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**The international criminal court's office of the
Prosecutor: navigating between independence and
accountability?**

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THE INTERNATIONAL CRIMINAL COURT'S OFFICE OF THE PROSECUTOR: NAVIGATING BETWEEN INDEPENDENCE AND ACCOUNTABILITY?

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Introduction

Of the four bodies provided for in Article 34 of the Rome Statute of the International Criminal Court (“the Rome Statute”), to date, the “Office of the Prosecutor” has doubtless been the most visible. Since June 2003, Mr Luis Moreno-Ocampo of Argentina has served as the first Prosecutor of the International Criminal Court (“the Court”) and, in the eyes of many worldwide, is the Court’s public face. Less than three years separates his donning the mantle of first Prosecutor and the appearance before a Pre-Trial Chamber on 20 March 2006 of the first accused, Thomas Lubanga Dyilo, against whom an application for the issuance of an arrest warrant had been lodged two months earlier by the Prosecutor’s Office. The Court’s swift birth following the adoption of the Rome Statute in 1998 and the rapid pace of events have surprised friends and foes alike.

In this contribution, the position of the Office of the Prosecutor will be approached from an institutional perspective, an angle that will be informed, wherever possible and relevant, by the practice that has put the Court’s provisions to the test so far. In particular, the central focus will be to assess to what extent the Prosecutor’s position, that is supposedly an independent one, can be said to be truly independent, and whether that independence can, has and should be matched by some form of accountability. Thus, an attempt will be made to focus on the Prosecutor’s position from a balance of powers perspective.

At the time of concluding this contribution, the Prosecutor had opened investigations into three “situations”: Democratic Republic of Congo, Uganda and Darfur (Sudan). In a fourth situation – the Central African Republic, a State Party that referred its own situation to the Court – no publicly available decision had been made as to whether the Prosecutor would initiate an investigation. So far, not a single case has reached the trial – let alone appeals – phase, and in order to remain within the prescribed limits, the present contribution will not deal with the Prosecutor’s role (and independence) during the trial phase. Hence, this contribution does not purport to provide a final and comprehensive account of the Office of the Prosecutor as a Court body. Rather, some topics have been selected to appraise the Office of the Prosecutor’s institutional position.

Section I attempts to provide a concise “black letter law” overview of the provisions that regulate the Office of the Prosecutor *lex lata* in both its composition and prescribed modes of functioning. Taking a distance from these more easily discernable provisions, Sections II and III put things into a broader perspective. Section II tackles a question that has haunted the Office of the Prosecutor even before it came into existence as a separate body of the Court, notably whether the Prosecutor’s independence and power result in its being accountable to no one, creating the fear of a Pandora’s box.

Along the same lines, Section III assesses the issue of prosecutorial policy and discretion in the specific context of the Court. After these two “macro” questions, some snapshots from a “micro”, more technico-legal perspective will be taken, and this in a chronological order of a case’s coming into existence. Thus, Section IV deals with the preliminary examinations, whereby the Prosecutor collects information to assess whether a case can be made to start an investigation into a situation. Section V looks into the investigations and pre-trial phase.

Both Sections IV and V will shed light on the question of how both the Rome Statute and some of the documents adopted by the Office of the Prosecutor limit or encourage the Prosecutor’s independence in proceeding with his work in some of the

many phases that have to be gone through before a suspect can be charged with a specific crime. Ultimately, some concluding observations will be made, both in order to look back on the first experiences so far and to look forward to the interesting times ahead – times that will determine a few years down the road how enthusiastically the State Parties look upon the Court and the work it has accomplished.

I. The Office of the Prosecutor and its international civil servants

In this Section, a brief overview will be given of the relevant “black letter law” provisions setting out the general principles regulating the Office of the Prosecutor’s staff members and their employment conditions. It should be noted that in the Rome Statute, some provisions apply to both the Prosecutor and some or all of the Court’s bodies. This is the case for Article 44 (appointment of staff and, specifically, investigators). Through the latter’s referral to Article 36(8) of the Rome Statute, the staff employed at the Office of the Prosecutor will need to represent the world’s “*principal legal systems*”, have an “*equitable geographical representation*” and contain a “*fair representation*” of male and female staff members. Similarly, Article 42(2) of the Rome Statute prescribes that “[t]he Prosecutor and the Deputy Prosecutors shall be of different nationalities.”

Whereas Articles 45, 46 and 47 contain rules on the “solemn undertaking” by the (Deputy) Prosecutor and on disciplinary sanction mechanisms, the Rome Statute understandably remains, as far as the working conditions at the Prosecutor’s Office are concerned, at the level of general principles. The real bread and butter rules that guide the everyday life of the Office of the Prosecutor’s staff members holding a fixed-term appointment¹ can be found in the 2005 Staff Rules.² This lengthy document contains detailed rules – applicable to all such staff members of the Court, not exclusively of the Office of the Prosecutor – on a wide range of issues. Obviously, all staff members are international civil servants. The said Staff Rules regulate, *inter alia*, their “duties, obligations and privileges” (Chapter I), “Salaries and related allowances” (Chapter III), “Appointment and promotion” (Chapter IV), “Annual and Special Leave” (Chapter V), “Social Security” (Chapter VI) and “Disciplinary Measures” (Chapter X).

From an institutional perspective, the most important provision on the Office of the Prosecutor is laid down in Article 42 of the Rome Statute. Para. 4 thereof establishes a secret ballot procedure for electing the Prosecutor by the Assembly of States Parties. Just like the judges, both the Prosecutor and his Deputy Prosecutors cannot be re-elected, unless the initial appointment was for three years or less. Thus, the Statute ensures their independence at the personal level, for there is no incentive for them to try to rally further support from States after their election. This independence needs to be conceived as one where the Prosecutor does not see any reason to favour one situation over another, or to specifically target one situation over another: he is sure of the time he will be there and will only be assessed afterwards on the merits of the work he has achieved.

Below, “independence” will be analysed in quite a different sense, i.e. to what extent the Prosecutor can *work* independently while proceeding with his activities that

¹ Separate rules exist for staff members holding a short-term appointment.

² Staff rules of the International Criminal Court, ICC-ASP/4/3, available via http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-3_English.pdf This 2005 document elaborates upon the 2003 Staff Regulations, available via http://www.icc-cpi.int/library/about/officialjournal/Staff_Regulations_120704-EN.pdf

are intended to build up a case against a particular individual. At this stage, the principal issue to be emphasized is the central feature of the Prosecutor. Indeed, as a basic principle, the Office of the Prosecutor's independence is affirmed (Article 42(1) Rome Statute): "*A member of the Office shall not seek or act on instructions from any external source.*" This aspect will be dealt with in greater detail in Section II.

Regarding the type of individuals that could be considered eligible for the role of (Deputy) Prosecutor, Article 42(3) provides for the following requirements: "*The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. (...)*" Additionally, they "*shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.*"

Turning from principles to practice, Article 42(1) sets out the Office of the Prosecutor's basic function, i.e. its responsibility "*for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.*" Contrary to Article 12 of the International Law Commission's Draft Statute, Article 42 of the Rome Statute affirms the Prosecutor's administrative independence from the Registry³: "*The Prosecutor shall have full authority over the management and administration of the Office, including the staff facilities and other resources thereof.*" This is a considerable departure from the previous practice at both the ICTY and ICTR, where the Registry has sometimes been alleged to have slowed down the recruitment and staffing process.⁴ This aspect of the Prosecutor's independence "at home" shall be dealt with below (Section II, f).

Apart from the Rome Statute and the Staff Rules, the Office of the Prosecutor is regulated by Rules 9, 10 and 11 of the Court's Rules of Procedure and Evidence, that deal with the "Operation of the Office of the Prosecutor", "Retention of information and evidence" and the "Delegation of the Prosecutor's functions", respectively.⁵

Underlying many of these rules – often extremely important for the Office of the Prosecutor's daily functioning – is a much broader debate, that was settled by States before persons suitable to fulfil the role of (Deputy) Prosecutor had even begun being identified, namely whether it would be wise to make this body accountable while independent. This question will be addressed in the next section.

II. The Office of the Prosecutor: An unaccountable body?

a. Situating the debate

As is generally known, the creation of an independent Prosecutor as a body of the Court was the subject of considerable controversy and heated debate at the Rome Conference and before. Indeed, the International Law Commission's Draft Statute, that formed the starting point of the Rome Statute, did not provide for the institution

³ See J.R.W.D. Jones, "The Office of the Prosecutor", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), I, 270.

⁴ See J.R.W.D. Jones, "The Office of the Prosecutor", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), I, 273.

⁵ See M. Rwelamira, "The Office of the Prosecutor", in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), 262.

of a Prosecutor with *proprio motu* powers. The reason lies in the fact that, at the time, the international community was not yet ready for such a body with independent powers. Hence, the Draft only provided for the referral of situations by States Parties or by the Security Council.⁶ This is now considered one of the main inadequacies of the initial Draft Statute.⁷

During the Rome Conference, the institution of an independent prosecutor was strongly advocated by NGOs and the so-called group of like-minded States. According to these actors, the absence of *proprio motu* powers of the Prosecutor would have a negative impact on the Court in that it would risk becoming a lame duck. In light of the near-total absence of State complaints in the framework of human rights treaties, it was feared that States would be reluctant to refer situations to the Court. Furthermore, the possibility of a veto by one of its permanent members endangered referrals by the Security Council. This could threaten not only the referral of situations in which these permanent members are involved, but also the referral of a situation in which allies or client States would be accused of committing crimes within the jurisdictional scope of the Court. In short, the argument was that the absence of the said *proprio motu* powers would risk rendering the yet-to-be established Court an institution with no cases in the docket.

While these fears have been proven partially unfounded in practice – so far, the Court has received three State referrals and one referral by the Security Council and the Prosecutor has not yet used his *proprio motu* powers – the *proprio motu* powers of the Prosecutor proved a useful tool in obtaining a State referral in the situation of the Democratic Republic of Congo. Indeed, it was only after the Prosecutor indicated that he would use his *proprio motu* powers that the Democratic Republic of Congo referred the situation to the Court. The Prosecutor himself has mentioned in a policy document dealing with the matter that he “*will use this power with responsibility and firmness, ensuring strict compliance with the Statute.*”⁸

Opponents of an independent Prosecutor cited the danger of a politically unaccountable actor and of politicized trials in that the Prosecutor would be inappropriately targeting nationals of a State for political reasons. The United States is known to be vehemently opposed to any widespread powers of the Prosecutor. Thus, for example, John Bolton – at the time US Under-Secretary for Arms Control and International Security – wrote:

*“Requiring the United States to be bound by this treaty, with its unaccountable Prosecutor and its unchecked judicial power, is clearly inconsistent with American standards of constitutionalism. (...) Never before has the United States been asked to place any of that power outside the complete control of our national government without our consent.”*⁹

⁶ Draft Statute for an International Criminal Court, Report of the ILC on the work of its forty-sixth session, 2 May - 22 July 1994, GA, official records, forty-ninth session, supplement No 10 (A/49/10), par. 42-91, 29-161

⁷ W.A. Schabas, “First Prosecutions at the International Criminal Court”, 27 *Human Rights Law Journal* (2006), 28.

