f) requesting to be excused from any matter as soon as grounds for disqualification arise, especially those provided in article 42(7) and rule 34(1).³⁶

³¹ This standard does not affect the responsibility of certain members of the Office to articulate professional opinions on the culpability of an accused. It aims, rather, to curtail unprofessional expositions of personal opinion, as these harm the general standard of impartiality, which should be maintained both within the Office (“in the context of proceedings before the Court”) and outside the Office (“in public”).

³² This standard is excerpted from the *Code for Crown Prosecutors* (CPS, UK).

³³ See articles 61(3), 64, 67, 68 and 72, and rules 69, 72, 76-84, 112-119, 121, 126 and 152. Actions that may seek to disclose obligations include, for example, speaking with potential or actual witnesses without taking notes.

³⁴ The Office of the Prosecutor may be required to engage in *ex parte* in consultations with the Pre-Trial Chamber, *inter alia*, under rule 123(2) or during a confirmation hearing held in the absence of the person concerned, where the Pre-Trial Chamber decides that the person may not be represented by counsel under rule 125(1). Following the confirmation hearing, members of the Office may have to engage in *ex parte* communications, *inter alia*, under article 72(5)(d) or rule 81(2).

³⁵ The test of ‘objective adverse effect’ is drawn from rule 34(1)(d).

³⁶ Grounds for disqualification, as regards the Chief Prosecutor and Deputy Prosecutors, are provided in article 42(7) and rule 34(1). The duty of the Chief Prosecutor and Deputy Prosecutors to request to be excused is provided in rule 35. There is no analogous disqualification regime directly applicable to staff of the Office. However, it is advisable to extend

Regulation 79: Specific standards of conscientious conduct

The standard of conscientious conduct is diligent and systematic perseverance towards clear goals. Conscientious conduct includes, in particular:

- (a) efficient and competent completion of individual tasks;
- (b) clear and timely requests for assistance where required for the efficient and competent completion of individual tasks;
- (c) meaningful review of the work product of others, where required;
- (d) awareness of developments in international criminal law and in professional methods and standards;³⁷
- (e) regular and diligent participation in training within the Office.³⁸

Regulation 80: Specific standards of confidentiality

The standard of confidentiality is to safeguard confidences held within the Office or parts thereof. Confidentiality includes, in particular:

- (a) full conformity to policies and procedures of the Office regarding confidentiality of documents, proceedings, and other matters;³⁹
- (b) discernment and vigilance regarding all communications that may raise issues of confidentiality, particularly communications with persons outside the Office;
- (c) immediate reporting of suspected breaches of confidentiality directly and exclusively to the Chief Prosecutor or to the counsellor for standards of conduct, where such suspected breaches would pose a

this regime, *mutatis mutandis*, to staff of the Office through the Staff Regulations and Staff Rules, as this requires a level of specificity inappropriate for the Code.

³⁷ This standard is derived, in part, from the joint IAP/CICC *Draft Code of Professional Conduct*. The reference to “professional methods and standards” read with the general provisions on the application of the Code, is sufficiently broad to include the several professions within the Office. As certain professional methods and standards are rooted in national systems, Regulation 3.2 would preclude bias towards methods and standards from any one national system.

³⁸ This includes training in standards of conduct envisaged in Regulation 16.5, below.

³⁹ These policies and procedures will need to be developed.

danger to the safety, well-being or privacy of a victim, witness or third person;⁴⁰

- (d) containment of reported breaches of confidentiality by refraining from unnecessary discussion thereof in any context.

Regulation 81: Specific standards of truth-seeking

Seeking the truth includes, in particular:

- (a) upholding the central aim of investigation and analysis, namely to provide the factual and evidentiary basis for an accurate assessment of whether there may be criminal responsibility under the Statute;⁴¹
- (b) investigation of both incriminating and exonerating circumstances equally;⁴²
- (c) assessment of the materiality of facts and the probative value of evidence according to all relevant circumstances and irrespective of mere advantage or disadvantage to any potential case;⁴³
- (d) prompt reporting of concerns which, if substantiated, would tend to render a previous conviction made by the Court unsafe, bring the administration of justice into disrepute or constitute a miscarriage

⁴⁰ This standard is the only ethically-binding obligation to report within the Code, on the grounds that breaches of confidentiality may be particularly and irremediably damaging to the safety, well-being and privacy of persons outside the Office, whose interests are protected in the Statute. Members of the Office would be obliged to report exclusively to the Chief Prosecutor or the counsellor for standards of conduct under Regulation 84, and then contain the breach of confidentiality under subparagraph (d).

⁴¹ This standard is excerpted, in part, from the duties of the Chief Prosecutor with respect to investigations, which also establish the general duty of truth-seeking (article 54(1)(a)).

⁴² This standard is excerpted *verbatim* from the duties of the Chief Prosecutor with respect to investigations, which also establish the general duty of truth-seeking (article 54(1)(a)). The Statute requires that incriminating and exonerating circumstances be investigated “equally”. It is important to note that the Code does not create rights and obligations for non-members of the Office; as such, parties to proceedings cannot derive rights from this ethical standard to investigate exonerating and incriminating circumstances equally. For example, there would be no basis in the Code of conduct to request disclosure of resource allocation on Investigation Teams to see if equal attention was paid to both incriminating and exonerating circumstances. The defence also retains its responsibility to seek exculpatory evidence.

⁴³ This standard is derived, in part, from the joint IAP/CICC *Draft Code of Professional Conduct*.

of justice; and full conformity to the applicable rules on disclosure of new evidence.⁴⁴

Regulation 82: Specific standards of effective investigation and prosecution

The standard of effective investigation and prosecution includes, in particular,

- (a) preservation of the integrity of information and evidence in whatever form held within the Office and refusal to compromise the effective retention, storage and security of information and evidence in whatever form;
- (b) reasoned evaluation of facts, evidence and law, particularly in preparing and conducting the tests of reasonable basis, *prima facie* admissibility, interests of justice and reconsideration, considering applicable factors and criteria and taking into account the interests protected in the Statute in each case;⁴⁵
- (c) close scrutiny and attentive evaluation of facts, evidence and law in preparing and conducting the test of substantial grounds.⁴⁶

⁴⁴ The Chief Prosecutor is empowered to bring a claim to revise a final judgment of conviction or sentence on behalf of a convicted person under article 84(1) of the Statute. It is envisaged that internal review procedures will be established for this purpose, through which members would “report” concerns, either directly or through the chain of command.

⁴⁵ This specific standard adds an ethical obligation for members of the Office preparing for and conducting certain enumerated tests of facts, evidence and law, as provided in the Statute and the Regulations of the Office. As such, the standard is broad enough to extend to investigators, analysts, lawyers and others involved in preparation and conduct of these tests. The test of reasonable basis is established in articles 15(3) and 53(1)(a) (see especially rule 48 as regards the relation between these articles, as well as draft Regulations on the draft investigation plan and the decision whether or not to initiate an investigation). The tests of *prima facie* admissibility, as it concerns the Office, is established in article 53(1)(b) and elaborated in the draft Regulations. The test of interests of justice is established in article 53(1)(c) and elaborated in the draft Regulations. The test of reconsideration is established in article 53(4) (see also article 53(3)(a)) and elaborated in the draft Regulations.

⁴⁶ This specific standard adds a heightened ethical obligation for members of the Office preparing for and conducting the test of substantial grounds, in anticipation of the need to establish substantial grounds at confirmation hearing under article 61(5). As such, the standard is broad enough to extend to investigators, analysts, lawyers and others involved in preparation and conduct of these tests. The heightened ethical obligation is justified as the confirmation hearing represents the first public disclosure of the charges document and

Regulation 83: Counsellor for standards of conduct⁴⁷

- 83.1. The Chief Prosecutor shall designate one staff member of the Office to serve as counsellor for standards of conduct, for a renewable fixed period determined by the Chief Prosecutor. The designated person should be of high moral character and discerning and tactful disposition, and have particular competence in professional ethics.
- 83.2. The designated person shall assume the function of counsellor in addition to the exercise of ordinary duties.
- 83.3. When acting in the capacity of counsellor, the designated person shall report exclusively and confidentially to the Chief Prosecutor, as provided in this Code.

Regulation 84: Consultations

- 84.1. The counsellor shall be directly and immediately available for consultations with any member of the Office regarding general or specific matters related to compliance with this Code, whether

thus the indictment review procedure is the final opportunity for internal review of the charges document prior to its public disclosure.

⁴⁷ In principle, the role of the counsellor balances the following factors (a) the need to ensure that the standards of the Code are realised and enforced where necessary; (b) the reality that ethical and professional standards inevitably operate in a grey area, where consultative, collegial discussion, including a more detached, expert colleague such as the counsellor, is a most effective way to pre-empt problems before they arise; (c) the necessity for the Chief Prosecutor to retain full management authority over the Office while not necessarily having the time or resources within the Immediate Office to monitor overall compliance with standards of conduct and assist staff in their day-to-day implementation; and (d) the consideration that disciplinary measures, properly so-called, fall under the purview of other governing documents, notably the Staff Rules and Regulations of the Court. Another approach involves the appointment of several advisers, from various professions and sections of the Office, to serve on an advisory body for standards of conduct. Members could seek consultations with any adviser, who would then bring the concern to the collegial body. This has the advantage of providing additional transparency, checks-and-balances and a pool of advisers; however, this approach creates an additional layer of administration that may hamper the prompt, collegial and discreet rectification of non-compliance, and may create the impression of a disciplinary body, which would be inconsistent with the aims and purposes of this Code. It is therefore not recommended in this draft text.

concerning the conduct of the member seeking consultations or the conduct of any other member of the Office.⁴⁸

- 84.2. The name of the member seeking consultations and the content of consultations shall be confidential and protected by privilege in favour of the member seeking consultations, without whose consent such information shall not be disclosed by the counsellor in the course of any proceeding or to any person. The counsellor shall notify the member seeking consultations of this Sub-regulation and Regulation 85.2. prior to undertaking consultations.
- 84.3. If a member of the Office can show good cause not to first report to the counsellor, nothing in this Regulation shall preclude a member of the Office from reporting concerns regarding compliance with this Code directly to the Chief Prosecutor, or submitting a complaint to the Presidency, as the case may be.⁴⁹

Regulation 85: Reports and recommendations

- 85.1. The counsellor shall report annually to the Chief Prosecutor on efforts to promote compliance with this Code, and provide a general assessment of standards of conduct within the Office, including any particularly positive or negative patterns of conduct; to this end, the counsellor may seek information from any member of the Office. A report under this subsection shall not include privileged or otherwise confidential information, unless requested specifically and in writing by the Chief Prosecutor.⁵⁰
- 85.2. In situations where alleged or apparent non-compliance with this Code could pose a danger to the safety, well-being or privacy of a victim, witness or third person, the counsellor shall inform the

⁴⁸ It is evident that knowingly providing false information to the counsellor, for malicious or frivolous purposes, would be subject to disciplinary proceedings for misconduct. Such action would also constitute a breach of standards of honourable conduct towards members of the Office in Regulation 76(c).

⁴⁹ The expression “submitting a complaint to the Presidency” refers to the general complaints procedure regarding conduct of the Chief Prosecutor and Deputy Prosecutors under rule 26.

⁵⁰ The Chief Prosecutor retains full authority under the preceding Regulation to request full particulars of otherwise privileged or confidential information.

Chief Prosecutor, directly and without delay.⁵¹ Where the conduct of a Deputy Prosecutor is in question, the counsellor shall inform the Chief Prosecutor. Where the conduct of the Chief Prosecutor is in question, the counsellor shall inform the Chief Prosecutor in the presence of a Deputy Prosecutor, and, additionally, shall inform the Presidency.⁵²

- 85.3. The counsellor may provide recommendations to the Chief Prosecutor on measures to rectify general or specific situations of non-compliance with this Code.

⁵¹ It is assumed that ethical situations in the “grey area” are best resolved through informal individual or group consultations procedures. As such, the counsellor would only report non-compliance that poses a danger to the safety, well-being or privacy of a victim, witness or third person, as these interests are accorded primary importance in the Statute.