⁸ Annex to the “Paper on some policy issues before the Office of the Prosecutor”: Referrals and Communications, September 2003, page 4, available via www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf

⁹ J.R. Bolton, “The United States and the International Criminal Court, Remarks to the Federalist Society (Nov. 14, 2002), available via www.state.gov/t/us/rm/15158.htm

Certainly, a Prosecutor that is accountable to no political body at all, could have negative consequences for the protection of international peace and security and for the Court itself. For example, a Prosecutor desirous of prosecuting war crimes committed during a civil war being settled through negotiations between the parties to the conflict, could undermine the peace and security in that country or of the international community, hence usurping the Security Council's powers. Furthermore, if a Prosecutor were ever to wage a personal vendetta against individuals of a particular country, this would seriously undermine the credibility and legitimacy of the Court. These arguments and fears led Germany and Argentina to make a proposal during the Rome Conference intended to consider the legitimate concerns of both sides. One thing is clear, however; if the Court were perceived to be politically biased, it would immediately lose its greatest asset, namely its moral authority.¹⁰

b The compromise reached

In the end, building upon the German and Argentine proposal, the drafters of the Rome Statute opted for an independent Prosecutor with *proprio motu* powers to initiate an investigation, but – in order to allay opponents' fears¹¹ - with considerable checks to this power by the Court itself, by States and by the Security Council. To be fully correct, it must be underscored that – strictly speaking – the Prosecutor cannot initiate investigations under the Rome Statute. However, pursuant to Article 15 (1) of the Rome Statute, he can investigate “*on the basis of information in crimes within the jurisdiction of the Court*”, that is a very low threshold. It boils down to the fact that the Prosecutor can receive such “information” by watching the news.¹² Notwithstanding the nuanced solution reached, the opponents of the Court continue to assert that the Prosecutor and his Office are unaccountable. Therefore, considerable attention in this contribution will be devoted to examining which mechanisms within the Rome Statute place a check on the powers of the Prosecutor and if it indeed can be concluded that the Prosecutor is unaccountable.

c Accountable and with limited powers while independent?

As previously mentioned, Article 42 of the Rome Statute generally declares that the Prosecutor and his Office are an independent body of the Court and that they may not seek or act on instructions from any external source. This duty to remain independent is specified in three fields. First, Article 15 of the Rome Statute gives the Prosecutor the power to independently launch an investigation after having received information from any source without any State or Security Council referral. This phase will be dealt with in Section II.d. Secondly, the Prosecutor and his staff independently determine how to conduct investigations and in that way the case will be presented during the whole trial phase. This phase will be dealt with in Section II.e. Thirdly, as

¹⁰ A.M. Danner, “Navigating law and politics: the Prosecutor of the International Criminal Court and the Independent Counsel”, 55 *Stanford Law Review* (2002 – 2003), 1655.

¹¹ See S.A. Fernandez de Gurmendi, “The Role of the International Prosecutor”, in R.S. Lee (ed.), *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, 1999), 181.

¹² See J.R.W.D. Jones, “The Office of the Prosecutor”, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), I, 270.

mentioned, the Prosecutor is independent in the organization of the structure of his Office.¹³ This feature will be dealt with in Section II.f.

All these feature of the Office of the Prosecutor's independence necessarily entail a form of discretion, that will, however, be more or less tempered depending on the possible negative consequences of the exercise of discretionary powers and, most importantly, by the many actors the Office of the Prosecutor needs to face – as allies, opponents, or overseers – even before being able to make his case against a particular suspect. The most important checks placed on the Prosecutor's work are related to the initiation of an investigation *proprio motu*.

The Prosecutor and his Office will have the discretion to weed through the numerous complaints and information received and select only the situations for there are reasonable grounds to initiate an investigation. In this respect, the Prosecutor can request any additional information as he sees fit.¹⁴ However, this discretion of screening the received information seems to be limited by objective criteria. First, the Prosecutor has to examine if the information leads to the conclusion that there is a reasonable ground that the Court has jurisdiction over the alleged conduct. Second, the Prosecutor has to asses whether the case will be admissible pursuant to Article 17 of the Rome Statute. Even if these two conditions are fulfilled, the Prosecutor can still decline to initiate an investigation if this would not be in the interest of justice, taking into account the seriousness of the crime and the interest of the victims.¹⁵

d Independent when and after there are reasonable grounds to initiate an investigation? Yes, but...

If the Prosecutor, after having assessed the information, concludes that a reasonable ground to initiate an investigation exists, his powers are curbed by the Pre-Trial Chamber, the Security Council and States. Each of them will be discussed in the following paragraphs.

(a) The Pre-Trial Chamber must grant a request to commence investigations, a request that will only be granted if the Prosecutor convinces the Pre-Trial Chamber that there is a reasonable basis to proceed and that the case appears to fall within the jurisdiction of the Court.¹⁶ The reasonable basis test concerns evidentiary matters and does not judge on the appropriateness of the request of initiation of the investigation.¹⁷ In particular, the Pre-Trial Chamber has to examine if the material submitted by the Prosecutor is sufficiently strong to merit an investigation. However, if the Prosecutor has shown the necessary professionalism and demonstrates that an investigation strategy has been adopted for the particular case or situation, he will pass the reasonable basis test, if material supporting the application has been filed. Furthermore, the Pre-Trial Chamber has to assess that a crime appears to be committed within the jurisdiction of the Court. Jurisdiction includes all jurisdictional requirements and not only the subject matter. On the other hand, the Pre-Trial Chamber will allow the start of the investigation if there appears to be jurisdiction and will hence not look into the matter of jurisdiction too deeply. Consequently, when all

¹³ Article 42(2) Rome Statute.

¹⁴ Article 15(2) Rome Statute.

¹⁵ Article 53(1) Rome Statute.

¹⁶ Article 15(4) Rome Statute.

¹⁷ M. Bergsmo and J. Pejic, "Article 15", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Nomos, 1999), 370.

jurisdictional requirements seem to be fulfilled, the Pre-Trial Chamber should authorize the start of the investigation.

In practice, for every single situation, this basically means that the Prosecutor is far from independent: he needs to obtain permission before being allowed to go out in the field to initiate investigations. Both the Rome Statute and the judges of a Pre-Trial Chamber can curb his initiatives.

(b) Secondly, the Security Council can always decide to defer a situation from the investigation and prosecution of the Court for a renewable period of 12 months by adopting a Chapter VII resolution.¹⁸ The deferral can involve cases where the Prosecutor has only reached the stage of investigations, but also cases where an accused is brought before the Trial Chamber and even the Appeals Chamber. However, the deferral does not affect the preliminary examination of a situation. As a result, the Prosecutor can request information from States, United Nations bodies and other entities notwithstanding a deferral by the Security Council. Furthermore, the situation or case can only be deferred in the cases of a threat to or breach of international peace and security, although frequently these situations and cases will come within the purview of the Court. Moreover, the Security Council has a broad margin of discretion to determine what constitutes a threat to and a breach of the international peace and security.¹⁹ Consequently, the Security Council has broad powers to intervene with the proper functioning of the Court and will hamper a Prosecutor who is misusing his power to investigate and prosecute. On the other hand, a Chapter VII resolution requires 9 votes in favour, including no negative votes of permanent members. This entails that a single State, in theory, cannot take the Security Council hostage to pursue its agenda. In reality, the Security Council has until now used this power only to shield peacekeepers of States not party to the Statute of the Court.²⁰

Similarly, the Security Council can refer a situation to the Prosecutor, as has been the case with Security Council Resolution 1593 in regard of the situation in Darfur (Sudan):²¹ Here, the Security Council can put a situation in the investigative spotlight, no matter what other ongoing investigation the Office of the Prosecutor's staff was involved in. Here, the Prosecutor's independence is curbed in the opposite sense: if the Security Council agrees to the referral, the Prosecutor will be seized of the situation.

(c) Thirdly, the *proprio motu* power of the Prosecutor is limited by *States* and by the complementarity principle. When the Prosecutor initiates a *proprio motu* investigation and receives the authorization of the Pre-Trial Chamber, he has to inform States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.²² The notification must contain information about the acts that may constitute crimes under the Rome Statute.

¹⁸ Article 16 Rome Statute.

¹⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Rep.* 1970, 16.

²⁰ Security Council Resolution 1422 (2002) and Security Council Resolution 1487 (2003). In 2004, when the issue arose again, the United States was in a very weak position in the wake of the Abu Ghraib prison abuse scandal, leading to its withdrawing the proposal.

²¹ S.C. Res. 1593, U.N. SCOR, 60th Sess., 5158th mtg., U.N. Doc. S/RES/1593 (March 31, 2005).

²² Article 18(1) Rome Statute.

The information provided needs to be relevant for the purposes of establishing that a particular State has jurisdiction over the situation.²³

Hence, not only States Parties, but also other States that normally would have jurisdiction (e.g. on the basis of the nationality principle) should be informed and can request the deferral to their national jurisdiction if they request so one month after the receipt of the notification.²⁴ The Prosecutor will have to defer to the State investigating or having investigated its nationals, unless the Pre-Trial Chamber decides otherwise. The issue of assessing a State's inability or unwillingness to prosecute, is fraught with procedural and substantive hurdles, whereby the Office of the Prosecutor has anything but the last word and the power to decide.²⁵

Along the same lines, the same question can be asked as to what happens with States that are not investigating, but start investigations after the receipt of the notification. Can they request the deferral? It is submitted that they can, due to the primacy the Rome Statute places on prosecutions by States.²⁶ A State requesting the deferral must provide the necessary information on its investigations and the Prosecutor has the opportunity to ask for additional information.²⁷ A dispute between the Prosecutor and the requesting State will be settled by the Pre-Trial Chamber. Since the Prosecutor normally has to respect the request of a State, the *onus probandi* will be on him. In particular, he will have to prove that the State in question is unable or unwilling to investigate or prosecute the situation concerned. An appeal against the Pre-Trial Chamber decision is possible²⁸ and, in any event, the Prosecutor can review the deferral after six months or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation. The Prosecutor can then request the Pre-Trial Chamber for authorization to continue his investigations.²⁹ Furthermore, the Prosecutor may seek, on an exceptional basis, authority from the Pre-Trial Chamber to pursue the 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.³⁰

Consequently, the Prosecutor's independence in the field of *proprio motu* powers to initiate an investigation are significantly curbed by the need for authorization by the Pre-Trial Chamber, the possibility of a deferral by the Security Council and the request of States Parties and non-Parties investigating or having investigated their nationals to defer a situation to their national jurisdiction. As a result, there are ample opportunities to hinder and stop investigations that are considered political and irresponsible – or simply undesired.

Finally, regarding the Prosecutor's independence in terms of whether to launch investigations into a specific situation, his independence is – ironic as this may seem – curbed whenever a State proceeds to a “self-referral” of its own situation.

²³ Rule 52 Rules of Evidence and Procedure.

²⁴ Article 18(2) Rome Statute.

²⁵ See M.A. Fairlie, “Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop?”, 39 *The International Lawyer* (2005), 817.

²⁶ D.D. Ntanda Nsereko, “Article 18”, O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Nomos, 1999), 400.

²⁷ Rule 53 Rules of Evidence and Procedure.

²⁸ Article 18(4). Rome Statute.

²⁹ Article 18(3) Rome Statute and Rule 54 Rules of Procedure and Evidence.

³⁰ Article 18(6) Rome Statute.

Article 53 of the Rome Statute indeed leads to the situation that such State can, unless the Prosecutor determines that there is no reasonable basis to proceed, jump the queue: self-referral has the legal consequence that a State can position itself at the top of the Prosecutor's agenda.³¹ Hence, this feature means an additional constraint on the Prosecutor's independence, as some States may use the mechanism to transfer their domestic problems to the international plane.

d. Independent while carrying out investigations: for sure, but...

With regard to discretion in conducting investigations and prosecutions, the Prosecutor's independence is broader than in the stage where he is merely assessing whether or not to initiate investigations, but again not unchecked. Both the Security Council and States can seriously hamper the Office of the Prosecutor's work at this stage. The experience of the first half of 2006 – in particular the case-law of the Court – has shown that a third actor, notably a Pre-Trial Chamber and potentially even victims, can considerably limit the Prosecutor's scope of manoeuvring during this stage. As to victims, the practice in the coming months will indicate how it will evolve.

First, the *Security Council* can limit the Prosecutor's discretion in the case of a situation's referral pursuant to Article 13(b) of the Rome Statute. Indeed, by referring the situation to the Prosecutor, the Security Council has, in the case of Sudan, excluded peacekeepers in the Sudan from being the subject of investigations and prosecutions.³² Although it is in reality not likely that peacekeepers will commit a crime serious enough to merit the attention of the Court, this possibility cannot be altogether excluded. Regrettable as this may be, the exclusion of certain categories of persons from the scope of investigations and prosecutions by the Court seems to be in line with the broad powers the Security Council enjoys under Chapter VII of the United Nations Charter, powers that are not affected by Article 13(b) of the Rome Statute. As a result, the independence of the Prosecutor in conducting investigations and prosecutions will be checked, since he will not be empowered to investigate and prosecute certain perpetrators' conduct. *Ab initio*, he is allowed to go on the field but ordered to remain blind for certain actors.

Secondly, *States* have the capacity to limit investigations and prosecutions based on politically motivated claims. In general, the Prosecutor is not allowed to conduct investigations on a State's territory without that State's consent.³³ With some limited exceptions outlined below, the Prosecutor is quite powerless if a State refuses to grant such access. It is not altogether unthinkable that a State provides such access but intends to exclude certain actors from the investigation. Although States Parties are under a general obligation to cooperate with the Court and hence the Prosecutor³⁴, a Prosecutor's request will have to be performed under the procedures of national legislations. This can limit the presence and powers of the Prosecutor or his representatives; indeed, while States are obliged to adopt the necessary procedures under their national laws to be able to meet the Court's requests³⁵, they retain the liberty to determine the nature of these procedures under domestic law. Consequently,

³¹ W.A. Schabas, "First Prosecutions at the International Criminal Court", 27 *Human Rights Law Journal* (2006), 32.

³² Operative Paragraph 6 Security Council Resolution 1593 (2005).

³³ Article 54(2) Rome Statute and Article 87 Rome Statute.

³⁴ Article 86 Rome Statute.

³⁵ Article 88 Rome Statute.

States can limit the discretionary powers during the Prosecutor's investigations by adopting laws that limit his functions.³⁶

Furthermore, although the Rome Statute establishes that the Prosecutor is equally entitled to conduct investigations on the territory of a State that is not a party to the Rome Statute, outside the scope of Article 12(3) of the Rome Statute, the Prosecutor can only conduct his investigations after the conclusion of an *ad hoc* agreement.³⁷ In real life terms: a "no" is and remains a "no".

Moreover, under the Statute, States can deny access to documents relating to national security. While the Rome Statute provides for a detailed procedure to establish whether some evidence might endanger the national security of a State, the final word rests with the State concerned³⁸. This can easily stonewall the Prosecutor's investigation if it deems that his investigations are politically motivated or simply unwarranted.

Unfortunately, there are no adequate remedies against a State's refusal to cooperate. Indeed, contrary to the *ad hoc* tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR), both of which were established pursuant to a Security Council resolution adopted under Chapter VII of the United Nations Charter, the Rome Statute is a multilateral treaty, whereby consent remains the core of the matter.

Thus, regarding States Parties, the Court is limited in making a finding of non-compliance and reporting the matter to the Assembly of State Parties or the Security Council in the case of a Security Council referral.³⁹ In this respect, it has to be noted that in the case of the Security Council's referral of the situation in Darfur, the latter has obliged Sudan and all other parties to cooperate with the Court and even urged non State parties to fully collaborate.⁴⁰ With regard to States not party, they are not obliged to enter into *ad hoc* agreements and the sole reaction of the Court can potentially be to refer the matter to the Security Council, which *can* take measures against the non-complying State under Chapter VII.⁴¹ It is clear that all of this is fraught with uncertainty for the Prosecutor, given the many procedural hurdles along the way.

Despite the general reliance on State cooperation during the investigations phase, the Pre-Trial Chamber can authorize the Prosecutor in limited exceptions to conduct an investigational act without the cooperation of a State Party if it is satisfied that this State is clearly unable to execute a request for cooperation due to the unavailability of an authority or a component of its judicial system competent to execute the request for cooperation.⁴² To get this far, the Prosecutor will have to make a written request for authorization to the Pre-Trial Chamber. The Pre-Trial Chamber will then inform and invite the State Party to hear its views on the matter and can organize a hearing.

An authorization will have to be motivated and based on the reasons set forth in Article 57(3)(d) of the Rome Statute.⁴³ In this respect, the Pre-Trial Chamber will

³⁶ M. Bergsmo and P. Kruger, "Article 54", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Nomos, 1999), 721.

³⁷ Article 87(5) Rome Statute.

³⁸ Article 72 Rome Statute.

³⁹ Article 87(7) Rome Statute.

⁴⁰ Operative Paragraph 2 Security Council Resolution 1592 (2005).

⁴¹ G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), II, 1168.

⁴² Article 57(3)(d) Rome Statute.

⁴³ Rule 115 Rules of Procedure and Evidence.

first have to be satisfied that no authority or component of the State's judicial system is able to fulfil the request for cooperation. Furthermore, it must be established that there is no other authority or official of any kind that is capable to execute the request. Consequently, such cases will only occur when there is, for example, a total collapse of State authority.⁴⁴ But in these situations, it is not excluded that the Prosecutor will be unable to perform an investigation since the local situation could be too dangerous.

As a third actor, a *Pre-Trial Chamber* and potentially *victims* can also prove to be a constraint on the Prosecutor's scope of action, as some case-law of the first half of 2006 has already indicated. The debate centres around the philosophical divide between interventionist judges who are of the opinion that they must guide the prosecution, on the one hand, and judges constraining themselves to a much more passive role, on the other hand.⁴⁵

The issue of victim participation during the investigations phase has proved to be extremely contentious.⁴⁶ In January 2006, it has been the first issue shaking up the Court, as a Pre-Trial Chamber allowed individuals claiming to be victims to participate in the proceedings during the investigations phase, even when no charges have been filed against a specific accused and even when it is actually not yet clear at all that such charges will be filed.⁴⁷ As the Prosecutor's attempt to appeal this decision has been rejected on 13 July 2006 by the Appeals Chamber, this issue is not only the first major defeat of the Office of the Prosecutor during its judicial activities, but it also results in the situation that the Prosecutor's decision what to investigate or not could be seriously hampered by victims' requests. Whereas the consequences of this decision still need to be appraised in subsequent practice, it should be mentioned that the Prosecutor has consistently argued on this issue that such victim participation – as granted by the Pre-Trial Chamber - during the investigations phase could endanger the Prosecutor's independence and objectivity.⁴⁸ If it turns out to be true, as the Prosecutor has argued⁴⁹ and as indeed seems to stem – at least in part - from the aforementioned decision, that a very wide pool of individuals can claim to be a victim and thus seek access to the proceeding, then this decision might lead, ironically, to the result that it will be the victims – one of the proceedings' intended beneficiaries – that become the Prosecutor's opposing actor in ensuring an efficient and fair way of proceeding. In the long run, this Pre-Trial Chamber's decision may very well turn out have introduced another impediment into the Prosecutor's work, where no one was expecting it.

⁴⁴ F. Guariglia and K. Harris, "Article 57", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Nomos, 1999), 751; A.M. Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", *AJIL* (2003), 529.

⁴⁵ W.A. Schabas, "First Prosecutions at the International Criminal Court", *27 Human Rights Law Journal* (2006), 39.

⁴⁶ J. de Hemptinne and F. Rindi, "ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings", *4 Journal of International Criminal Justice* (2006), 342.

⁴⁷ Situation in the Democratic Republic of Congo, ICC-01/04-101. Decision on the Applications for Participation in the Proceedings of VPRS 1. VPRS 2. VPRS 3. VPRS 4. VPRS 5 and VPRS 6. 17 January 2006.

⁴⁸ See for example ICC – 01 / 04, 6 February 2006, available via www.icc-cpi.int/library/cases/ICC-01-04-111_English.pdf

⁴⁹ para. 18 of ICC – 01 / 04.

e. Independent at home? The Prosecutor's power to organize his office

With regard to the third limb of independence, the power to organize his office, the Prosecutor has a very wide margin of discretion. In particular, he is responsible for the organization of the office, the use of staff members and gratis personnel, recruitment, authorization of official travel, retention and security of information and physical evidence and application of all equipment of the Office.

Of course, the Prosecutor is not entirely unlimited since he has to respect the financial regulations and the staff regulations, that have been adopted by the Assembly of States Parties and discussed above, which also provides for management oversight to the Prosecutor.⁵⁰

Is there a risk that the Assembly of State Parties, through budgetary tools, would hinder the Prosecutor's management of his office? By making cuts in the budget allocated to the Prosecutor and his Office, the Assembly of State Parties could indeed affect the investigation and prosecution of cases since such investigations are very costly. However, such conduct would undoubtedly violate Article 42 of the Rome Statute, that establishes that the Prosecutor has full authority over the management of his Office. In this regard, Article 112(5) of the Rome Statute provides that the Prosecutor or one of his representatives may participate in the meeting of the Assembly of State Parties and its Bureau when appropriate.

Financial predictability is indeed key to the Office of the Prosecutor's being able to plan ahead and to move forward on certain issues. The Prosecutor's independent room for organizing his own Office is a vital component for a successful functioning of the institution, that has fortunately been strongly inscribed in the Rome Statute.

f. The Prosecutor's independence: an assessment

In conclusion, the Prosecutor's independence has been declared in principle, but strongly constrained in practice. Both the Court, States (not even party to the Rome Statute) and the Security Council can interfere in most aspects of the independence of the Prosecutor.