⁵² In the latter case, the counsellor would be triggering the general complaints procedure regarding conduct of the Chief Prosecutor under rule 26. The presence of a Deputy Prosecutor affords a measure of protection for the Adviser, who would have sacrificed, at least in part, the right to confidentiality for complainants envisaged in rule 26.

Annex 2: Comparative Table of Key Provisions

Ethical standards are, by nature, interrelated and interdependent and their classification defies exclusivity. Where provisions are susceptible to classification under multiple categories, a reasonable primary classification has been selected in order to avoid duplication.

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
General principles	<p>[7(4)] Assist the Court [...] to do justice for the international community, the victims and the accused.</p> <p>[14(5)] Accept the Rules as a guideline for ethics and professional responsibility, and exercise integrity, thoroughness, sensitivity, cooperation, and professionalism to the highest degree in all functions.</p>	<p>Members of the Office shall uphold the principles and purposes of the Statute and adhere to its provisions, fulfil their solemn undertaking to the Court; fulfil their undertaking of confidentiality to the Office of the Prosecutor; and adhere to the Rules of Procedure and Evidence, the Regulations of the Court, the Staff Regulations, the Staff Rules, the Financial Regulations and Rules, and the Regulations of the Office.</p> <p>To this end, members of the Office should be fully familiar with these texts and be aware of amendments thereto.</p> <p>The Office shall offer professional in-house training on a regular basis. All staff of the Office shall participate in such training [...]</p>	<p><i>Five Fundamental Rules</i></p> <ol style="list-style-type: none"> 1. Respect, regard and adhere to the Rome Statute and the Rules of Procedure and Evidence; 2. Conduct yourself in a manner befitting the status of international civil servants, displaying the highest standards of integrity, independence, impartiality professionalism and confidentiality; 3. Be conscious of the purpose of the Court and the crucial role the Office plays in investigating and prosecuting international crimes, and in the administration of justice; 4. Respect human rights and fundamental freedoms, the principle of equality before the law, the presumption of innocence and right to a fair trial;

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
			<p>5. Be respectful, courteous and considerate towards victims and witnesses, all staff members and elected officials of the Court and all counsel.</p> <p>The Office upholds and respects the principles embodied in the Statute, the Rules of Procedure and Evidence and the Regulations of the Court. It also adheres to the Financial Regulations and Rules, Staff Regulations and Rules, the Regulations of the Office of the Prosecutor and all policies of the Court that are relevant to the Office.</p> <p>8. The Office and all its members are primarily guided by the following principles:</p> <ul style="list-style-type: none"> (a) independence of the Office; (b) professional ethics and integrity; (c) fair, impartial, effective and expeditious investigation and prosecution; (d) respect for confidentiality of investigations and prosecutions; (e) respect for human rights and fundamental freedoms recognised by international law in conformity with the Statute, and non-discrimination against any individual

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
Institutional culture		Members of the Office shall establish and promote a unified international legal culture within the Office, rooted in the principles and purposes of the Statute, without bias for the rules and methods of any one national system or legal tradition.	[...] a shared culture rooted in the principles and purposes of the Statute, without bias for the rules and methods of any national system [...]
Scope of application		<p>The standards of this Code apply to the Chief Prosecutor and Deputy Prosecutors, all general services and professional staff members of the Office, consultants, temporary and gratis personnel and clerks of the Office.</p> <p>The standards of this Code apply within the scope of the performance of individual duties and the individual exercise of inherent and delegated powers.</p> <p>This Code is subject to the provisions of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and the Staff Regulations and Staff Rules, incorporates by reference those provisions of the code of conduct of the Victims and Witnesses Unit applicable to members of</p>	<p>This Code shall apply to all Members of the Office as well as interns, visiting professionals, gratis personnel and staff members of other organisations on secondment or otherwise made available to the Office.</p> <p>2. Unless indicated otherwise in their contracts, this Code shall not apply to consultants, contractors and special advisers of the Office.</p> <p>3. The standards of this Code are applicable at all times, to the extent that professional and personal conduct and associations of Members of the Office may adversely affect the integrity, independence and impartiality of the Office.</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
Normative hierarchy	[18(1)] If there is any inconsistency between the standards of professional conduct set out in this Code and any other code which Prosecutors are bound to honour, the former shall prevail with respect to their conduct before the Court.	This Code [...] operates notwithstanding any other national or international standard to which members of the Office may be held.	Where there is any inconsistency between this Code and any other code of ethics or professional responsibility which Members of the Office are bound to honour outside the applicable legal regime established at the Court, the provisions of this Code shall prevail in respect of the professional conduct of Members of the Office when working for or practising before the Court.
Competence	[1(2)] (Prosecutor and Deputy Prosecutors) to be legally qualified and trained to carry out the work of prosecutors. [3(1)] Be individuals of...ability, with appropriate legal training and qualifications... [3(3)] Have appropriate education and be made aware of the ideals and ethical duties of their office... [8(2)] Carry out their duties with due com-		

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
	<p>petence and diligence...</p> <p>[12(4)] Advise any unrepresented person to secure legal representation, and inform the unrepresented person of the role counsel plays in the matter, the person's right to counsel under the Rules and the nature of legal representation in general....</p> <p>[13(3)] Respect the rules of evidence and disclosure with regard to privileged information...</p>		
Independence	<p>[7(1)] Recall that the OTP is an independent organ within the Court, and avoid any activities that call into question, or are likely to affect, confidence in their independence by, <i>inter alia</i>, engaging in activities that are or seem to be incompatible with their prosecutorial functions, including having an external occupation or employment...</p> <p>[14(6)] Not engage in any activity which would undermine his or her integrity and independence in his or her official capacity...</p> <p>[17(2)] Make it clear, particularly when undertaking official speaking engagements,</p>	<p>The standard of independence includes, in particular:</p> <p>(a) remaining unaffected by any individual or sectional interests and in particular any pressure by any State, organ of the United Nations, intergovernmental or non-governmental organisation or the media;</p> <p>(b) refraining from any activity which is likely to affect the confidence of others in the independence of the Office;</p> <p>(c) refraining from the exercise of other occupations of a professional nature without the approval of the Chief Prosecutor;</p> <p>(d) refraining from any activity which is</p>	<p>21. In accordance with article 42, the Office of the Prosecutor acts independently as a separate Organ of the Court in the execution of its mandate. Members of the Office shall exercise their functions free of any external influences, inducements, pressures, threats or interference, direct or indirect.</p> <p>22. The Prosecutor shall ensure that Staff members maintain their full independence.</p> <p>23. In particular, Members of the Office shall, <i>inter alia</i>:</p> <p>(a) not seek or act upon instructions from any external source;</p> <p>(b) remain unaffected by any individual or</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
	<p>that he or she is representing the OTP and not the Court as a whole...</p>	<p>likely to interfere with the performance of duties and the exercise of powers; (e) not being influenced by fear or intimidation.</p>	<p>sectional interests and, in particular, by any pressure from any State, or any international, intergovernmental or non-governmental organisation or the media; (c) refrain from any activity which is likely to negatively affect the confidence of others in the independence or integrity of the Office; (d) refrain from any activity which may lead to any reasonable inference that their independence has been compromised; (e) refrain from the exercise of other occupations of a professional nature without the prior approval of the Prosecutor; and (f) refrain from any activity which is likely to interfere with the performance of duties and the exercise of functions as Members of the Office.</p>
Honesty	<p>[7(5)] Never knowingly make a false or misleading statement of material fact to the Court or offer evidence which he or she knows to be incorrect... [14(7)] Abstain from obstructing the trial by, inter alia, giving false testimony, know-</p>	<p>[see 'Truthfulness', below]</p>	

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
	<p>ingly presenting false evidence, interfering with the testimony or attendance of a witness, retaliating against a witness for giving testimony or hindering the collection of evidence, disrupting court proceedings, refusing to comply with a direction by the Court, and soliciting or accepting a bribe as an official of the Court in connection with his or her official duties....</p>		
<p>Honour / professionalism</p>	<p>[3.(1)] Be individuals of integrity... [4] Consult regularly and co-ordinate with other OTP staff and co-operate with colleagues in other sections of the Court... Know, understand and follow OTP policies, guidelines and procedures... Cooperate with the relevant law enforcement agencies, courts, legal profession and government agencies, whether nationally or internationally.... Render assistance to colleagues in other jurisdictions, in accordance with the law and with a spirit of mutual cooperation... [7(9)] Avoid communicating with a Judge or Chamber of the Court about the merits</p>	<p>The standard of honourable and professional conduct is the embodiment of the dignity of the Office through words and deeds. Honourable and professional conduct includes, in particular: (a) dignified and courteous conduct before the Chambers of the Court, as befitting a high institution of international criminal justice; (b) dignified and courteous conduct in the presence of judges, high officials of the Court, State officials, and other dignitaries; (c) dignified, courteous, collegial and supportive conduct towards all other members of the Office and other Organs of the Court;</p>	<p>17. Members of the Office shall refrain from any conduct which would adversely reflect on the Office and/or the Court, and shall not engage in any activity that is incompatible with the aims, objectives and interests of the Office and the Court, or with the exercise of their functions as persons working for the Court. 18. Members of the Office shall not participate or engage in any illegal activities or corrupt practices. 19. Members of the Office shall refrain from using illegal substances, including narcotics or other unlawful drugs, or consume alcohol in a quantity sufficient to interfere with their official functions.</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
	<p>of a particular case, except within the proper context of the proceedings... [8(1)] ...respect the rights, interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular where it involves sexual violence or violence against children... [9(1)] Provide the defence with the names and prior statements of witnesses and means to inspect collected evidence, and promote a cooperative and honourable pre-trial atmosphere</p> <p>[11(4)] Be sensitive to the need not to re-victimise victims...</p> <p>[11(5)] Obtain consent of victims prior to seeking protective measures, testimony facilitation, or other special measures to protect the mental or physical well-being of victims or witnesses...</p> <p>[11(7)] Provide the witness with the opportunity to obtain legal advice if he or she requests...</p> <p>[12(2)] Ensure that cross examination of an accused is fairly conducted, and material</p>	<p>(d) building constructive professional relationships, consulting frankly and openly with colleagues and refraining from backbiting in any context;</p> <p>(e) respect for the rights of persons protected during investigation, dignified and courteous conduct towards the persons being investigated and professional conduct towards their legal representatives;</p> <p>(f) respect for the rights of accused; dignified and courteous conduct towards accused persons, and professional conduct towards their legal representatives;</p> <p>(g) respect for the rights of victims and witnesses, and respect for their interests and personal circumstances; dignified and courteous conduct towards victims and witnesses, professional conduct towards their legal representatives, and sensitive conduct towards victims, particularly victims of sexual and gender violence and violence against children;</p> <p>(h) compliance with measures adopted by the Chief Prosecutor or other Organs of the Court, as may be applicable, in order to</p>	<p>In the exercise of their duties and powers, the Members of the Office shall at all times act honourably and regulate their conduct with the interests of the Court only in view.</p> <p>26. Honourable conduct encompasses the embodiment of the dignity of the Office, which includes, inter alia:</p> <p>(a) dignified and courteous conduct in all relations with the Chambers and judges of the Court, the Registrar and the Deputy Registrar of the Court, State officials, and other dignitaries that befits a high institution of international criminal justice;</p> <p>(b) dignified, courteous, collegial and supportive conduct towards all persons working for the Office and the Court;</p> <p>(c) dignified and courteous conduct towards the persons under investigation or the accused;</p> <p>(d) dignified, courteous and sensitive conduct towards all victims and witnesses, in particular children, elderly persons, persons with disabilities and victims of sexual and gender violence; and</p> <p>(e) dignified and courteous conduct to-</p>