On the one hand, in some instances, one could wonder whether the Prosecutor is still independent. On the other, the multiple checks and balances remove the argument of a renegade Prosecutor that is accountable to no one. In this respect, it is not surprising that until now the Prosecutor has not used its *proprio motu* power to initiate an investigation, but has relied on State referrals and a Security Council referral. State referrals will certainly make the investigations easier since a referring State will most likely – though not certainly once it comes down to sensitive investigation - be cooperative in the field of investigations. Indeed, State referrals are inherently biased in that as long as the State's conduct is not the matter of the investigation, the Prosecutor can count on the support of the referring State, which is most probably more than glad to have others pay for the investigation against forces it is fighting with internally anyway. Thus, Uganda's referral aimed primarily to investigate and prosecute the conduct of the leadership of the Lord's Resistance Army. Although this rebel group certainly has committed crimes under the scope of the Rome Statute, some conduct of the Ugandan military could equally be the subject of criminal investigations and proceedings by the Court. If this were the case, it is

⁵⁰ Article 112(2) Rome Statute.

very likely that Uganda would not be as cooperative as with investigations into the conduct of the Lord's Resistance Army. Consequently, in such situations, State referrals could endanger the legitimacy of the Court. However, it is also important that the Court starts its activities smoothly so as to demonstrate that it indeed is the right body to deal with the type of international crimes for which it has been established.

In the long term, however, the Prosecutor should not rely primarily on State referral, but use his *proprio motu* power, even if this entails entering into conflict with the States concerned: it is in the use of the *proprio motu* powers that his real force resides. Obviously, this is a long-term process, requiring the Prosecutor to increase his Office's legitimacy before actually resorting to using these powers. In any event, any use of his *proprio motu* power that would conflict with a State out right, cannot be done by the Prosecutor acting as a lone cowboy: widespread and serious diplomatic backing will be essential to avoid committing political and institutional suicide.

This type of delicate debates bring us to the question of whether and to what extent, even though being fully entitled to do so, the Prosecutor can or should decide not to exercise his powers in a particular case. The next section attempts to shed some light on this.

III. Prosecutorial policy and discretion

The Court is a body with limited resources and hence it will not be able to deal with all cases that are referred to it or, eventually, that are initiated by the *proprio motu* powers of the Prosecutor. A comprehensive analysis of the issue of prosecutorial discretion, in all its relevant dimensions and complexities, goes far beyond the present contribution.⁵¹ Rather, the following paragraphs merely seek to highlight some of the constraints and opportunities under that the Office of the Prosecutor is operating when assessing whether "cases" can be made amidst a "situation". To put the matter succinctly, it can indeed be said that the scope of prosecutorial discretion at the Court is much more limited than in most national criminal justice system and than what is the case at the Rwanda and Yugoslavia *ad hoc*-tribunals.

III.a Who prosecutes?

In this respect, the Rome Statute emphasizes that the main prosecution responsibility lies with the States Parties⁵²: the complementarity principle is one of the cornerstones of the Court. Consequently, the Prosecutor – who, together with the Pre-Trial Chamber, is the decision-maker on the matter of initiating an investigation - will have to sift through the information received and through referrals to select the cases that merit the time and resources of the Court. In this regard, the Prosecutor adopted a policy document.⁵³

The main issue that the policy document addresses is the complementarity principle and its consequences for the Prosecutor and his office. In general, the

⁵¹ See, among others, A.M. Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", 97 *American Journal of International Law* (2003), 510 and D.D. Ntanda Nsereko, "Prosecutorial Discretion before National Courts and International Tribunals", 3 *Journal of International Criminal Justice* (2005), 124.

⁵² 6th recital, Preamble of the Rome Statute; Article 17 Rome Statute.

⁵³ "Paper on some policy issues before the Office of the Prosecutor", available at: < http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf >

Prosecutor will only investigate a situation where there is a clear case of failure to take national action, due to the unwillingness of the State or due to the inability of the State to investigate or prosecute itself. Consequently, a major strategy of the Prosecutor and his Office will be to make States Parties aware that crimes within the purview of the jurisdiction of the Court are committed on their territory or by their nationals abroad and to induce them to take action themselves. This is an important feature: in line with the complementarity principle, the Prosecutor hereby confirms that he will encourage States to start cases themselves under their own national criminal justice system. This is explicitly based on the recognition that States will generally have the best access to evidence and witnesses.⁵⁴

However, even if it is clear that a particular State is manifestly unwilling or unable to investigate and prosecute, it will not be an obvious matter that the Prosecutor will initiate the investigation. The Office of the Prosecutor does not have its own police force and will hence have to rely on the will of States or on the international community's support to conduct investigations *in situ*. If he and his Office must operate in an environment of violence without the support of national police forces or of peacekeeping forces, the safety of the staff and the witnesses, and the findings of the investigation cannot be protected. Consequently, the Prosecutor will have to be a diplomat as well in order to foster support for his cause with international organizations and States. If, however, it turns out that he would not obtain the necessary results and that the investigations will not be sufficient to reach a conclusion, he will be better off not initiating the investigations at all.

b. Who is prosecuted?

Another policy question for the Prosecutor is who to prosecute. Indeed, even if the Prosecutor is selective in choosing a situation that merits the attention of the Court, he will often be faced with a large group of potential witnesses, victims and perpetrators. For example, the situation in the Democratic Republic of Congo, even in the Ituri region alone, was characterized by widespread and systematic crimes that fall within the ambit of the Rome Statute. Furthermore, in the situation in Darfur, the Prosecutor received a list of 50 names of persons that were allegedly responsible for such crimes committed in Darfur.⁵⁵ Obviously, by no means can all of these can be prosecuted, if only for logistical reasons. In the case of Uganda, only a handful of persons of the Lord's Resistance Army will be prosecuted.⁵⁶

In short, the question is who to prosecute and how to deal with the alleged perpetrators who will not stand trial before the Court (the so-called impunity gap). The Prosecutor's policy will be one of targeting the *main* leaders and the *main* criminals: "the *leaders* who bear most responsibility for the crimes".⁵⁷ Hereby, the

⁵⁴ P. 5 of the "Paper on some policy issues before the Office of the Prosecutor".

⁵⁵ Available at: < http://www.icc-cpi.int/pressrelease_details&id=101&l=en.html >.

⁵⁶ At the time of writing there are arrest warrants for Joseph Kony, decision available at < http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf >; Vincent Otti, decision available at: < http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-54_English.pdf >; Raska Lukwiya, decision available at: < http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-55_English.pdf >; Okot Odhiambo, decision available at: < http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-56_English.pdf > and Dominic Ongwen, decision available at: < http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-57_English.pdf >.

⁵⁷ Emphasis added. For a discussion of the terminology used and of its potential ambiguities, see W.A. Schabas, "First Prosecutions at the International Criminal Court", 27 *Human Rights Law Journal* (2006), 26 – 27.

Prosecutor confirms what has been the Court's aim from the very beginning: it has been established not to target small, but "big fish".

On some occasions, starting investigations and prosecutions of low-level perpetrators will potentially be useful to establish the criminal responsibility of high-level offenders: one builds up the case against the major leader. Still, although it remains to be seen how this will work out in practice, it would seem like the Prosecutor does not have too much room to first try the "small fish".

Dealing with the impunity gap, however, will not be that easy, as the Prosecutor warns in the aforementioned policy document. Still, Article 53 of the Rome Statute empowers him to decline to investigate or prosecute when this would be detrimental to the "interests of justice".

Alternative means (other than criminal investigation and prosecution by the Court) for resolving the situation will be necessary, whether by encouraging and facilitating national prosecutions (not only by the territorial or national States, but also by other States on the basis of universal jurisdiction), by strengthening or rebuilding national justice systems; by providing international assistance to those systems; or by some other means. For example, as indicated, the Prosecutor may very well decide to defer to a national criminal justice system "in the interests of justice"⁵⁸, though his decision to defer to such a system is reviewable by a Pre-Trial Chamber.⁵⁹ Such deferral can for example, occur when there are politically viable and legally acceptable alternative justice mechanisms and amnesty-granting programmes.

Since the Rome Statute does not define this concept of "interests of justice", it has not taken any explicit position as to any of the so-called "transitional justice" mechanisms. In the light of the experience in Uganda in the spring of 2006, where the negotiations between the rebel movements and the Government seem to hinge on a trade-off between withdrawing the arrest warrants and signing up for peace, this may prove to be a fundamental flaw in the Rome Statute, fatally leading the Prosecutor to be forced to take position in a politically sensitive area without clear legal guidelines. With due caution, it is submitted that, if that is indeed in the interests of justice, the Rome Statute does not foreclose a (highly) conditioned use of amnesties.⁶⁰

The issue of the Court's relationship with transitional justice mechanisms goes far beyond the scope of the present contribution.⁶¹ While there is no easy solution to the problem, it can be hoped that the prosecution of the main leaders of the crimes will encourage national authorities to initiate investigations and prosecutions or that these prosecutions will set an example and have a preventive ("deterrent") effect.

As the previous and following remarks show, it is pretty clear that virtually any decision of the Office of the Prosecutor can be reviewed by a Pre-Trial Chamber. This statement holds furthermore true at virtually any stage of the Prosecutor's work. The following section provides some examples of a more technical nature, related to

⁵⁸ Article 53(2)(c) Rome Statute.

⁵⁹ Although the concept "interests of justice" seems to be a broad one, the decision may not be invoked upon "arbitrary grounds" and such discretion must be exercised "in a reasonable manner": see T.H. Clark, "The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance", 4 *Washington University Global Studies Law Review* (2005), 397.

⁶⁰ See, for an overview of the many conditions preceding this statement, as well as a number of examples and hypothesis, T.H. Clark, "The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance", 4 *Washington University Global Studies Law Review* (2005), 407 ff.

⁶¹ For an excellent introduction to the issues, see D. Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court", 14 *European Journal of International Law* (2003), 481.

the stages dealt with above, in order to demonstrate how and to what extent the Office of the Prosecutor is independent.

IV. The stage of preliminary examinations

a. General duty to start preliminary examinations

Regardless of a State or Security Council referral or the commencement of an investigation based on the *proprio motu* power of the Prosecutor, the first duty of the Prosecutor is to assert whether there is a reasonable basis to start an investigation. This stage of the proceedings, i.e. the stage of the preliminary investigations, is explicitly required by Article 15(6) of the Rome Statute and takes place before the actual start of the investigation. Indeed, Article 15(2) and (3) of the Rome Statute obliges the Prosecutor to analyse the information received before requesting the Pre-Trial Chamber to grant the authorization of the start of an investigation. Furthermore, Article 53, that deals with referrals by States and the Security Council⁶², equally requires a preliminary examination of the information transmitted by the referring State or by the Security Council, since the Prosecutor has the right to determine that the referral cannot constitute a sufficient basis to start the investigations, which entails a form of preliminary assessment of the information received. Needless to say, the conditions for a preliminary examination in the case of the *proprio motu* powers will be more stringent.

b. Method and parameters

The Prosecutor has elaborated a policy paper on how to deal with the management of referrals and communications, or information provided by other sources than referring States or the Security Council.⁶³ In general, the Office of the Prosecutor takes a more rigorous approach in determining if a communication can serve as a basis for investigations, due to the required authorization by the Pre-Trial Chamber. The Rome Statute remains silent on the required content of the communications. On the one hand, one cannot expect that the provider of the information is able to conduct an extensive inquiry into the conduct in question for the purpose of sending detailed information to the Office of the Prosecutor. On the other, communications that are too general and broad will not be of great help for the Prosecutor.