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
	<p>put to an accused is considered on reasonable grounds to be accurate and its use justified in the circumstances of the trial...</p> <p>[12(9)] Ensure that the rights of the accused are protected, including a fair and public hearing; a detailed explanation of the cause and content of the charge in a language best understood by the accused, an expedited trial to the extent possible, an entitlement to cross-examine any witnesses and declare defences, permission to remain silent without any presumption of guilt therefrom, permission to be present during his or her trial or at least observe the trial, and receipt of adequate facilities, choice of counsel, and translators...</p> <p>[13(1)] Recognise all legal representatives appearing or acting in proceedings before the Court as professional colleagues and act fairly, honestly and courteously towards them and their clients...</p> <p>[13(4)] Cooperate with the Defence Counsel as reasonably as possible when considering the admissibility of evidence, or other matters that require sensible cooperation</p>	<p>protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses;</p> <p>(i) respect for the human rights and fundamental freedoms recognized by international law, consistent with the Statute and treatment of persons without distinctions founded on grounds such as gender, sexual orientation, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.</p>	<p>wards counsel and their team members</p> <p>52. Members of the Office shall comply with the applicable rules on disclosure of evidence and inspection of material in the possession or control of the Office in a manner that facilitates the fair and expeditious conduct of the proceedings and fully respects the rights of the person under investigation or the accused, with due regard for the protection of victims and witnesses.</p> <p>53. Disclosure shall include:</p> <p>(a) evidence that shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence; and</p> <p>(b) any documents or information by order of the Chambers.</p> <p>54. Inspection shall include any books, documents, photographs or any other tangible object in the possession or control of the Office which are material to the preparation of the defence or are intended for use by the Office as evidence for the purposes of the confirmation hearing or at trial or</p>

The Origins and Development of the Code of Conduct

Category	IAP/CICC Draft Code (2003) and professionalism as outlined in the Rules...	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
			<p>were obtained from or belonged to the suspect or accused.</p> <p>56. Members of the Office shall not engage in any deliberate conduct, or make any disclosure, which places or is likely to place the security of any person at risk.</p> <p>57. Members of the Office shall take appropriate measures to protect the physical and psychological well-being, dignity and privacy of any person at risk as a direct result of his or her interaction with the Office.</p> <p>58. Staff members shall be recruited, hired, transferred, trained and compensated on the basis of merit and without regard for characteristics such as race, marital status, pregnancy or potential pregnancy, religion, ethnicity, colour, sexual orientation, disability, political belief or responsibilities as a caregiver.</p> <p>59. Members of the Office shall treat their colleagues, and other persons encountered in the context of their work, with courtesy and respect, and abstain from treating individuals less favourably because they have a</p>

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
			<p>particular characteristic or belong to a particular group as specified in paragraph 58 above.</p> <p>60. Members of the Office shall not engage in any covert or overt behaviour that reasonably has the effect of violating someone else's dignity or creating an intimidating, degrading, hostile, humiliating or offensive work environment, and avoid behaviour that, although not rising to the level of harassment or abuse, may nonetheless create an atmosphere of hostility or intimidation.</p> <p>61. Staff members shall pay particular attention to the rules set out in the Administrative Instructions on Sexual and other Forms of Harassment and on Equal Employment Opportunity and Treatment.</p> <p>66. The Office aims to establish a relationship of trust and respect with victims and witnesses. Members of the Office shall conduct themselves in a manner that limits risks to witnesses, victims and others who are at risk on account of testimony given by such witnesses, respect their confidentiality and privacy and minimise the potential for</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
			<p>harm.</p> <p>67. Members of the Office shall, inter alia:</p> <ul style="list-style-type: none"> (a) not harass, intimidate or pressure victims and witnesses to testify before the Court or to have any dealings with the Court; (b) consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Statute and the Rules; (c) engage constructively with the legal representatives of victims in order to promote the efficient conduct of proceedings; (d) where appropriate, fully explain the rights of witnesses pursuant to article 55(1), including the right against self-incrimination or the incrimination of family members. <p>68. Members of the Office shall not abuse or misuse their status and the authority of the Office, and shall not engage in any conduct that is likely to bring the Court into disrepute. This includes, but is not limited</p>

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
			<p>to:</p> <p>(a) any deliberate conduct resulting in physical, sexual or psychological harm or suffering to members of any locality, especially women and children, in which an investigation is being conducted;</p> <p>(b) any abusiveness, coercion or threats to any person with whom Members of the Office have dealings;</p> <p>(c) corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or retaliating against a witness for giving testimony;</p> <p>(d) any sexual relationship with witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses, or a person engaged by a Member of the Office in relation to a situation under investigation.</p>
Faithfulness	<p>[7(3)] Always observe the rules of the Court and respect its impartiality...</p> <p>[7(10)] Respect all decisions made by a Judge or Chamber of the Court...</p> <p>[7(8)] Take all necessary steps to ensure</p>	<p>The standard of faithful conduct is the fulfilment of the trust reposed in the members of the Office by the Chief Prosecutor. Faithful conduct includes, in particular:</p> <p>(a) subordination of personal interests to</p>	<p>Faithful conduct encompasses the fulfilment of the trust reposed in the Office of the Prosecutor. Faithful conduct includes, inter alia:</p> <p>(a) loyalty to the aims, principles and pur-</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
	<p>that his or her actions do not bring proceedings before the Court into disrepute... [8(10)] Refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment...</p> <p>[8(11)] Ensure that appropriate action is taken against those responsible for using such improper methods...</p> <p>[9(2)] Defer to the judgment of the Pre-Trial Chamber on all issues of disclosure...</p> <p>[10] Prosecutors shall defer to the judgment of the Chambers in assessing the admissibility of any submitted evidence...</p> <p>[11(6)] Not require any witness to make any statement that might incriminate himself or herself, or the accused person, nor offer the witness any monetary or other incentive for his or her testimony...</p> <p>[12(3)] Refrain from giving legal advice to an unrepresented defendant...</p> <p>[12(5)] Recall article 66 of the Statute, af-</p>	<p>the interests of the Office, of the Court as an institution and, more broadly, to the interests of international justice;</p> <p>(b) acting solely within the scope of individual duties and within the bounds of inherent or delegated powers;</p> <p>(c) due deference to the authority of the Chief Prosecutor, Deputy Prosecutors and their designated representatives, acting within the scope of their powers;</p> <p>(d) due deference to the decisions of collegial bodies and of superiors, acting within the scope of their powers;</p> <p>(e) full compliance with instructions received through appropriate channels of authority within the Office, and due consideration to general guidance and specific recommendations;</p> <p>(f) setting an unimpeachable example for subordinate members of the Office and providing appropriate direction, guidance and support;</p> <p>(g) full compliance with arrangements and agreements binding on the Office;</p>	<p>poses of the Court;</p> <p>(b) acting within the boundaries of inherent or delegated powers and functions;</p> <p>(c) due deference to the authority of the Prosecutor, the Deputy Prosecutor(s), the Executive Committee of the Office, superiors and relevant authorities, including Chambers, acting within the scope of their powers; and</p> <p>(d) respect for the principles of this Code, and a concerted effort to prevent, oppose and address any departure therefrom.</p>

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
	<p>firming that everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law and establishing that the burden of proof is on the Prosecutor...</p> <p>[12(7)] Never compel an accused person to incriminate himself or herself, or to confess guilt, nor subject him or her to coercion, duress, threat, or any form of degrading treatment...</p> <p>[13(2)] Not communicate with a represented defendant except through or with the permission of that person's legal representative...</p> <p>[14(4)] Not abuse the official duties of Prosecutors by harming the standing of the Court or hampering the goal of securing a fair trial...</p>	<p>(h) respect for the principles of this Code, and concerted effort to prevent, oppose and address any departure therefrom through, inter alia, the measures provided in Regulation 84 [concerning the ethics counseling function].</p>	
Impartiality	<p>[3(2)] Be safeguarded against appointments based on partiality or prejudice, excluding any discrimination against a person...</p> <p>[7(2)] Ensure to the best of their abilities that a just verdict is reached at the end of the trial process and not strive for a conviction...</p>	<p>The standard of impartial conduct is the fair-minded and moderate treatment of persons and issues, and is fully compatible with thorough investigation and analysis and with vigorous advocacy. Impartial conduct includes, in particular:</p> <p>(a) respect for the presumption of innocence...</p>	<p>29. Impartiality is one of the core principles governing the work of the Office.</p> <p>Impartial conduct encompasses the fair-minded and objective treatment of persons and issues, free from any bias or influence.</p> <p>30. Impartial conduct includes, inter alia:</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
	<p>tion at all costs...</p> <p>[8(5)] Consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or disadvantage of the prosecution...</p> <p>[8(7)] Act with competence and diligence, make impartial judgments based on the evidence and consider foremost the public interest, and not proceed if the evidence does not create a reasonable basis for a charge...</p> <p>[11(3)] Consider the views, legitimate interests and possible concerns of victims and witnesses, in accordance with the requirements of a fair trial, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights and of the progress of the case...</p> <p>[12(1)] Ensure that evidence favourable to the accused is disclosed in accordance with the Rules and the requirements of a fair trial...</p> <p>[12(10)] Respect the need for impartial hearings, fair evaluations of testimony, and the requirement that the probative value of</p>	<p>cence, particularly by avoiding expressions of opinion on the guilt or innocence of an accused in public or outside the proper context of proceedings before the Court;</p> <p>(b) seeking to ensure that the right person is prosecuted for the right offence;</p> <p>(c) full conformity with the applicable rules on disclosure of evidence, including refraining from any action whatsoever that may tend to evade the disclosure obligations of the Office;</p> <p>(d) refusal to engage in direct or indirect <i>ex parte</i> communication with Judges or Chambers of the Court on the merits of trial or appeal proceedings during the course of those proceedings unless otherwise authorised under the Statute or the Rules of Procedure and Evidence, or unless otherwise instructed by the relevant Chamber or Judges;</p> <p>(e) refraining from expressions of opinion that could, objectively, adversely affect the standard of impartial conduct, whether through the communications media, in writing or in public addresses or actions,</p>	<p>(a) respect for the presumption of innocence. In particular, Members of the Office shall not publicly express an opinion on the guilt or innocence of a person under investigation or the accused outside the context of the proceedings before the Court;</p> <p>(b) refraining from expressing an opinion that could, objectively, adversely affect the required impartiality, whether through communications media, in writing or public addresses, or through any other actions outside the context of the proceedings before the Court;</p> <p>(c) full conformity with the applicable rules on disclosure of evidence.</p> <p>31. Members of the Office shall not participate in any matter in which their impartiality might reasonably be doubted on any ground, and shall request to be excused from any matter as soon as grounds for disqualification arise, especially those indicated in article 42(7) and rule 34(1).</p>

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
	<p>any evidence outweigh any prejudicial effect of disclosing that evidence....</p> <p>[13(5)] Acknowledge the equal nature of the relationship between the Prosecutor and the Court, and the Defence Counsel and the Court, and not benefit from any greater right than the Defence Counsel to be heard, present a case, or access a judge...</p> <p>[16] Prosecutors shall be disqualified in the event of personal interest in the case, including, inter alia, a relationship with any of the parties, involvement in any prior related legal proceedings, and expression of opinions in public that could adversely affect the required appearance of impartiality...</p>	<p>outside the proper context of proceedings before the Court;</p> <p>(f) requesting to be excused from any matter as soon as grounds for disqualification arise, especially those provided in article 42(7) and rule 34(1).</p>	
Conscientiousness	<p>[3(6)] Not stray from the requirements of a proper investigation and procedure for seeking authorization thereof according to the Rules, and respond to requests on an expedited basis ...</p> <p>[8(8)] At all times maintain the integrity of evidence, whether in written, oral or any other form, which may be submitted to the Court...</p>	<p>The standard of conscientious conduct is diligent and systematic perseverance towards clear goals. Conscientious conduct includes, in particular:</p> <p>(a) efficient and competent completion of individual tasks;</p> <p>(b) clear and timely requests for assistance where required for the efficient and com-</p>	<p>Conscientious conduct encompasses the diligent and systematic pursuit of goals established by the Office. Conscientious conduct includes, inter alia:</p> <p>(a) understanding of and due compliance with the standards established by this Code, the Operations Manual, guidelines, policies, procedures and recommendations of the Office; and</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
<p>Confidentiality</p>	<p>[8(9)] Examine proposed evidence to ascertain if it has been lawfully obtained...</p> <p>[3(4)] Ensure the confidentiality, and security for victims and witnesses, of all documents in or passing through the possession of any staff member of the Office of the Prosecutor...</p> <p>[9(3)] Protect the confidentiality of all information and evidence retained, stored, and secured through investigation by the Prosecutor, or others representing the Prosecutor in the exercise of his or her functions...</p> <p>[11] Preserve professional confidentiality and not improperly disclose information which may jeopardise the safety of victims and witnesses...</p>	<p>petent completion of individual tasks;</p> <p>(c) meaningful review of the work product of others, where required;</p> <p>(d) awareness of developments in international criminal law and in professional methods and standards;</p> <p>(e) regular and diligent participation in training within the Office.</p> <p>The standard of confidentiality is to safeguard confidences held within the Office or parts thereof. Confidentiality includes, in particular:</p> <p>(a) full conformity to policies and procedures of the Office regarding confidentiality of documents, proceedings, and other matters;</p> <p>(b) discernment and vigilance regarding all communications that may raise issues of confidentiality, particularly communications with persons outside the Office;</p> <p>(c) immediate reporting of suspected breaches of confidentiality directly and exclusively to the Chief Prosecutor or to the counsellor for standards of conduct, where</p>	<p>(b) compliance with arrangements and agreements binding the Office.</p> <p>32. Members of the Office shall uphold the highest standard of confidentiality in the discharge of their duties, respect and actively exercise all care to ensure respect for the confidentiality of information.</p> <p>33. Members of the Office shall not disclose any privileged material or any material deemed confidential by the Court, unless authorised to do so.</p> <p>34. In addition, Staff members who accidentally encounter confidential material or information shall immediately take all measures necessary to avoid or minimise a possible negative impact on the operations of the Office and the Court and notify their superiors.</p>