In this respect, Article 42 of the Rome Statute obliging the Prosecutor to examine substantiated information seems to indicate that the preferred basis for analysis is comparatively detailed and credible information. As a result, the main task of the Prosecutor will be to analyse the seriousness of the information⁶⁴, an analysis that will be affected by the detailed and substantive nature of the available information.

Hence, if the information provided does not allow for sufficient guidance to determine that a reasonable basis for starting an investigation exists, the Prosecutor will decide to inform the sender that he will not request the authorization of the Pre-Trial Chamber to commence an investigation. Furthermore, the Prosecutor can equally determine that there is no reasonable basis to start an investigation on the

⁶² Article 53 (3) Rome Statute.

⁶³ Available at: < http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf >

⁶⁴ Rule 104 Rules of Procedure and Evidence.

basis of a State or Security Council referral due to the vagueness of the provided information, although in such cases the referring State and the Security Council will mostly be able to provide for sufficiently detailed information that would enable examination of the seriousness of the information.

The general method and parameters to assess the information received are laid down in Article 15(2) and Article 53(1) of the Rome Statute respectively. Although Article 15 deals with investigations started on the basis of the exercise of the *proprio motu* powers of the prosecutor and Article 53 with investigations on the basis of a State or Security Council referral, the general method established in Article 15 is applicable to Article 53, while the parameters of Article 53 are pertinent to Article 15.⁶⁵ The unclear relationship between these two articles of the Rome Statute has been clarified by the Rules of Procedure and Evidence, more in particular Rule 48 – that provides that the Prosecutor, in determining whether there is a reasonable basis to proceed with an investigation under Article 15(3), will have to consider the criteria set out in Article 53(1) – and Rule 104 – thus introducing the method of Article 15(2) in the case of State or Security Council referral.

The general method of conducting preliminary examinations is, on the one hand, that one proceeds to requesting additional information and to collect written or oral testimony at the seat of the Court. In all cases of received information, the Prosecutor has to protect the confidentiality of such information and testimony or take any other necessary measures pursuant to his or her duties under the Statute.⁶⁶ The parameters allow the Prosecutor to determine if the commencement of an investigation subsequent to the preliminary investigation is warranted.

In this respect, Article 53(1) of the Rome Statute establishes *four parameters* that the Prosecutor has to take into account: whether there is a reasonable basis to start an investigation; whether the alleged conduct falls within the jurisdiction of the Court; whether the case is or would be admissible; and whether there are substantial reasons to believe that an investigation would benefit the interests of justice.

In addition, the Prosecutor will take into account his prosecutorial policy and the likelihood of any effective investigation being possible. When all the requirements have been fulfilled, the Prosecutor will request for authorization of the Pre-Trial Chamber to initiate investigations in the case of exercise of *proprio motu* powers or will initiate the investigations automatically in the case of a State or Security Council referral.

With regard to the *first parameter*, it has been stated above that this requirement is objective in the sense that it deals with evidentiary matters and is not a test of appropriateness. What is relevant is that the provided and collected information is serious and detailed enough to lead to the conclusion that there is a probability of a *prima facie* case.

With regard to the *second parameter*, jurisdiction, the totality of the information indicates that a crime within the Court's jurisdiction has been committed, in the territory of a State Party or by a national of a State Party, after the entry into force of the Rome Statute for the State concerned (the last two limbs of jurisdiction are not relevant in the case of a Security Council referral).

⁶⁵ G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), II, 1146-1148.

⁶⁶ Rule 46 Rules of Procedure and Evidence.

The *third parameter* deals with admissibility and aptly refers to Article 17 of the Rome Statute. According to this provision, a case will be inadmissible if it is being investigated or prosecuted by a State that has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; the case has been investigated by a State that 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; the person concerned has already been tried for conduct that is the subject of the complaint; and the case is not of sufficient gravity to justify further action by the Court.

While the first three grounds of inadmissibility mentioned in Article 17 of the Rome Statute are objectively assessable, the last ground gives the Prosecutor some margin of appreciation and is in fact related to the last parameter (already discussed above), namely, whether the prosecution is in the interests of justice. Indeed, Article 53 (1) (c) of the Rome Statute indicates that one of the criteria to assess whether prosecution is in the interests of justice is the gravity of the crime.

Consequently, Article 17(1)(d) and Article 53(1)(c) of the Rome Statute are substantially the same. However, this raises some questions since the refusal to start investigations based solely on Article 53(1)(c) has some consequences that are not attached to the other parameters (*infra*). Furthermore, although Article 53(1)(b) does not refer to the interests of victims, should the Prosecutor take them into account if he decides not to start investigations based on the insufficient gravity of the crime laid down in Article 17(1)(d) of the Rome Statute? The best solution to this conundrum may be to regard a decision not to prosecute on the basis of the gravity of the crime as falling under Article 53(1)(c) of the Rome Statute and hence under the parameter of not being into the interests of justice.⁶⁷ As a result, due consideration should be given to the interests of victims and the special consequences attached to a refusal to initiate an investigation based solely on Article 53(1)(c) of the Rome Statute are applicable.

c. Procedure for dealing with communications and referrals

The Office of the Prosecutor has adopted provisional regulations laying down how communications and referrals will be dealt with.⁶⁸ Communications have to go through three phases, while referrals will only be analysed in two phases, that are identical to the last two phases of the communications procedure.

The Information and Evidence Unit is in the first place responsible for receiving, registering, and securing *referrals* and supporting documents received by the Office of the Prosecutor from the Security Council or a State Party. In the case of a referral, the Head of the Information and Evidence Unit will immediately inform the Prosecutor of the referral and will make electronically available the referral and supporting documents to the heads of the Jurisdiction, Complementarity and Cooperation Division (JCCD), the Investigation Division and the Prosecution Division. Next, the Prosecutor will inform the Presidency of the referral. In a case where a State Party provides a referral in confidence, the Prosecutor will naturally inform the Presidency on condition of confidentiality, until such time as the referring

⁶⁷ G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), II, 1153-1154.

⁶⁸ These provisional regulations are available at: < http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf >

State Party agrees to disclosure. The receipt of the referral shall be acknowledged by the Head of the Information and Evidence Unit or otherwise as directed by the Prosecutor.

With regard to *communications*, an additional preliminary analytical phase is instituted, namely a review of the communication by the Information and Evidence Unit and JCCD. The Information and Evidence Unit will, on a weekly basis, or more frequently as required by the number of communications received or by reasons of urgency, prepare reports analysing the communications received. The reports will subsequently be made electronically available to JCCD. The reports will identify (i) communications that manifestly do not provide any basis for the Office of the Prosecutor to take further action, (ii) communications that appear to relate to a situation already under analysis, investigation or prosecution, and (iii) communications warranting further analysis in order to assess whether further action may be appropriate. The JCCD must review these reports on communications and confirm or amend the preliminary identifications made by the Information and Evidence Unit.

On the one hand, when the review by the Information and Evidence Unit and the JCCD identifies a communication that relates to a situation already under analysis, investigation, or prosecution, the Information and Evidence Unit will send an acknowledgement and the JCCD will draw the information to the attention of the relevant staff of the Office of the Prosecutor. On the other hand, when the review identifies a communication as either manifestly not providing any basis for the Office of the Prosecutor to take further action or as warranting further analysis, it shall be included in a report from the JCCD to the Prosecutor and the Executive Committee, with appropriate recommendations. Furthermore, the report has to be made electronically available to the Investigation Division and the Prosecution Division. Members of the Executive Committee may request clarification or make comments. After hearing any comments, the Prosecutor will determine whether the communication manifestly does not provide any basis for the Office of the Prosecutor to take further action, in which case the Information and Evidence Unit will send an acknowledgement and response and the information will be archived; or whether further analysis is necessary to evaluate the seriousness of the information in the communication, in which case the Information and Evidence Unit will send an appropriate acknowledgement and the communication will be analysed in a second phase.

In the second phase, or the first phase in the case of referrals, the JCCD will assess the Court's jurisdiction and the admissibility of the situation conducting the analysis on the basis of Article 15(2) of the Rome Statute and Rule 104, including issues of jurisdiction, admissibility, interests of justice, and credibility and sufficiency of information. In carrying out this analysis, the JCCD must consider and examine related communications and other readily-available information. Furthermore, at this stage, the JCCD may consult with the Prosecution Division and the Legal Advisory Section, if it deems this appropriate and the Executive Committee may recommend that the Investigation Division gather information about alleged crimes identified by the referrals or the communications, taking into account the reports and recommendations from the first phase and the analysis conducted by the JCCD about jurisdiction and admissibility.

Among the measures available to the JCCD in assessing issues of jurisdiction, admissibility and the interests of justice, are the identification of situations to be monitored on an ongoing basis; the contacting of the State or States that would

normally exercise jurisdiction; the seeking of additional information about *inter alia* the existence and progress of national proceedings--unless there is reason to believe that such consultations may prejudice the future conduct of an analysis or investigation; the taking of appropriate steps to assess the progress of national proceedings relating to crimes within the Court's jurisdiction and to seek additional information as appropriate, and establish and maintain contacts with States and organizations for providing information and cooperation.

In the end, the JCCD will prepare reports summarizing its analyses and submit them to the Executive Committee, that will cast an advice to the Prosecutor. In this respect, the JCCD may make recommendations for consideration by the Executive Committee, including recommendations that there is no reasonable basis for further analysis, that further analysis and monitoring is required, and that advanced analysis is warranted in a next analysis phase after consultation with the Investigation Division.

Taking into account the reports and recommendations submitted by the JCCD and the advice of the Executive Committee, the Prosecutor may on the one hand determine that there is no reasonable basis for further analysis. In such a case, the sender will be promptly informed of the decision and the reasons for the decision and the information must be archived. Any such decision is provisional and may be reopened in the event that new information is forthcoming. On the other hand, the Prosecutor may determine that further analysis and monitoring relating to jurisdiction and admissibility is required or that advanced analysis in a next phase is warranted.

In the last analysis phase, the phase of advanced analysis and planning, the Prosecutor may authorize or instruct his staff to seek additional information, to receive written or oral testimony at the seat of the Court, to assess the progress of national proceedings relating to crimes within the jurisdiction of the Court, to prepare reports on jurisdiction, admissibility, the interests of justice and any other matter relevant to the determination under Article 53 of the Rome Statute, to prepare an investigation plan on the situation or the cases, and to take other appropriate measures to facilitate analysis and prepare for possible investigation.

The JCCD will be responsible for any reports on jurisdiction, admissibility, the interests of justice and any other matter relevant to the determination under Article 53 of the Rome Statute. If necessary, the JCCD will obtain additional information on the alleged crimes from the Investigation Division and may consult with the Prosecution Division and the Legal Advisory Section. In the event that the Prosecutor directs the preparation of an investigation plan, the Executive Committee must establish a joint analysis team, comprising members of the JCCD, the Investigation Division and the Prosecution Division. The Investigation Division must lead the joint analysis team and will be responsible for preparing the investigation plan. The joint analysis team must consult with the Legal Advisory Section and the JCCD will provide input to the investigation plan on the topics within its expertise. The Executive Committee can, in this regard, appoint a staff member to coordinate the work, if necessary.

Taking into account any reports and recommendations submitted by the JCCD and the joint analysis team, and the advice of the Executive Committee, the Prosecutor may determine that there is no reasonable basis to proceed with investigation, in which case the sender of the information will be informed, or he may decide to initiate an investigation pursuant to Article 53 or to seek authorization from the Pre-Trial Chamber under Article 15(3) of the Rome Statute.

d. Duty of notification

As indicated in the description on the procedure of the preliminary examination phase, the Prosecutor has a duty to inform the provider of information that he declines to start up an investigation, a duty flowing from Article 15(6) of the Rome Statute. However, Article 15 only deals with the requirements of a *proprio motu* investigation and not with cases of referrals by States or the Security Council. The concrete procedure to be followed seems to indicate that also in the case of referrals, the Prosecutor has a duty to inform the Security Council and the relevant State as well in the case of a decision not to initiate an investigation, a conclusion that is further corroborated by Rule 105 of the Court's Rules of Procedure and Evidence⁶⁹ and by the option of States and the Security Council to launch a request to the Pre-Trial Chamber to review the decision of the Prosecutor⁷⁰, which implies that the decision and its reasons are communicated to them, with due regard to the protection of the safety, physical and psychological well-being, dignity and privacy of the victims and witnesses.⁷¹

A second obligation of notification concerns the duty to notify the Pre-Trial Chamber of the decision not to prosecute based solely on Article 53(1)(c) of the Rome Statute.⁷² In such a case the Pre-Trial Chamber may decide on its own motion to review the decision of the Prosecutor.⁷³ Consequently, the Pre-Trial Chamber will have to be informed of the decision and the reasons in writing.⁷⁴ This duty equally applies in the case of a decision based on Article 17(1)(d) of the Rome Statute, inadmissibility due to the gravity of the crime, since this decision substantially overlaps with a decision not to start an investigation on the basis of it not being in the interest of justice. Furthermore, the Pre-Trial Chamber has to be informed regardless of the source of the request to start an investigation (communication or referral).

e. Remedies against a decision not to prosecute

The Prosecutor's decision not to initiate an investigation is not the end, however, and the analysis of the following sheds light on the Prosecutor's independence. As stated above, the Pre-Trial Chamber can review on its own motion the decision not to prosecute based only on the finding that a prosecution is not in the interests of justice. Moreover, the Pre-Trial Chamber can review a decision based on other grounds in the case of a State or Security Council referral.⁷⁵

Pursuant to Rule 107 of the Rules of Procedure and Evidence, the Security Council and the referring State can within 90 days after the notification of the decision not to prosecute address the Pre-Trial Chamber in writing and request to review the Prosecutor's decision. The Pre-Trial Chamber can request the Prosecutor to transmit the necessary information or documents in his possession, or summaries thereof, and will take measures to protect these documents and the safety of victims and witnesses and family members. Lastly, it can seek further observations from

⁶⁹ Rule 105(1) Rules of Procedure and Evidence.

⁷⁰ Article 53(3)(a) Rome Statute.

⁷¹ Rule 105(3) Rules of Procedure and Evidence.

⁷² Article 53(1) *in fine* Rome Statute.

⁷³ Article 53(3)(b) Rome Statute.

⁷⁴ Rule 105 Rules of Procedure and Evidence.

⁷⁵ Article 53 (3)(a) Rome Statute.

States or the Security Council. Furthermore, Rule 109 of the Rules of Procedure and Evidence provides that the Pre-Trial Chamber, if it decides to review the Prosecutor's decision based solely on Article 53(1)(c) on its own initiative, must inform the Prosecutor within 180 days following the notification and must establish a time-limit within which the Prosecutor may submit observations and other material.

In the end of the review, the Pre-Trial Chamber will either determine to confirm the decision of the Prosecutor not to initiate investigations or request the Prosecutor to reconsider his decision. The Pre-Trial Chamber's decision requires a majority of judges, will be motivated, and will be communicated to all who made submissions before the Pre-Trial Chamber.⁷⁶

If the Pre-Trial Chamber adopts the decision to request the Prosecutor to reconsider his decision not to investigate, the Prosecutor will as quickly as possible rethink his decision, notify the Pre-Trial Chamber of his final decision and its reasons and inform everyone who participated in the review.⁷⁷ It is important to note that the Prosecutor is at liberty to retain his initial decisions, but a new review under the same conditions may follow. However, when the decision of the Prosecutor was solely based on the ground that an investigation was not in the interests of justice, the review of the Pre-trial Chamber concluding that this is not the case, will oblige the Prosecutor to initiate the investigations, since Article 53(3)(b) explicitly determines that such a decision of the Prosecutor can only have effect if confirmed by the Pre-Trial Chamber.

Hence, if the Pre-Trial Chamber does not confirm the Prosecutor's decision, it is of the opinion that it is in the interests of justice to start an investigation and due to the absence of other grounds not to initiate investigations, the Prosecutor has no further reason not to start investigations. This interpretation is confirmed by the adoption of Rule 110 of the Rules of Procedure and Evidence, determining that the Prosecutor in such case *shall* (emphasis added) proceed with the investigation.

Does this entail that the Pre-Trial Chamber will always review a negative decision of the Prosecutor based on Article 53(1)(c) of the Rome Statute since this decision is only effective after its confirmation? There is a tension between, on the one hand, the need for confirmation and, on the other, the wording of Article 53(3)(b) first sentence, which provides that the Pre-Trial Chamber *may* (emphasis added) review on its own initiative. Although the matter is certainly not settled, it is argued that there is no need to confirm every decision based on Article 53(1)(c), but only if the Pre-Trial Chamber wishes to review the decision of the Prosecutor.⁷⁸ In this respect, the beginning of the second sentence, requiring confirmation, of Article 53(3)(b), "In such a case", could easily be interpreted as referring to the situation when the Pre-Trial Chamber has decided to review the decision.

Finally, it has to be observed that this review can only be initiated by the Pre-Trial Chamber itself, when applicable, or on the request by a State Party and the Security Council making a referral, and not by other interested persons (for example, victims or the providers of information in the case of *proprio motu* investigations). Consequently, these persons can only present additional information to the Prosecutor

⁷⁶ Rule 108 and Rule 110 Rules of Procedure and Evidence.

⁷⁷ *Id.*

⁷⁸ *Pro:* G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), II, 1157-1158; *contra:* M. Bergsmo and P. Kruger, "Article 53", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Nomos, 1999), 713.

in the hope of convincing him to reconsider or address the Pre-Trial Chamber to review the decision on its own initiative if solely based on Article 53(1)(c) of the Rome Statute.

Thus, also for the specific issue of the Prosecutor's decision *not* to prosecute, the Prosecutor cannot be said to be truly independent.

V. The investigations and the pre-trial phase

When the Prosecutor starts his investigation on the basis of a State referral or on the basis of an authorization by the Pre-Trial Chamber in the case of *proprio motu* investigations, he is obliged to inform all States that normally could exercise jurisdiction. Those States can request to defer the investigation. Although such a challenge is not possible in the case of a Security Council referral, there may still be challenges relating to the jurisdiction or admissibility of the Court during the investigations. Consequently, in a first subsection (V.a), these procedures will be discussed. Thereafter, the duties (V.b) and powers (V.c) of the Prosecutor while conducting investigations will be examined, before ending by (V.d) the criteria that the Prosecutor should apply at the end of the investigation in order to determine if the investigation is sufficient to bring an alleged perpetrator to the Court.

V.a Deferral to national jurisdictions and challenges to the jurisdiction of the Court and the admissibility of the case

At the start of the investigation into a situation, in the case of authorization by the Pre-trial Chamber or by a State referral, the Prosecutor must notify all States which in normal circumstances could be deemed to have jurisdiction.⁷⁹

Within one month of the receipt, this State may request the deferral to the national sphere on the basis that it is investigating or has investigated the situation concerned. In other words, the State alleges that it is or has been able and willing to investigate and prosecute the situation in question and perhaps it has even convicted particular perpetrators. Consequently, cases related to the situation investigated would be inadmissible pursuant to Article 17(1)(a)-(c) of the Rome Statute. In such case, the Prosecutor is obliged to grant the request and defer the investigations to the national level.

It is important to note that not only must States Parties be informed, but likewise other States that would normally exercise jurisdiction, based on the information available.⁸⁰ This provision goes far, and it can be questioned why States who are not supporting the Court should be capable of intervening directly into the work of the Court without subscribing to the obligations of the Rome Statute. Furthermore, it is not entirely clear what is meant by "normally" exercising jurisdiction. Does this include States that could exercise universal jurisdiction, if this is mandatory and one of the alleged perpetrators is found or resides on their territory?

In the practice of the Court so far, there has not been a request for deferral for any of the three State referrals. This might indicate that States are reluctant to request such deferral to the national level. Furthermore, the request for deferral is in principle mandatory, obliging the Prosecutor to defer. However, this does not mean that the Prosecutor has to wait until the timeframe of one month has passed to conduct

⁷⁹ Article 18(1) Rome Statute.

⁸⁰ Article 18(1) Rome Statute.

investigations. Indeed, the wording of Article 18(1) of the Rome Statute clearly states that the Prosecutor has to notify the relevant States when he initiates an investigation, indicating that he in any event may start with the investigation, pending the request for deferral.⁸¹

When a State requests a deferral, it has to make the request in writing and provide information concerning its investigation, while the Prosecutor may request additional information from that State.⁸²

Thus, in the end, the Prosecutor will have to defer unless he applies to the Pre-Trial Chamber with a request to continue the investigation. The application has to be in writing and motivated and the information provided by the State to the Prosecutor has to be communicated to the Pre-Trial Chamber. It is very likely that the motivation will be based on the factors laid down in Article 17 of the Rome Statute and that the application will need to argue why the situation is admissible before the Court. Furthermore, the Prosecutor will have to inform the State making the request of the deferral of his application and summarize the basis of the application.⁸³

The Pre-Trial Chamber will decide on the procedure to be followed, may take measures for the proper conduct of the procedure and will decide if it will hold a hearing. The Pre-Trial Chamber will consider the Prosecutor's application, examine the information of the State and decide to authorize the continuation of the investigation in the light of the criteria laid down in Article 17 of the Rome Statute. The motivated decision of the Pre-Trial Chamber will be as expediently as possible communicated to the Prosecutor and the State requesting the deferral.⁸⁴

No matter what decision the Pre-Trial Chamber takes, the Prosecutor can always, even in the case of a deferral, seek the authority from the Pre-Trial Chamber in order to take the necessary investigative steps in the case of a unique investigation opportunity.⁸⁵ This application will be considered *ex parte* and *in camera*.⁸⁶

Moreover, the Prosecutor's deferral to the national jurisdiction is open to review six months after the date of deferral or at any time when there has been a significant change in the circumstances resulting from the State's inability or unwillingness to genuinely conduct investigations or prosecutions.⁸⁷ The procedure mirrors the one of the application not to defer the situation to the national jurisdiction.