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
		<p>such suspected breaches would pose a danger to the safety, well-being or privacy of a victim, witness or third person;</p> <p>(d) containment of reported breaches of confidentiality by refraining from unnecessary discussion thereof in any context.</p>	<p>35. Confidentiality includes, inter alia:</p> <p>(a) full conformity with policies and procedures regarding confidentiality of correspondence, documents, proceedings, information and other matters.</p> <p>Members of the Office shall pay particular attention to the provisions set out in the Information Security Manual, the Administrative Instructions on the ICC Information Protection Policy and the Computer and Network Services Policy;</p> <p>(b) upholding the obligations stipulated in the Confidentiality Undertaking and the Oath of the Office;</p> <p>(c) discernment and vigilance regarding all communications that may raise issues of confidentiality, particularly communications with persons outside the Office;</p> <p>(d) immediate reporting of suspected breaches of confidentiality where such suspected breaches would pose a danger to the safety, well-being or privacy of staff, victims, witnesses, persons under investigation, the accused and their families;</p> <p>(e) containment of reported breaches of</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
<p>Truthfulness</p> <p>[7(4)] Assist the Court to arrive at the truth...</p> <p>[7(6)] Where a false or misleading statement is made, take all necessary steps to correct it as soon as possible after the error has been discovered</p> <p>[8(4)] Conduct his or her investigations with the goal of establishing truth, ensuring confidentiality, fully respecting the rights of all persons under the Statute, and serving the interests of justice...</p> <p>[12(8)] Ensure that all opinions offered by Prosecutors to the Pre-Trial Chamber or Registry by the Prosecutor are thorough, honest and genuine...</p>		<p>Seeking the truth includes, in particular:</p> <p>(a) upholding the central aim of investigation and analysis, namely to provide the factual and evidentiary basis for an accurate assessment of whether there may be criminal responsibility under the Statute;</p> <p>(b) investigation of both incriminating and exonerating circumstances equally;</p> <p>(c) assessment of the materiality of facts and the probative value of evidence according to all relevant circumstances and irrespective of mere advantage or disadvantage to any potential case;</p> <p>(d) prompt reporting of concerns which, if substantiated, would tend to render a previous conviction made by the Court un-</p>	<p>confidentiality by refraining from unnecessary discussion thereof in any context; and</p> <p>(f) secure maintenance and storage of any material obtained by members of the Office in the course of their official functions.</p> <p>36. The obligations of Members of the Office regarding confidentiality shall not cease upon separation from service.</p> <p>49. In compliance with the duty to establish the truth under article 54(1)(a) of the Statute, the Office shall investigate incriminating and exonerating circumstances equally in all steps involved in the planning and conduct of investigative and prosecutorial activities. In particular, Members of the Office shall:</p> <p>(a) conduct investigations with the goal of establishing the truth, and in the interests of justice;</p> <p>(b) consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or the disadvantage of the prosecution;</p> <p>(c) ensure that all necessary and reasonable</p>

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
Effectiveness	<p>[3(7)] Adhere to the working languages of the Court, and be fluent in at least one of these working languages...</p> <p>[3(5)] Respect the roles of the other organs of the Court, and not interfere with their functions...</p> <p>[8(1)] Take appropriate measures to ensure the effective investigation of crimes within the jurisdiction of the Court...</p> <p>[8(3)] Deal expeditiously with all matters, including issues of pre-trial detention...</p> <p>[11(2)] Take all reasonable measures to protect the privacy and ensure the safety of victims, witnesses and their families, to</p>	<p>safe, bring the administration of justice into dispute or constitute a miscarriage of justice; and full conformity to the applicable rules on disclosure of new evidence.</p> <p>The standard of effective investigation and prosecution includes, in particular,</p> <p>(a) preservation of the integrity of information and evidence in whatever form held within the Office and refusal to compromise the effective retention, storage and security of information and evidence in whatever form;</p> <p>(b) reasoned evaluation of facts, evidence and law, particularly in preparing and conducting the tests of reasonable basis, prima facie admissibility, interests of justice and reconsideration, considering applicable factors and criteria and taking into account the interests protected in the Statute in</p>	<p>enquiries are made and the results disclosed in accordance with the requirements of a fair trial, whether they point to the guilt or the innocence of the suspect.</p> <p>50. Staff members shall report to the Prosecutor concerns which, if substantiated, would tend to render a previous conviction made by the Court unsafe, bring the administration of justice into dispute or constitute a miscarriage of justice.</p> <p>51. In accordance with article 54(1)(b), Members of the Office shall ensure that the standards of effective investigation and prosecution are upheld and shall:</p> <p>(a) act with competence and diligence, make impartial judgments based on the evidence and consider foremost the interests of justice in determining whether or not to proceed;</p> <p>(b) fully respect the rights of persons under investigation and the accused and ensure that proceedings are conducted in a fair manner;</p> <p>(c) refrain from prosecuting any person whom they believe to be innocent of the</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
	<p>treat victims with appropriate compassion, and to make reasonable efforts to minimise inconvenience to witnesses...</p> <p>[12(6)] Recognize the role of the Prosecutor in representing the interests of the public community while protecting the rights of the accused by ensuring trials are conducted in a diligent, competent and fair manner...</p> <p>[13(6)] Disclose to the defence, as soon as practicable, all evidence in their possession or control that may demonstrate the innocence or mitigate the guilt of the accused...</p> <p>[15(4)-(5)] Respect the procedures of discipline that may impose sanctions of, inter alia, a fine, reprimand, or possible term of imprisonment;</p> <p>Respect the procedure of removal for serious misconduct, and the necessary suspension of duty pending investigation...</p>	<p>each case;</p> <p>(c) close scrutiny and attentive evaluation of facts, evidence and law in preparing and conducting the test of substantial grounds [i.e. in respect of confirmation of charges under Article 61(5) of the Statute].</p>	<p>charges;</p> <p>(d) refrain from proffering evidence reasonably believed to have been obtained by means of a violation of the Statute or internationally recognised human rights if the violation casts substantial doubt on the reliability of the evidence or the admission of evidence would be antithetical to and would seriously damage the integrity of the proceedings.</p> <p>55. Members of the Office shall, in order to ensure an uninterrupted chain of custody:</p> <p>(a) preserve the integrity of information and evidence;</p> <p>(b) not compromise the effective retention, storage and security of information and evidence; and</p> <p>(c) handle and maintain securely any material obtained in the course of their official functions.</p>

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
<p>Discrimination in expression and association</p>	<p>[17(1)] Avoid making public comments outside the courtroom, including, inter alia, speaking to the media about the merits of particular cases or the guilt or innocence of certain accused before judgment by the Court, and making any public statements regarding the character, credibility, reputation, or record of an accused...</p>		<p>37. Members of the Office shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect the independence and/or impartiality of the Office.</p> <p>38. Members of the Office shall not, either officially or unofficially, make any public comments that detract from the role of the Office and the Court.</p> <p>39. Members of the Office shall refrain from making any public pronouncements, outside the context of the proceedings before the Court, that they know, or reasonably ought to know, may be disseminated by means of public communication, and may have a substantial likelihood of prejudicing the judicial proceedings or the rights of any person in the proceedings before the Court.</p> <p>40. In accordance with Staff Rule 101.7 and Staff Regulation 1.2(n)-(o), except where authorised in the normal course of their official duties, Staff members of the Office shall not issue statements to the press, radio or other public information</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
Conflicts of interest and other impediments			<p>agencies; accept any outside speaking engagements; take part in film, theatre, radio or video productions; or submit any articles, books or other material for publication without the prior approval of, or on behalf of, the Prosecutor.</p> <p>41. Without prejudice to their obligations of, inter alia, confidentiality, nothing in this Code shall prevent the Members of the Office from responding to or taking action in good faith against slanderous statements or statements amounting to defamation of their good character or reputation.</p> <p>42. Members of the Office shall abstain from any conduct which may, directly or indirectly, be in conflict with the discharge of their official duties during terms of service or may compromise the independence and trust reposed in the Office following separation of service. These conflicts may arise, inter alia, from:</p> <p>(a) personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the par-</p>

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
			<p>ties; and</p> <p>(b) circumstances in which Members of the Office appear to benefit, directly or indirectly, from financial or other involvement with the activities of any enterprise that engages in any business or transaction with the Court.</p> <p>43. In the event of any conflict of interest, whether financial or otherwise, Staff members shall immediately disclose the nature of that interest to the head of the Division or Section, or to the Prosecutor, who shall decide whether the conflict is of such a nature as to require that the Staff member concerned participate no further in the matter concerned.</p> <p>44. Upon separation from service for whatever reason, Staff members shall refrain from accepting engagement or appointment as defence counsel or member of a defence team in any of the proceedings before the Court, for a period of 12 months from the day of separation, unless specifically authorised by the Prosecutor. This applies only to those who have made a declaration to</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
<p>Compliance mechanism</p>	<p>15(1)-(3)] Respect these standards of ethical conduct and, to the best of their ability, prevent and actively oppose any departure therefrom;</p> <p>Report to the Prosecutor any believed past or imminent departure from the precepts of this Code;</p> <p>Observe the provisions of this Code or be dealt with by the Prosecutor, in the exercise of his or her discretion, and subject to the staff rules of the United Nations, in addition to any sanctions that may exceptionally be imposed upon prosecutors pursuant to the Rules.</p>	<p>The Chief Prosecutor shall designate one staff member of the Office to serve as counsellor for standards of conduct. for a renewable fixed period determined by the Chief Prosecutor. The designated person should be of high moral character and discerning and tactful disposition, and have particular competence in professional ethics.</p> <p>The designated person shall assume the function of counsellor in addition to the exercise of ordinary duties.</p> <p>When acting in the capacity of counsellor, the designated person shall report exclusively and confidentially to the Chief Prosecutor, as provided in this Code.</p> <p>The counsellor shall be directly and immediately</p>	<p>that effect.</p> <p>Staff members who are confronted with an attempt by any source to induce them to violate their obligation of loyalty and independence shall promptly report this to a Head of Division or Section, the Prosecutor or the Deputy Prosecutor(s), who shall provide guidance on how to proceed.</p> <p>Staff members shall respect, uphold and adhere to the principles and standards of conduct established in this Code, and, to the best of their ability, prevent and actively oppose any departure therefrom.</p> <p>When given reason to believe that a departure from these standards has occurred or is about to occur, Staff members shall report the matter to their supervisors or the Prosecutor.</p>

Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
		<p>diately available for consultations with any member of the Office regarding general or specific matters related to compliance with this Code, whether concerning the conduct of the member seeking consultations or the conduct of any other member of the Office.</p> <p>The name of the member seeking consultations and the content of consultations shall be confidential and protected by privilege in favour of the member seeking consultations, without whose consent such information shall not be disclosed by the counsellor in the course of any proceeding or to any person.</p> <p>The counsellor shall notify the member seeking consultations of this Sub-regulation and Regulation 52 prior to undertaking consultations.</p> <p>If a member of the Office can show good cause not to first report to the counsellor, nothing in this Regulation shall preclude a member of the Office from reporting concerns regarding compliance with this Code directly to the Chief Prosecutor, or submitting a complaint to the Presidency, as the</p>	<p>Adherence to this Code is mandatory and shall be taken into account during yearly performance appraisals of Members of the Office.</p> <p>The Legal Advisory Section shall assist the Prosecutor in promoting awareness of and compliance with this Code.</p>

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
		<p>case may be.</p> <p>The counsellor shall report annually to the Chief Prosecutor on efforts to promote compliance with this Code, and provide a general assessment of standards of conduct within the Office, including any particularly positive or negative patterns of conduct; to this end, the counsellor may seek information from any member of the Office. A report under this subsection shall not include privileged or otherwise confidential information, unless requested specifically and in writing by the Chief Prosecutor.</p> <p>In situations where alleged or apparent non-compliance with this Code could pose a danger to the safety, well-being or privacy of a victim, witness or third person, the counsellor shall inform the Chief Prosecutor, directly and without delay. Where the conduct of a Deputy Prosecutor is in question, the counsellor shall inform the Chief Prosecutor. Where the conduct of the Chief Prosecutor is in question, the counsellor shall inform the Chief Prosecutor in the presence of a Deputy Prosecutor, and, ad-</p>	

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Category	IAP/CICC Draft Code (2003)	ICC-OTP Draft Code (2003)	ICC-OTP Code (2013)
		ditionally, shall inform the Presidency. The counsellor may provide recommendations to the Chief Prosecutor on measures to rectify general or specific situations of non-compliance with this Code.	

Part 4

Budget of the Office of the Prosecutor

The First Budget of the Office of the Prosecutor

Morten Bergsmo and Klaus Rackwitz*

48.1. Background and Relevancy

The co-ordinator of the preparatory team for the Office of the Prosecutor of the International Criminal Court ('ICC')¹ was asked to prepare the draft budget for the Office, prior to joining the ICC Advance Team on 1 August 2002. His conceptions, language and numbers were included as offered in document ICC-ASP/1/3, 'Budget for the first financial period of the Court', the relevant parts of which are reproduced in Annex 1 to this chapter. The budget of an international organisation such as the ICC is an important governance instrument for the states parties. According to Article 112(2)(d) of the ICC Statute, it is the ICC Assembly of States Parties that considers and decides the budget for the Court. The budget contains not only the projected and allowed costs of the organisation, but also a specification of all posts, sections and units, and their functional justification.

The impact of a budget on a public institution goes beyond governance; it is an important policy tool. The first budget of the ICC, in particular, carved the institution in a significant way. For example, it was this budget document that decided as a matter of fact that the ICC would follow the United Nations Common System on salaries and allowances, a fundamental decision for the Court, one that was not determined by the (then draft) Financial Rules or the ICC Statute. This policy decision not

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¹ That is, Morten Bergsmo, co-author of this chapter, who was asked in his personal capacity and not as an employee of the ex-Yugoslavia Tribunal at the time.

only determined the level of salaries and other benefits, it also made the ICC – in terms of its human resources administration and practices – a part of the United Nations system, which does not have a reputation of being a model of lean and flexible public administration. Looking back, it is clear, however, that there was no viable alternative to this decision. The United Nations Common System remains the only staff remuneration system that is applied worldwide and designed for global implementation. Other public remuneration systems² are either applied only in a regional context, or they are ‘Western’ remuneration systems with high salaries and only applied in a smaller number of countries in advanced stages of material development. Furthermore, the United Nations Common System had already been applied and its adoption saved the ICC critical time. It is a transparent system with known salary scales, allowing candidates a clear overview of expected remuneration and other benefits which is important information for most persons considering application to a newly created institution³ (most applicants plan to make a living from the salary they will earn at the Court).

The first budget therefore served as the initial architectural drawing or design of the structure and composition of the ICC Office of the Prosecutor. Preparing this became a fine balancing act for several reasons. The self-perceived interests of groups of professionals at the tribunals for ex-Yugoslavia and Rwanda were articulated in direct and indirect representations to the co-ordinator. Analysts wanted to make sure that there would be a unit for them; prosecutors preferred investigators to be subordinated to them; investigators sought to retain as much authority as they had enjoyed for many years at the tribunals for ex-Yugoslavia and Rwanda; and case managers were concerned that they have a proper place in the organigram. This solicitation intensified greatly when the co-ordinator drafted the first job descriptions and vacancy announcements for the Office of the Prosecutor at the start of 2003. These texts were all approved by the first ICC Prosecutor immediately after his election in April 2003. The posts were then advertised, and the recruitment of the budgeted posts

² For example, the salary system of the Coordinated Organizations or the European Union Staff Regulations.

³ The newly established Kosovo Specialist Chambers chose a different system. They created their own staff regulations including a court-specific remuneration system which leaves applicants in the dark because no salary scales or the equivalent are published (see <https://www.scp-ks.org/en/employment/conditions-service>).

proceeded on this basis. The preparatory team worked very closely with the first ICC Chief of Human Resources, Dr. Guido Hildner, and developed a model approach to recruitment which was seen by those concerned in the Registry at the time as the best way to protect the Court against the risks recruitment entails, especially in the start-up phase of a public international organisation. This model was followed during the first few months, at a time when the Office enjoyed hundreds of applications from well-qualified applicants for many of the advertised posts. This regrettably changed later, but this chapter is not the place for an analysis of the human resources practice of the ICC Office of the Prosecutor during the initial years of the first Prosecutor, however vital that practice is to properly understand the Office and some of its ongoing challenges, even at the time when this book was published in early 2017.

48.2. The Importance of Proper Analysis Capacity

Several issues stood out for the co-ordinator of the preparatory team as particularly important when he drafted the first budget of the Office of the Prosecutor. Four are mentioned here. First, there was an emphasis on establishing an Analysis Section to

serve functions such as collecting and analysing potential evidence on systemic facts required by contextual elements of crimes; analysing military, police and civilian power structures in territorial States; developing evidence relevant to superior responsibility; advising senior management on investigation strategy by assessing overall victimization in territorial States; identifying and assisting experts; analysing document collections; developing tools of criminal intelligence-analysis such as time lines and visual aids relevant to factual patterns, providing a mapping and reference service and sensitive sources coordination; and assisting the Legal Advisory and Policy Section with the training of staff members on background information relevant to territorial States.⁴

It was suggested that the Analysis Section should have four regular professional category posts from the very start of the life of the Office. Underlying this emphasis was a recognition of the critical importance of

an appropriate analytical capacity within the Office of the Prosecutor from the outset of its work. By providing *an early*

⁴ See Annex 1 to this chapter, para. 67 (footnotes omitted here).

*overview of the overall victimization in a situation referred to the Court, the Analysis Section would play a vital role in developing a proper investigation strategy of the Office of the Prosecutor, which can have significant long-term resource implications (a proper investigation strategy will contribute to a more focused and economical prosecution).*⁵

It was also pointed out that some of the legal requirements of core international crimes – for example, the existence of an armed conflict or a widespread or systematic attack directed against a civilian population – refer to “systemic facts which differ fundamentally from the crime-specific facts with which criminal investigators normally work in national jurisdictions”.⁶ These considerations have since become widely recognised in international criminal justice, and the ICC Office of the Prosecutor has come to develop a strong analysis capacity. The proper use of analysts is now a greater challenge in national criminal justice for core international crimes than at the international level.

48.3. The Subordination of Investigators to Prosecutors

The budget addressed the relationship between the chains of authority of prosecutors and police investigators. This had been a matter of significant controversy at the ex-Yugoslavia and Rwanda tribunals, where many prosecutors felt that police investigators enjoyed too much authority in the work processes linked to preparation and presentation of cases. This view is reflected by a number of chapters in Part 1 of this book.

While the first budget retained separate Prosecution and Investigation Divisions, it placed the Director of Prosecutions above the Chief of Investigations. The former position was provided at the D-2 level, whereas the latter would be a D-1.⁷ The idea was to place the Investigation Division below the Prosecution Division in the hierarchy of the Office of the Prosecutor. This was one of the main contributions of the first budget. It was initially not implemented in practice, as the D-1 post was reallocated in May 2003, immediately after the election of the first Prosecutor, to the new function of Chef de Cabinet and head of what became known as the Jurisdiction, Complementarity and Cooperation Division (a position not

⁵ *Ibid.* (emphasis added).

⁶ *Ibid.*

⁷ See Annex 1, paras. 59 and 64.

foreseen by the budget) at the request of the incumbent of that function, Judge Silvia Fernández de Gurmendi.⁸ This was perhaps the most significant deviation from the first budget of the Office of the Prosecutor, with substantial consequences for the development of the Office. To fill the lacuna that arose, the Prosecutor subsequently chose to place one Deputy Prosecutor at the helm of each Division, both at the same Assistant Secretary-General level. Later, when the first Deputy Prosecutor, Dr. Serge Brammertz – who led the Investigation Division – resigned, the Prosecutor did not appoint a successor, and as a consequence the Prosecution Division became the only Division led by a Deputy Prosecutor, then Mme. Fatou Bensouda. When she became Prosecutor, her Deputy Prosecutor, Mr. James K. Stewart, took over as head of the Prosecution Division. In this way, the original idea of the first budget of the ICC Office of the Prosecutor was in the end implemented.

The upgrading of the external affairs capacity of the Office of the Prosecutor – to what became the Jurisdiction, Complementarity and Cooperation Division – was never a subject of controversy between the first Prosecutor and the preparatory team for the Office. As pointed out in Chapter 46 above, the very idea for such an upgrade came from the expert group on fact-finding powers formed by the preparatory team.⁹

48.4. Deputy Prosecutors and Continuity

As regards the Deputy Prosecutors, the budget had suggested that consideration may be given “to the desirability of grading their terms of office in such a manner that the experience and the institutional memory of the Office of the Prosecutor will be preserved and the continuity of its work ensured”.¹⁰ This was followed in that the first Deputy Prosecutor, Dr. Brammertz, was given a reduced term of six years from his solemn under-

⁸ At the time of writing, President of the International Criminal Court.

⁹ Professor Jens Meierhenrich gets this important fact wrong in his chapter “The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory”, in Martha Minow, C. True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints. Law, Meaning, and Violence*, University of Michigan Press, Ann Arbor, 2015, pp. 97–127. He constructs a disagreement between the Prosecutor and the preparatory team about this which has no basis in reality.

¹⁰ See Annex 1, para. 49.

taking on 3 November 2003.¹¹ The first and second Deputy Prosecutors were also appointed at different times. As it turned out, Dr. Serge Brammertz resigned quite early in his term and was not replaced.

The consideration of continuity was present during the negotiations of Article 42. It had been proposed that the position as Deputy Prosecutor should “not be time-limited, based on political appointment, but rather be a professional position in the international civil service. This could ensure the continuity which is of such importance in large-scale, complicated investigations against persons in senior leadership positions, as well as contribute to maintaining organisational stability”.¹² This view did not prevail. Instead, in “setting the maximum term as long as nine years [for the Prosecutor], states gave decisive weight to the interest of continuity in the work of the Office of the Prosecutor. This reinforces the responsibility of States Parties to elect individuals who can best serve the interests of the Court”.¹³ In light of the serious challenges faced by the Office of the Prosecutor during the term of the first Prosecutor, it would seem that states parties left something to be desired in this regard in 2003.