Lastly, the Prosecutor has the right to periodically request information on the progress of the investigations and the ensuing prosecutions, to which States Parties must respond without undue delay.⁸⁸

The procedure of Article 18 of the Rome Statute is only applicable to issues of admissibility and cannot be initiated in the case of a Security Council referral. However, this does not mean that under the Rome Statute no challenge to the jurisdiction and admissibility is possible at all in such a case. Indeed, pursuant to Article 19(1) of the Rome Statute, the Court has in any event the duty to examine whether it has jurisdiction and whether the case is admissible.

⁸¹ G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), II, 1163.

⁸² Rule 53 Rules of Procedure and Evidence.

⁸³ Rule 54 Rules of Procedure and Evidence.

⁸⁴ Rule 55 Rules of Procedure and Evidence.

⁸⁵ Article 18(6) Rome Statute.

⁸⁶ Rule 57 Rules of Procedure and Evidence.

⁸⁷ Article 18(3) Rome Statute.

⁸⁸ Article 18(5) Rome Statute.

Furthermore, an accused or a person for whom an arrest warrant or a summons to appear has been issued, a State that has jurisdiction and is investigating or prosecuting and a State of which acceptance of jurisdiction is required, can challenge the admissibility of a case on the grounds of Article 17⁸⁹, even in the case of a Security Council referral. These States have to make their challenges at the earliest opportunity.⁹⁰

However, some limitations apply. First of all, a State that has already challenged a decision of the Pre-Trial Chamber under Article 18 of the Rome Statute can only challenge the admissibility under Article 19 if new significant facts have surfaced or significant changes have occurred.⁹¹ Furthermore, a challenge to the jurisdiction and admissibility can only be made once and this before or at the commencement of the trial. Only in exceptional circumstances may the Court grant leave for a challenge to be brought more than once or after the commencement of the trial. Moreover, challenges to the admissibility at the commencement of a trial or later may only be based on the prior conviction of the persons for the crimes alleged.⁹²

Apart from the accused or persons for whom an arrest warrant or summons to appear has been issued, States that have jurisdiction and are investigating or prosecuting and States whose acceptance of jurisdiction is required, the Prosecutor can seek a ruling of the Court on any issue of jurisdiction and admissibility. A strategic use of this power could seriously limit challenges made by other actors and speed up proceedings. However, when the Prosecutor seeks a ruling, he has to inform the victims and those who have referred the case to the Court.

A request or application made under Article 19 of the Rome Statute has to be in writing and state the reasons for it. When a Chamber receives such a request or application or brings the issues of jurisdiction or admissibility on the forefront itself, it will decide on the procedure to be followed and guard the proper conduct of the procedure. In this respect, it may organize a hearing, but it is not obliged to do so. It can join the request or application to the confirmation or to a trial procedure, if this should not cause unnecessary delay. In the case the Chamber opts for this, it will decide the question on jurisdiction and admissibility first. Furthermore, the Court will transmit the request or application received to the Prosecutor and to the accused or the person for whom an arrest warrant or a summons to appear has been issued and allow them to make written observations. When the Prosecutor requests a decision on the jurisdiction or the admissibility, the Registrar will inform the States or the Security Council who have made the referral and the victims who have already communicated with the Court in relation to the case or with their legal representatives and provide them in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged. The referring State, the Security Council and the victims or their representatives will have the opportunity to submit written observations. In any event, the question of jurisdiction will be dealt with first, before

⁸⁹ Article 19(2) Rome Statute.

⁹⁰ With regard to an accused or person for whom an arrest warrant or a summons to appear has been issued, it has been held that the *ad hoc* defence counsel cannot challenge the jurisdiction or admissibility of the Court when there is no accused or arrest warrant or summons to appear; *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, No. ICC 01/04, 9 November 2005, 4, at http://www.icc-cpi.int/library/cases/ICC-01-04-93_English.pdf.

⁹¹ Article 18(7) Rome Statute.

⁹² Article 19(4) Rome Statute.

examining the questions of admissibility.⁹³ Finally, if the challenge is made prior to the confirmation of the charges, it will be decided upon by the Pre-Trial Chamber; if made after the confirmation, a Trial Chamber will look into the matter. If a challenge to the jurisdiction of the Court or to the admissibility of a case is made after a confirmation of the charges but before the constitution or designation of the Trial Chamber, it must be addressed to the Presidency, who has to refer it to the Trial Chamber as soon as the latter is constituted or designated.⁹⁴

When a State makes an application under Article 19 of the Rome Statute, the Prosecutor has to suspend the investigation pending the decision of the Chamber, although he can request the Chamber to take some investigative steps, namely to preserve evidence where there is a unique investigation opportunity or a danger that the evidence might get lost, to take a statement or testimony from a witness or to complete the collection and examination of evidence that had begun prior to the making of the challenge, and to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest in cooperation with the relevant States. Applications relating to these issues must be heard *ex parte* and *in camera*.⁹⁵ The making of an application will however not affect any investigative act taken prior to the application.

When the Chamber decides that the case is inadmissible, the Prosecutor may submit a request for a review of the decision when he is fully satisfied that new facts have arisen that negate the basis on that the case had previously been found inadmissible.⁹⁶ The request has to be filed to the Chamber that made the latest decision on admissibility. The States whose challenge to the admissibility provoked the Prosecutor's request, will be informed of the request and can make written representations. If the Prosecutor, in the end, defers an investigation, he may request that the relevant State make available to the Prosecutor information on the proceedings. That information will be qualified as confidential at the request of the State concerned. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

b. The Prosecutor's duties during an investigation

Article 54(1) extensively regulates the Prosecutor's duties while investigating.

The *first duty* is to establish the truth. In order to do so, the Prosecutor has to extend the investigation to cover all the facts and evidence, provided that they are relevant to the case, and investigate incriminating and exonerating circumstances equally. In this respect, the Prosecutor is not solely a party to the trial, but is equally an objective and impartial body of justice, comparable to prosecutors in civil law countries. In this regard the Prosecutor differs from the Prosecutor of the ICTR or the ICTY, which are merely regarded as a party to the trial; they have the duty to reveal exculpatory evidence, but not to research it. The insertion of the aforementioned duty in the Rome Statute can be labelled as a significant improvement since the experience of the *ad hoc* Tribunals has demonstrated that the gathering of exculpatory evidence

⁹³ Rules 58 and 59 Rules of Procedure and Evidence.

⁹⁴ Rule 60 Rules of Procedure and Evidence.

⁹⁵ Rule 61 *juncto* Rule 57 Rules of Procedure and Evidence.

⁹⁶ Article 19(10) Rome Statute.

by the accused was not self-evident due to the lack of cooperation of the authorities, especially in the former Yugoslavia.⁹⁷

The Prosecutor's *second duty* concerns the protection of victims and witnesses.⁹⁸ In taking appropriate measures to ensure the effective investigation and prosecution of crimes, the Prosecutor must respect the interests and personal circumstances of victims and witnesses, including age, gender and health. As a result, the Rome Statute imposes particular care on the Prosecutor, whenever appropriate, with respect to the elderly, children, and women. Moreover, the Prosecutor must consider the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.

The *third duty* is to respect the rights of persons arising under the Rome Statute. This again emphasizes that the Prosecutor is not only a party to the trial but also an impartial officer of justice who has to make sure that he respects, and has his staff respect, the rights granted to every person – especially accused and victims. Although, initially, this duty might seem superfluous, careful compliance with it will surely enhance the Prosecutor's and the Court's legitimacy and credibility.

c. The Prosecutor's powers during an investigation

Apart from duties, Article 54 (in its second and third paragraph) lists the Prosecutor's powers during investigations. Some powers are very generally described while others are very specific. For example, the Prosecutor has, according to Article 54(3)(a) of the Rome Statute, the power to collect and examine evidence and Article 54(3)(b) states that he can request the presence of and question persons being investigated, victims and witnesses. The Rules of Procedure and Evidence elaborate on these two powers in more detail. With regard to the first power, Rule 111 lays down that a record will always be made of any formal statement; the record has to be signed by all the persons present during the questioning and has to indicate time, date and place of questioning. Furthermore, when a suspect is questioned the record has to contain that the suspect has been informed of his rights under Article 55(2) of the Rome Statute. Rule 112 establishes that the questioning of a suspect will be audio- or video-recorded according to a detailed procedure laid down in Rule 112. Only for exceptional reasons and after an authorization by the Pre-Trial Chamber, the Prosecutor may choose to follow this procedure of audio- and video-recording in other circumstances as well.

The Prosecutor has the power to *conduct investigations on the territory of a State* in accordance with Part 9 of the Rome Statute or in exceptional circumstances and upon authorization of the Pre-Trial Chamber under Article 57(3)(d).⁹⁹ As stated above, Part 9 relates to international cooperation and judicial assistance. According to Article 86, States Parties have a general duty to cooperate fully with the Court in its investigations, or in other words to cooperate with the Prosecutor since he is the body of the Court tasked with investigations. However, it has also been noted that, despite this general duty to cooperate, the Prosecutor's investigative acts are subject to procedural limitations imposed by States Parties, which result in the factual consent of States Parties to the Prosecutor's investigations. The only exception is Article

⁹⁷ See also M. Bergsmo and P. Kruger, "Article 54", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Nomos, 1999), 716-718.

⁹⁸ Article 54(1)(b) Rome Statute.

⁹⁹ Article 54(2) Rome Statute.

57(3)(d), which establishes that a judicial authorization for a direct investigation on the territory of a State Party may be granted leaving aside Part 9 of the Rome Statute, when the concerned State is unable to execute the request.

The procedure for this is regulated by Rule 115. The Prosecutor has to submit a written request to the Pre-Trial Chamber for authorization. The Pre-Trial Chamber will then, whenever possible, inform and invite views from the State Party concerned and take its views into account in determining whether the request is well-founded. The Pre-Trial Chamber may, at its own initiative or at the request of the Prosecutor or the State Party concerned, decide to hold a hearing. If the Pre-Trial Chamber decides that the Prosecutor's request is founded, it will issue the authorization in the form of an order, stating the reasons based on the criteria set forth in Article 57(3)(d). The order can also specify the procedure to be followed while collecting the evidence in the territory of the unable State Party, but this procedure may of course not hamper the on-site investigation.

Although the general duty of Article 86 to cooperate and the judicial authorization pursuant to Article 57(3)(d) merely concern States Parties, Article 54(2) seems to be addressing non-party States as well. Indeed, it states that the Prosecutor has the power to conduct investigations on a territory of a State, which can also mean a non-party State. This is further substantiated by the possibility to conclude an *ad hoc* arrangement with a non-party State in order to provide judicial assistance. Moreover, Article 54(3)(c) also mentions the Prosecutor's option to conclude arrangements and allows him to seek cooperation of any State.