48.5. Administrative Capacity in the Office of the Prosecutor

The first budget stressed the authority of the Office of the Prosecutor under Article 42 of the ICC Statute, and it suggested that the Office should have its own “Administrative Unit” from the start, to “manage and administer his or her Office”.¹⁴ The Unit was to be “directly attached to the Immediate Office of the Prosecutor”,¹⁵ and it should have four professional category staff from the beginning of the life of the Office.

Although this was a logical manner to give effect to the reference in Article 42(2) to the functional principle that the “Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof”, it was the first time a modern international criminal jurisdiction opened for parallel ad-

¹¹ “Solemn undertaking of the Deputy Prosecutor (Investigations)”, ICC Press Release, ICC-OTP-20031103-40, 3 November 2003.

¹² Morten Bergsmo, Frederik Harhoff and ZHU Dan, “Article 42”, in Kai Ambos and Otto Triffterer (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck, Munich, 2016, p. 1273.

¹³ *Ibid.*

¹⁴ Annex 1, para. 56.

¹⁵ *Ibid.*

ministrative capacity between the Office of the Prosecutor and Registry. The term “full authority” was certainly not read as “total authority”. It was with some concern that this budgetary provision was proposed, cognizant of the risk of duplicative capacity. Fortunately, an efficient Services Section evolved within the Office of the Prosecutor after a short time, its performance having been recognised by states parties in one early budget discussion after the other.

48.6. Quality of Work

The budget was modestly formulated and did not in any way presume to present a “blueprint for the future structure of the organs of the Court”.¹⁶ It contained a proposed structure, but only to the extent budget documents of this nature in international organisations require that level of specificity. Needless to say, it was understood at the time, that the structure of the Office would have to evolve over time. The budget did stress, however, in no uncertain terms, that “the credibility of the Court will be built on the quality of its work from the outset of its existence”.¹⁷ It is not easy to challenge this reminder.

The present authors worked together on the second budget of the Office of the Prosecutor which saw additions and minor modifications to the structure, primarily the addition of the Jurisdiction, Complementarity and Cooperation Division, led by the Chef de Cabinet. Klaus Rackwitz became the Chief of the Services Section and, as such, he oversaw the preparation and presentation of the budgets for the Office of the Prosecutor during the subsequent years.

As almost all budgets in newly established organisations, the first and the second budgets of the ICC provided more resources than the ICC could spend, with the consequence of a budgetary surplus at the end of 2003.¹⁸ This surplus was not the result of bad planning, but simply evidenced the unpredictable situation in which the ICC was at this early stage. It was not clear when and where the first investigations would be conducted, whether suspects would be arrested and surrendered to the Court, and what resources this would require in reality. How to reconcile

¹⁶ *Ibid.*, para. 3.

¹⁷ *Ibid.*, para. 54.

¹⁸ At the end of 2003, the budgetary surplus stood at €9,415 million or 32 per cent of the budget (see ICC-ASP/3/25, p. 261).

expenditure planning with the desire of states parties not to over-budget and over-resource the Court?

Income and expenditure at the ICC are governed by the principle of annuity which does normally not allow for the accruing of cash for the benefit of financial flexibility beyond the closure of the fiscal year. However, after detailed submissions, in particular by the Office of the Prosecutor, the ICC Assembly of States Parties came to understand the need for financial flexibility in addition to precise budgets. Already during its third session in 2004, the Assembly established the ICC Contingency Fund which allowed the Prosecutor to launch investigations (including the expenditures they trigger, in particular for additional staff, travel and security, interpretation and translation services)¹⁹ without any delay, even in case of an already full implementation of the actual budget for the fiscal year. The Contingency Fund enabled the Prosecutor to focus on the situations before the Office rather than on the budget of a given year, and provided the necessary financial means for Chambers and the Registry in case of an unexpected arrest and surrender. Looking back, this establishment was a vital step in securing operational independence for the Office of the Prosecutor.

¹⁹ See ICC-ASP/3/Res. 4, Section B.

Annex 1: Budget for the first financial period of the Court*

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* Assembly of State Parties to the Rome Statute of the International Criminal Court, Budget for the first financial period of the Court, 3–10 September 2002, document no. ICC-ASP/1/3. We have selected the parts of the budget document dealing with the Office of the Prosecutor. The paragraph and section numbers are the same. The format has been kept to the greatest extent possible, but the footnote numbering that reflects text concerning other organs of the Court, with their footnotes, is left out of this text.

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Introduction

1. At its eighth session, the Preparatory Commission for the International Criminal Court requested the Secretariat to prepare a revised draft budget for the first financial year of the Court, taking into account the priority guidelines proposed by the Coordinator (PCNICC/2001/L.3/Rev.1/Add.1, appendix) for consideration by the Commission at its ninth session. The present document is submitted pursuant to that request. In accordance with regulation 2 of the draft Financial Regulations (PCNICC/2001/1/Add.2 and Corr.1), the financial period shall consist initially of one calendar year unless otherwise decided by the Assembly of

States Parties for the first-year budget of the Court. It is proposed that the first financial period should last from the first meeting of the Assembly of States Parties to the end of the subsequent calendar year. Based on the last preambular paragraph of General Assembly resolution 56/85 of 12 December 2001 and the decision of the Preparatory Commission at its 41st plenary meeting on 8 July 2002, that the first meeting of the Assembly be held at United Nations Headquarters in New York from 3 to 10 September 2002, the first financial period would thus stretch from September 2002 to the end of December 2003, namely 16 months. The proposed estimates of the requirements for the first financial period of the International Criminal Court (ICC or ‘the Court’) relate to the costs of operation of the ICC and the costs related to the meetings of the Assembly of States Parties, the meetings of the Bureau of the Assembly, the Committee on Budget and Finance, two plenary sessions of the Court subsequent to the Inaugural Meeting, a meeting of the Board of Directors of the Victims Trust Fund, as well as the costs related to the Inaugural Meeting.

2. The magnitude of the resource requirements of the Court in the first financial period of its operation would depend upon the level and scope of activities of the Court, bearing in mind the need to provide a stronger capacity for the Court and the Assembly of States Parties to respond to various challenges. The proposed resource requirements are responsive to the necessity to create, among other things, the ability for the Court – financially, administratively and procedurally – to recruit the required staff at short notice.

3. The proposed structure of the organs of the Court, together with the corresponding administrative arrangements, is discussed in Part One of the present document. This takes into account the composition and experience of the most relevant existing international judicial institutions, such as the International Court of Justice (ICJ), the International Tribunal for the Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR) and the International Tribunal for the Law of the Sea (ITLOS). It is anticipated that the overall staffing resource requirements of the Court might consist of 202 posts in 2003 and 61 posts in the period from September to December 2002 (see Part Two, tables 3 and 4). Organizational charts containing details of the proposed staffing structure in 2003 are shown in annexes I.A, B, C and D to the present document. It is emphasized that these charts are purely illustrative and should be interpreted nei-

ther as a target for expenditure nor as an agreed blueprint for the future structure of the organs of the Court.

4. The cost estimates are outlined in Part Two. They were calculated on the basis of a number of assumptions, the proposed structure and administrative arrangements for the Court, and experience with similar institutions, such as ICTY. In accordance with regulation 3.2 of the draft Financial Regulations, which, *inter alia*, provides that the proposed programme budget shall be presented in the currency of the statutory headquarters of the Court, the present draft budget has been set out in euros. The United Nations operational rate of exchange as of June 2002 (US\$ 1.00 = €1.11, or €1 = \$0.900901) was used.

5. Since the first financial period would cover 16 months and it may be particularly difficult to accurately foresee the Court's needs during this initial period, reference is made to regulations 4.2 and 4.3 concerning the appropriation line as well as regulation 3.6 relating to the supplementary budget, of the draft Financial Regulations. Should circumstances unforeseen at the time of adoption of the budget make it necessary, the appropriation line adopted by the States Parties may be utilized or supplementary budget proposals may be submitted by the Registrar with respect to the first financial period. Accordingly, a reserve for unforeseen expenses has been included in the present draft budget.

6. The first and the resumed/special meetings of the Assembly of States Parties will be held at the Headquarters of the United Nations in New York, whereas the Inaugural Meeting of the Court will take place at The Hague. A meeting of the Board of Directors of the Victims Trust Fund will also be held at The Hague. The second meeting of the Assembly of States Parties, the June 2003 meeting of the Bureau and the meeting of the Committee on Budget and Finance in 2003 will take place in New York. During discussions in the Working Group on a Draft Budget for the First Financial Period of the Court, a general preference was expressed for the convening of future meetings at The Hague. At the same time, it was recognized that the initial meetings should be convened at the Headquarters of the United Nations in New York. The dates and duration of the meetings are assumed to be as follows: Assembly of States Parties: six days for the first meeting in September 2002, five days for the resumed/special meeting in January/February 2003, three days for the resumed/special meeting in April 2003 and five days for the second meeting in September 2003; Bureau of the Assembly: one one-day meeting in June

2003; Committee on Budget and Finance: one five-day meeting in August 2003; and Board of Directors of the Victims Trust Fund: one three-day meeting in 2003.

7. It is also foreseen that a one-day plenary session of the Court for the election of the Registrar and a two-week plenary session of the Court for the elaboration and adoption of the Regulations of the Court would be convened in 2003. Accordingly, the costs of those sessions have been included in the present document.

8. The Inaugural Meeting of the Court will be held at The Hague. It is assumed that it would be held in February 2003, shortly after the resumed/special meeting of the Assembly in January/February 2003. In view of the commitment of the Government of the Netherlands to finance the Inaugural Meeting of the Court, only estimates of travel costs and partial daily subsistence allowance in respect of the judges and the Prosecutor have been included.

9. At the ninth session of the Preparatory Commission, the representative of the host Government reiterated the latter's commitment to provide premises for the Court, free of rent, for a period of 10 years starting at the date of entry into force of the Rome Statute. He also confirmed the host Government's offer to build a courtroom in the interim premises, within the overall amount of €10 million that it would make available for the interior layout and design.¹ It is necessary that the appropriate arrangements on the matter be made between the representatives of the Court and the Government of the Netherlands, at the very early stage of the start-up phase, in order to ensure that facilities are in place whenever needed for the proper functioning of the Court.

10. In accordance with the task list contained in Part B of the annex to the Proceedings of the Preparatory Commission at its ninth session (PCNICC/2002/L.1/Rev.1/Add.1), various contacts were held between representatives of the Permanent Mission of the Netherlands to the United Nations and the Secretariat, including two formal meetings on 3 and 16 May 2002, respectively. During those contacts, the Secretariat was informed in detail of the contributions from the host country to the Court. Information and data received from the host country are reflected in the present document.

¹ See PCNICC/2002/INF/5, paras. 7 and 8.

11. Post requirements are presented in net terms, given that a decision has been taken by the Preparatory Commission against the adoption of a system of staff assessment and tax equalization. Furthermore, the requirements were computed on the basis of the post structure, salaries, allowances and entitlements applicable to the United Nations common system. Should the States Parties adopt different standards, adjustments will have to be made to the budget.

12. The estimates provided in the present draft budget are based on cost parameters for the years 2002 and 2003. The total requirements for the first financial period on the basis of estimates of meetings in New York would be €30,893,500. Since the host Government has committed itself to contribute a non-reimbursable amount of €300,000 to defray the cost of the meetings,² the total costs for holding meetings are presented as net of the €300,000 contribution from the host country. Further details concerning total requirements can be found in paragraphs 120 and 121 as well as tables 1 and 2 in Part Two of the present document.

13. Pursuant to regulation 6.2 of the draft Financial Regulations, an amount of €1,915,700 (based on the practice of the United Nations, at one twelfth the cost of the operations of the Court) is provided for the establishment of a Working Capital Fund to ensure capital to meet short-term liquidity requirements pending the receipt of assessed contributions. Advances shall be made in accordance with the agreed scale of assessment pursuant to regulation 5.2 of the draft Financial Regulations, and shall be carried to the credit of States Parties which have made such advances.

[...]

XII. Office of the Prosecutor

46. The Office of the Prosecutor will act independently as a separate organ of the Court (Statute, art. 42, para. 1).

47. It is assumed that the Prosecutor will be elected at a resumed/special meeting of the Assembly in early 2003.

48. The Prosecutor can be assisted by one or more Deputy Prosecutors (Statute, art. 42, para. 2). The Deputy Prosecutors shall also be elected by the Assembly, but from a list of candidates provided by the Prosecutor.

² *Ibid.*, para. 9.

For each position of a Deputy Prosecutor to be filled, the Prosecutor would have to nominate three candidates (art. 42, para. 4). In view of these requirements, it is unlikely that the first Deputy Prosecutor would be elected during the resumed/special meeting of the Assembly in January/February 2003 (unless consensus regarding the suitable candidates is reached prior to the session). Accordingly, the first Deputy Prosecutor could be elected at a resumed/special meeting of the Assembly to be held in April 2003. Presumably the Prosecutor will, when in office, determine when a second Deputy Prosecutor should be elected. For purposes of the present draft budget, it is assumed that, in the first financial period of the Court, the Prosecutor would need only one Deputy Prosecutor to assist him/her on matters such as recruitment, investigation and prosecution policies, structuring of the Office, etc.

49. The Prosecutor and the Deputy Prosecutor shall serve on a full-time basis (Statute, art. 42, para. 2). They will take up their respective duties after having made a solemn undertaking in accordance with article 45 of the Statute. It would be up to the Assembly of States Parties to decide on the terms of office of both the Prosecutor and the Deputy Prosecutor in accordance with article 42, paragraph 4, of the Statute. Consideration may be given in this respect to the desirability of grading their terms of office in such a manner that the experience and the institutional memory of the Office of the Prosecutor will be preserved and the continuity of its work ensured.

50. As to the staffing needs of the Office, the Prosecutor will have the authority to appoint such qualified staff as may be required, including the appointment of investigators (Statute, art. 44, para. 1). They will be part of the staff of the Court and subject to staff regulations to be proposed by the Registrar, with the agreement of the Presidency and the Prosecutor, and approved by the Assembly (*ibid.*, para. 3). The Prosecutor would also appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children (art. 42, para. 9). The adviser(s) on issues relating to sexual and gender violence and violence against children would form part of the staff of the Office of the Prosecutor.

51. The possible requirement of an upsurge capacity (for example, in the case of a referral of a situation or if an evidence preservation situation arises under article 18, paragraph 6, or article 19, paragraph 8, of the Statute) can be met through the equivalent of general temporary assistance

funds during the first financial period. Such upsurge capacity would be essential for the Prosecution Section, the Investigation Section, the Information and Evidence Section, and to the translation and interpretation function of the Office of the Prosecutor. Efficient procedures for the utilization of general temporary assistance funds would contribute to avoiding under- or over-utilization of such temporary staff in the event that upsurge capacity is required.

52. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, the facilities and other resources thereof (Statute, art. 42, para. 2). The establishment of a Common Services Division (see sect. XIV below) would be in full accord with this requirement.

53. In exceptional circumstances, the Prosecutor may employ gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations (Statute, art. 44, para. 4). Gratis personnel shall be employed in accordance with guidelines to be established by the Assembly (*ibid.*).

Staffing requirements

54. While it is difficult to predict whether there will be any referral of a situation to the Court during the first financial period, it is to be expected that the Office of the Prosecutor will receive many communications from the time of the establishment of the Court pursuant to the Prosecutor's *proprio motu* power of preliminary examination under article 15 of the Statute. The requirements of this mode of operation should not be underestimated. The Office of the Prosecutor must exercise due diligence within the parameters of article 15 and avoid being seen as inoperative in the face of complaints. It is important that the Office of the Prosecutor sets the highest standards in its dealings with sources of information relevant to article 15, paragraph 2, as well as with the Pre-Trial Chamber. The Prosecutor will have to take action according to articles 53 to 58 of the Statute as well as Part 9 thereof, and it cannot be excluded that the Office of the Prosecutor, through article 15, paragraph 3, may find itself in an article 18, paragraph 6, or article 19, paragraph 8, situation during the first financial period, requiring investigative steps to preserve evidence. The Prosecutor shall be responsible for the retention, storage and security of information and physical evidence in the course of the investigations (finalized draft text of the Rules of Procedure and Evidence, rule 10). In-

formation which the Prosecutor may receive during the first financial period pursuant to article 15, paragraph 2, article 18, paragraph 6, and article 19, paragraph 8, is potential evidence and must be handled appropriately so as to avoid contamination. In general, the credibility of the Court will be built on the quality of its work from the outset of its existence.

55. **Immediate Office of the Prosecutor.** This Office would include the Prosecutor, at the Under-Secretary-General level,²⁰ one Deputy Prosecutor, at the Assistant Secretary-General level, one Special Assistant to the Prosecutor at the P-5 level, one Special Assistant to the Deputy Prosecutor at the P-4 level, and one Spokesperson for the Office of the Prosecutor (P-4). The Office would be supported by a pool of three General Service staff with one Administrative Assistant at the Principal level assigned to the Prosecutor.

56. In order to help the Prosecutor recruit the relevant staff and exercise the statutory authority to manage and administer his or her Office, an Administrative Unit directly attached to the Immediate Office of the Prosecutor would be needed. The Unit would include one Budget Officer (P-4), one Personnel Officer (P-3), one Programmer/Analyst (P-3), one Language Coordinator (P-3),²¹ and two Administrative Assistants (General Service (Other level)).

57. Accordingly, the overall staffing requirement of the Immediate Office of the Prosecutor would consist of the Prosecutor, one Deputy Prosecutor, at the Assistant Secretary-General level, one P-5, three P-4, three P-

²⁰ This level of the Prosecutor is shown for illustration purposes and without prejudice to the future discussion thereon.

²¹ Document translation has proved to be one of the most persistent and serious problems in the experience of the *ad hoc* Tribunals. The ICC Office of the Prosecutor must have its own document translation capacity. The open nature of the Court's territorial jurisdiction necessarily means that this function will have to draw on general temporary assistance staff at the working level. However, there needs to be a permanent language coordination capacity within the Office of the Prosecutor through which needs are assessed, requests channelled, and advice is formulated for the Prosecutor on relevant internal language policies. It is not feasible to predict beforehand what the exact upsurge need for translators and interpreters would be in the event of a referral of a situation or if an evidence preservation situation were to arise under article 18, paragraph 6, or article 19, paragraph 8, during the first financial period. It is essential that the procedures for utilization of general temporary assistance funds for upsurge staff be efficient and sufficiently flexible to allow for the establishment of a translation and interpretation unit in the Office of the Prosecutor within reasonable time.

3, one General Service (Principal level) and four General Service (Other level) staff.

58. The functional needs of the Office of the Prosecutor suggest that it would need a Prosecution Division, an Investigation Division and a separate Appeals Section from the first financial period onward.

Prosecution Division

59. The Prosecution Division would be responsible for functions such as litigation; legal review of information and potential evidence; drafting of charges; directing investigators; advising senior management on investigation and prosecution strategies; drafting general guidelines and policies for the Office of the Prosecutor; drafting legal submissions; providing expert legal advice; and conducting legal research and training. To do this most effectively, the budget for the first financial period should provide for a Prosecution Section, a Legal Advisory and Policy Section and an Appeals Section within the Prosecution Division. The Prosecution Division should be headed by a Director of Prosecutions at the D-2 level, supported by an Administrative Assistant (General Service (Other level)).

60. The **Prosecution Section** within the Prosecution Division would review information and evidence; direct investigators; litigate; and draft charges and legal submissions on questions of procedure and evidence. The Section would also advise senior management of the Office of the Prosecutor on investigation and prosecution strategies, alongside other sections, and contribute to the drafting of general guidelines and policies of the Office of the Prosecutor. The Section would require five prosecutors, one at the P-5 level (Chief of Section), two at the P-4 level and two at the P-3 level. This team would be supported by a pool of two Secretaries (General Service (Other level)). The Section would probably require additional general temporary assistance staff if a situation were to be referred to the Court during the first financial period.²²

²² It would be preferable to pool the prosecutors in one section within the Prosecution Division during the first financial period, so as to better enable the Director of Prosecutions to respond in a flexible manner to the needs for prosecutors whether in connection with preliminary examination, investigation or litigation. The time-consuming nature of the investigation of international crimes means that the prosecution's litigation function during the first financial period would, even in the event that there is a referral of a situation, be limited to certain pre-trial questions, in particular admissibility proceedings, where the Prosecution Section should work closely with the Legal Advisory and Policy Section and the

61. The **Legal Advisory and Policy Section** would be required to provide independent specialist legal advice and legal drafting, in particular on questions pertaining to jurisdiction, including the scope of the subject-matter jurisdiction. The Section would also have to assist with the drafting of guidelines and policies relevant to the operation of the Office of the Prosecutor,²³ as well as with the training of members of the Office of the Prosecutor, general temporary assistance staff and gratis personnel.²⁴ Staff of the Section would include one Senior Legal Adviser (P-5), two Legal Advisers (P-4) and three Legal Advisers (P-3), including legal advisers, as appropriate, with specific expertise on issues of sexual and gender violence and violence against children. Administrative support to the Legal Advisory and Policy Section could be provided by one Secretary (General Service (Other level)).

62. The **Appeals Section**, which should be within the Prosecution Division, and would work with the Prosecution Section and Legal Advisory and Policy Section in handling interlocutory appeals (and later appeals proper) before the Appeals Chamber of the Court. The Appeals Section should have one P-5 level post of Senior Appeals Counsel and one Appeals Counsel at the P-4 level. The Section would be supported by one General Service (Other level) staff member.

63. Accordingly, the overall staffing resource requirement of the Prosecution Division and the Appeals Section would consist of one D-2, three P-5, five P-4, five P-3 and five General Service (Other level) posts.

Appeals Section. If there is no referral of a situation, the litigation function would be more limited, with an emphasis on article 15, paragraph 3 and subsequent admissibility proceedings, in both of which the Prosecution Section should be assisted by the Legal Advisory and Policy Section and the Appeals Section.

²³ Some of the subjects that will require guidelines are: criteria for full investigation; requesting assistance; interviewing witnesses; interviewing suspects and accused; use of policy and expert witnesses; written statements; search and seizure; field missions; format-of-the-charges document; formal internal review of charges; disclosure; contact with the media; file management; network access; and appeal procedure.

²⁴ The experience of the *ad hoc* Tribunals underlines the importance of these functions and that there must be appropriate expertise to execute them from the outset of the work of the Office of the Prosecutor, when precedents on jurisdiction will be set and internal standards will be established for the Prosecutor's action under, *inter alia*, articles 15, paragraphs 1-3, 17 to 19, 53 and 54. The Legal Advisory and Policy Section should also be responsible for the establishment and maintenance of an electronic legal decisions and submissions database from the start, as well as other electronic services relevant to the elements of applicable offences and key procedural and evidentiary rules.

Investigation Division

64. The **Investigation Division** would be responsible for functions such as reception and management of information and potential evidence; preliminary examination; investigative steps to preserve evidence; investigation, including analysis of contextual and systemic facts; and advising senior management on investigation strategy based on, inter alia, assessments of overall victimization. To do this most effectively, the budget for the first financial period should provide for three sections: an Information and Evidence Section, an Investigation Section and an Analysis Section. The Investigation Division would be headed by a Chief of Investigation at the D-1 level assisted by one Administrative Assistant (General Service (Other level)).

65. The **Information and Evidence Section** would be required from the outset of the work of the Office of the Prosecutor.²⁵ As pointed out above, the Prosecutor shall be responsible for the retention, storage and security of information and physical evidence in the course of the investigations. Information which the Prosecutor may receive during the first financial period pursuant to articles 15, paragraph 2, 18, paragraph 6, and 19, paragraph 8, is potential evidence and must be appropriately handled to avoid contamination. The Section would require one Evidence Management Officer (P-4) and three General Service (Other level) staff. The Section would have to be reinforced with Professional and General Service (Other level) staff on the basis of general temporary assistance funds in the event a situation is referred to the Court or an evidence preservation situation arises under article 18, paragraph 6, or article 19, paragraph 8, during the first financial period.

66. Although it is uncertain whether a full investigation will commence during the first financial period of the Court, the Office of the Prosecutor needs a basic investigative capacity, an Investigation Section, to work alongside other sections in executing preliminary examination under article 15, paragraph 2, and to coordinate and undertake investigative steps to preserve evidence under article 18, paragraph 6, or article 19, paragraph 8, or if an investigation proper is launched. The Section should be headed by

²⁵ Article 15 communications or complaints will most likely be submitted to the Court early in the first financial period. It is important for the Office of the Prosecutor to have the capacity to appropriately receive and manage materials submitted together with such complaints.

a Deputy Chief of Investigation at the P-5 level (Chief of Section) and should have four investigators, two at the P-4 level and two at the P-3 level. The Section would be supported by two General Service (Other level) staff. If a full investigation is launched or an evidence preservation situation arises pursuant to article 18, paragraph 6, or article 19, paragraph 8, during the first financial period, the Section would have to be reinforced with general temporary assistance staff at the Professional and General Service levels.²⁶

67. The **Analysis Section** would have to be provided for in the first financial period to serve functions such as collecting and analysing potential evidence on systemic facts required by contextual elements of crimes;²⁷ analysing military, police and civilian power structures in territorial States; developing evidence relevant to superior responsibility; advising senior management on investigation strategy by assessing overall victimization in territorial States;²⁸ identifying and assisting experts; analysing document collections; developing tools of criminal intelligence-analysis such as time lines and visual aids relevant to factual patterns,²⁹ providing a mapping and reference service and sensitive sources coordination; and assisting the Legal Advisory and Policy Section with the training of staff members on background information relevant to territorial States. The Section should be led by a Chief Analyst (P-4) and have one Military Analyst (P-3), one Political Analyst (P-3) and one Criminal

²⁶ In such a situation the Prosecutor may wish to establish a rapid reaction capacity within the Investigation Section, led by regular section members but supplemented by general temporary assistance staff. The Office would also have to turn to general temporary assistance staff in case there was a need for forensic expertise during the first financial period. It is very difficult to estimate the number of general temporary assistance staff that the Investigation Section would require if there was a need for upsurge capacity during the first financial period.

²⁷ For example, the existence of an armed conflict or a widespread or systematic attack directed against a civilian population. These requirements refer to systemic facts which differ fundamentally from the crime-specific facts with which criminal investigators normally work in national jurisdictions.

²⁸ The experience of ICTY shows that it is essential to have an appropriate analytical capacity within the Office of the Prosecutor from the outset of its work. By providing an early overview of the overall victimization in a situation referred to the Court, the Analysis Section would play a vital role in developing a proper investigation strategy of the Office of the Prosecutor, which can have significant long-term resource implications (a proper investigation strategy will contribute to a more focused and economical prosecution).

²⁹ Other such aids would include spreadsheets showing chains or patterns of events, and multilayered maps showing both background and crime-specific facts.

Intelligence Analyst (P-2), supported by one General Service (Other level) staff member. If a full investigation starts or an evidence preservation situation were to arise under article 18, paragraph 6, or article 19, paragraph 8, during the first financial period, it would be necessary to hire two or three additional analysts (P-2/P-1) with expertise relevant to the territorial State(s) on a general temporary assistance basis.

68. Accordingly, the overall staffing resource requirement of the Investigations Division would consist of one D-1, one P-5, four P-4, four P-3, one P-2 and seven General Service (Other level) staff.

69. Resources should be foreseen for travel of staff of the Office of the Prosecutor, including with regard to functions pursuant to article 15 of the Statute, as well as for special printers, scanners, photocopiers, monitors and software requirements. For reasons of confidentiality and security it is necessary for the Office of the Prosecutor from the beginning of its operation to have a computer network that is entirely separate from the rest of the Court and unconnected with the outside world.

70. The organizational chart of the Office of the Prosecutor is set out in annex I.B. Proposed post requirements are outlined in table 7.

[...]

Part Two

Provisional estimates for the first financial period of the Court

[...]

XVIII. Work programme

128. It is assumed that during the first financial period the Court will be dealing mainly with matters related to its internal organization and other start-up needs as well as public and media relations. The Court will need only the minimal level of resources necessary to undertake the tasks of setting up its operations and preparing to receive eventual cases. In accordance with the document entitled “Road map leading to the early establishment of the International Criminal Court” (PCNICC/2001/L.2), the judges and the Registrar will not be elected prior to the year 2003. Thus, for the period from September to December 2002, provision is made only

for a small number of “core staff”, comprising 61 posts, including the post of Director of Common Services (D-1).

[...]

B. Office of the Prosecutor

Activities

140. The structure and staffing of the Office of the Prosecutor in the first financial period of operation of the Court will allow the Prosecutor to carry out the tasks related to the initial establishment of the Office. However, resources are provided under general temporary assistance and the reserve for unforeseen expenses to allow the Office to respond to an upsurge in activities that may require a full prosecutorial and investigative capacity. For further details regarding the activities of the Prosecutor in the first financial period of the Court, see Part One, paragraphs 46-53.

141. Once the Prosecutor is elected, it would be necessary to set up an Immediate Office of the Prosecutor, consisting of the Prosecutor, one Deputy Prosecutor, a Special Assistant to the Prosecutor (P-5),³⁰ a Special Assistant to the Deputy Prosecutor (P-4) and a Spokesperson (P-4). The Immediate Office would also be supported by administrative and secretarial staff. The Prosecution Division, comprising the Prosecution Section, the Legal Advisory and Policy Section and the Appeals Section, will be headed by a Director of Prosecutions at the D-2 level. The Investigation Division, comprising the Information and Evidence Section, the Investigation Section and the Analysis Section, would be headed by a Chief of Investigations at the D-1 level.³¹

Resource requirements

142. Requirements for the Office of the Prosecutor are estimated at €3,961,200 distributed as described in table 6.

³⁰ The level of the post will be reviewed based on the experience gained during the year 2003 with a view to determining if it should be upgraded.

³¹ The level of the posts within the Information and Evidence Section and the Analysis Section may be upgraded during the first financial period of the Court.

Table 6
Estimates by object of expenditure

(In thousands of euros)

B. Office of the Prosecutor

<i>Expenditure</i>	<i>Estimated requirements</i>
Posts	3 078.9
Other staff costs	830.3
Travel (including travel for purposes of investigation)	52.0
Total expenditures	3 961.2

Table 7
Post requirements for 2003

B. Office of the Prosecutor

	<i>Estimated requirements</i>
Professional category and above	
USG	1
ASG	1
D-2	1
D-1	1
P-5	5
P-4	12
P-3	12
P-2/1	1
Total	34
Other categories	
General Service (PL)	1
General Service (OL)	16
Total	17
Grand total	51

Posts

143. Requirements estimated at €3,078,900 would provide for 51 posts (34 in the Professional category and above and 17 in the General Service category). Details concerning the staffing and its distribution in the Office of the Prosecutor can be found in Part One (paras. 54-68), table 7 and annex I.B to the present document.

Other staff costs

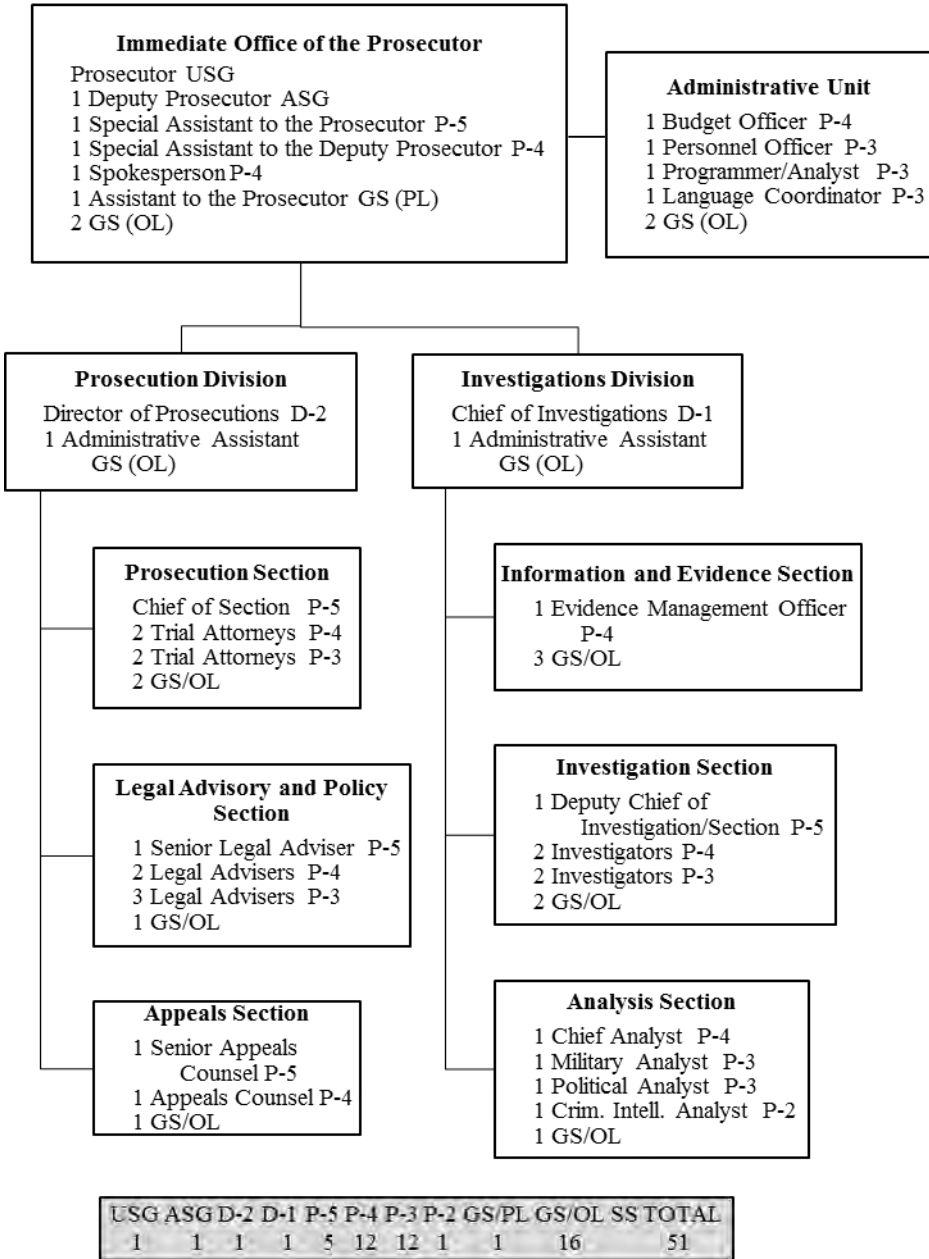
144. The provision of €830,300 would provide the equivalent of 17 work-months of general temporary assistance at the P-4 level, 32 work-months at the P-3 level, 17 work-months at the P-2 level and 26 work-months of General Service (Other level) (€817,300) as well as overtime and night differential (€13,000).

Travel

145. It is assumed that limited travel would be required in respect of the Prosecutor, the Deputy Prosecutor and other staff in the Office of the Prosecutor. A provision of €52,000 has been made to cover travel, such as for consultations and other business in connection with the installation of the Court. Travel and daily subsistence allowance costs related to possible attendance at sessions of the Assembly of the States Parties, the meeting of its Bureau, the Inaugural Meeting and the meeting of the Committee on Budget and Finance are not included under this heading, as they are reflected under the non-conference-servicing costs related to those meetings.

[...]

Annex I.B Office of the Prosecutor



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Part 2 has chapters on three expert-group reports that the preparatory team organised: on the length of proceedings, fact-finding and state co-operation, and complementarity in practice. Introductions by actors involved at the time explain the background, main issues, and impact of the reports. Parts 3 and 4 contain three chapters on governance documents prepared by the team with experts: the draft Regulations of the Office, the draft Code of Conduct, and budgetary documents.

In Chapter 1, Morten Bergsmo, the co-ordinator of the preparatory team, analyses its risk-assessment and strategy, as well as challenges that subsequently beset the ICC Office of the Prosecutor. He calls for accurate historical research on the institutions of international justice and, beyond that, for a sociology of international justice. He argues for renewed commitment to integrity as a binding legal standard.

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