As mentioned above as well, non-party States are under no obligation to conclude an *ad hoc* arrangement or to cooperate with the investigations, the only possibility being if they are obliged by a Chapter VII resolution of the Security Council. In this respect, the Security Council will oblige a non-party State whose conduct is subject to a Security Council referral to cooperate with the Court, but at least in the Darfur referral it proved unwilling to extend this obligation to other non-party States, although the situation in Darfur constituted a threat to international peace and security.¹⁰⁰

Another power of the Prosecutor, equally related to the power to investigate, is the ability to seek cooperation and to enter into agreements. Article 54(3)(c) states that the Prosecutor may seek the cooperation of any State or intergovernmental organization and may seek any suitable arrangement with any of them in accordance with its respective competence or mandate. Article 87(6) of the Rome Statute further specifies that intergovernmental organizations may be requested to provide information or documents or to provide other forms of cooperation and assistance that may be agreed upon. The agreement can be in the form of a memorandum of understanding or even an exchange of letters.¹⁰¹

Besides agreements with States and intergovernmental organizations, agreements can equally be concluded with specific persons. It has been stated that this wording would also allow the conclusion of an agreement with a suspect as long as this would not be inconsistent with the Rome Statute. What could be possible is that an agreement would be concluded with a minor offender in order to get his help for the prosecution of a major criminal. However, it is submitted that extreme caution

¹⁰⁰ Operative Paragraph 2 Security Council Resolution 1593 (2005) obligating Sudan and other parties to the conflict to cooperate with the Court, but at the same time only urging other non-State parties to cooperate.

¹⁰¹ M. Bergsmo and P. Kruger, "Article 54", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Nomos, 1999), 724.

should be applied before engaging in any of such agreements. In any event, it is unlikely that the Court would allow an agreement that would shield a major perpetrator from prosecution in exchange of his assistance, since this would be inconsistent with the Rome Statute.¹⁰² Indeed, Article 53(2)(c) establishes that the role of the perpetrator has to be taken into account in considering whether a prosecution would be in the interests of justice and in the interests of victims. The shielding of a major criminal would contradict this consideration. Furthermore, in the light of a prosecutorial policy that aims at prosecuting the major criminals, such an agreement would be very unlikely. Concluding an agreement with an offender promising immunity in exchange for assistance would be possible if it were balanced, well-thought through and, above all, in conformity with international law. A comprehensive analysis of this issue is beyond the scope of this contribution.

The Prosecutor has also powers to guarantee the confidentiality of information, the protection of persons and the preservation of evidence.¹⁰³ In particular, the Prosecutor may decide not to disclose documents or information obtained under the condition of confidentiality if the documents and information were given solely for the purpose of generating new evidence. However, if the document or information is likely to have direct probative value and hence is not solely used to generate new evidence, the Prosecutor is entitled to take necessary measures to guarantee the confidentiality of the documents or information or request the Pre-Trial Chamber to take such measures. This power is further specified in Article 72, dealing with the protection of national security information, and Article 73, addressing third-party information or documents. Some measures that could be taken are obtaining the same evidence in another form, providing summaries or using *in camera* or *ex parte* hearings.¹⁰⁴ The matter is more concretely regulated in Rules 80 and 81 of the Rules of Procedure and Evidence.

Furthermore, the Prosecutor also has to protect persons, especially victims and witnesses. Since the Prosecutor has to protect their interests and personal circumstances, the protection of victims and witnesses should better be qualified as a duty instead of a power. Article 68(5) of the Rome Statute entitles the Prosecutor to conditionally withhold information if this information when disclosed could endanger the security of a witness, whereas Rule 81 entitles the Prosecutor to protect the safety of victims and witnesses by requesting the Chamber to authorize the non-disclosure of their identity limited to the period prior to the commencement of the trial. Apart from the protection of victims and witnesses, situations could arise where other persons, such as the accused or agents of a State need protection.

Lastly, Article 54(3)(f) allows the Prosecutor to take necessary measures or request such measures to ensure the preservation of evidence, an issue that is further addressed by Article 56(2)(e)-(f) in relation to a specific investigation opportunity, in Article 18(6) concerning the need to preserve evidence in the case of a deferral to a national authority, and in Article 19(8) concerning the need to preserve evidence pending a ruling by the Court on jurisdiction or admissibility. Furthermore, Article 54(3)(f) could also become highly relevant in the case of a Security Council deferral under Article 16 of the Rome Statute: when it occurs, the Prosecutor should preserve the evidence gathered, since such a deferral is not for an indefinite period of time.

¹⁰² G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), II, 1169.

¹⁰³ Article 54(3)(e) and (f) Rome Statute.

¹⁰⁴ Article 72(5) Rome Statute.

The first few years of investigations by the Office of the Prosecutor have made it abundantly clear that the security situation on the ground can seriously hamper the Prosecutor's ability to actually move into a certain area and to collect evidence. Thus, turning from the theory to practice can constitute another impediment rendering the Prosecutor's independence limited. Both in theory and practice, it is obvious that the Prosecutor is but one actor – though beyond any doubt the main actor - involved in the type of tasks one actually thinks about in relation to all prosecutorial efforts.

d. The decision as to whether to prosecute

At the end of the investigation, the Prosecutor has to decide whether or not to prosecute a suspect. The criteria whether or not to instigate a prosecution are laid down in Article 53(2)(a)-(c). The Prosecutor will have to conclude that there is no sufficient basis for a prosecution when (i) there is no sufficient legal or factual basis to seek a warrant or summons under Article 58, (ii) the case is inadmissible under Article 17, or (iii) a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims, the age or infirmity of the perpetrator and his or her role in the perpetration of the crime.

As a result, according to Article 53(2), at the end of the investigation, the Prosecutor has to decide not to prosecute (i) if there are no reasonable grounds to believe that a person has committed a crime over which the Court has jurisdiction, (ii) when the reasonable grounds do exist, but the case is inadmissible under Article 17 and (iii) when there are reasonable grounds, the case is admissible, but the prosecution would not be in the interests of justice. He will prosecute if each of the three requirements are fulfilled, namely there are reasonable grounds, the case is admissible and it is in the interests of justice to prosecute. In that case, the Prosecutor will request the Pre-Trial Chamber to issue an arrest warrant or a summons to appear.

The *criterion of reasonable grounds* revolves around the presence of a *prima facie* case or the existence of reasonable grounds upon the examination of all the evidence collected, which point to such facts and circumstances as would justify a reasonable and ordinarily prudent man to believe that a suspect has committed a crime.

The *criteria of inadmissibility* are summed up in Article 17 of the Rome Statute. However, the inadmissibility of a case based on its insufficient gravity is better considered as an issue that falls under the criterion of the interests of justice, since Article 53(2)(c) establishes that one of the circumstances to conclude that a prosecution is not in the interests of justice is the gravity of the crime. Although the gravity of the case is not necessarily the same as the gravity of the crime, the latter will be an important factor in determining the former. Article 53(2)(c) allows some discretion to the Prosecutor, who can refuse to prosecute even if there are reasonable grounds and the case is admissible. The aim of this criterion is to allow using the Court's limited resources to prosecute only a limited number of perpetrators, especially the main perpetrators, while leaving the minor offenders to the national jurisdiction.

If the Prosecutor decides not to initiate a prosecution at the end of the investigation, he shall inform the Pre-trial Chamber in writing and the State Party or Security Council in the case of referral.¹⁰⁵ Furthermore, he should equally explain the reasons for his decision. It has to be noted that in the case of commencement of an

¹⁰⁵ Article 53(2) Rome Statute; Rule 106 Rules of Procedure and Evidence.

investigation *proprio motu* based on information provided to the Office of the Prosecutor, there is no obligation to inform the provider of the information of the decision not to prosecute and of the reasons thereof. The Prosecutor's decision not to prosecute can be reviewed by the Pre-Trial Chamber either on request of the State Party or the Security Council making the referral or on its own initiative, but this solely when the decision is based on the criterion that a prosecution would not be in the interests of justice. The procedure and powers of the Pre-Trial Chamber to review the Prosecutor's decision in fact mirror the procedure and powers of the Pre-Trial Chamber in relation to a decision not to initiate an investigation after the preliminary examination.¹⁰⁶ Consequently, what has been stated earlier with regard to a decision not to commence an investigation applies *mutatis mutandis*.

However, when the Prosecutor decides that there is a reasonable basis to prosecute, after having substantially completed the investigation, he will request the Pre-Trial Chamber to issue an arrest warrant or a summons to appear by filing the application, described in Article 58(2) of the Rome Statute. The application shall contain the name of the person and any other relevant identifying information, a specific reference to the crimes within the jurisdiction of the Court that the person is alleged to have committed, a concise statement of the facts, a summary of the evidence and any other information that establishes reasonable grounds to believe that the person committed those crimes and the reason why the Prosecutor believes that the arrest of the person is necessary.

This application is the only document through which it will become clear that the Prosecutor is starting up an investigation and can be considered as a provisional indictment and the issuance of the Pre-Trial Chamber of the arrest warrant or the summons to appear is a sort of provisional confirmation of an indictment.¹⁰⁷ However, this provisional indictment will be modified and completed and made formal by the Prosecutor in view of the hearing to be held by the Pre-Trial Chamber for the confirmation of the charges on that the Prosecutor intends to seek trial.

The confirmation hearing is provided for in Article 61 of the Rome Statute and regulated in Rules 121-126 of the Rules of Procedure and Evidence. The Prosecutor has to provide the Pre-trial Chamber and the accused no later than 30 days before the commencement of the confirmation hearing a document containing a detailed description of the charges, together with a list of the evidence that the Prosecutor intends to present at the hearing for the confirmation. This is to be considered as the formal indictment, which can however still be modified since the Prosecutor can before the confirmation hearing decide to amend or to remove some charges under the condition that the modified indictment is notified no later than 15 days before the start of the hearing.

Furthermore, the Prosecutor still has some opportunities to perform additional investigations after the provisional indictment of Article 58(2). In particular, the Prosecutor may continue the investigation in order to complete, amend and finalize the charges in view of the confirmation hearing. Moreover, he will conduct further investigations with respect to a particular charge upon request by the Pre-Trial Chamber and upon adjourning the confirmation hearing and may continue the

¹⁰⁶ Rules 107-110 Rules of Procedure and Evidence equally apply to a decision not to investigate as to a decision not to prosecute.

¹⁰⁷ G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), II, 1178.

investigation in order to seek additional evidence when the Pre-Trial Chamber declines to confirm a charge and in view of a subsequent request of confirmation.

Lastly, even after the closure of the confirmation hearing, which happens with the decision of the Pre-Trial Chamber to confirm the charges and the committal of the accused to the Trial Chamber¹⁰⁸, the Prosecutor can make supplementary investigations, since the allowance of further changes to the charges after the confirmation hearing necessarily entails the possibility of further investigations. In such a case, the Prosecutor must make a written request to the Pre-Trial Chamber that will so notify the accused. Before deciding whether to authorize the amendment, the Pre-Trial Chamber may request the accused and the Prosecutor to submit written observations on certain issues of fact or law.¹⁰⁹ Further investigations can also take place during the trial itself, but only for the purpose of performance of his functions of prosecuting party in the trial.

The preceding paragraphs, adopting a much more technico-legal approach to the matters discussed, shed some light on the fact that, at every single stage, the Prosecutor is and remains embedded in a potentially rather tightly controlled web of some of the Court's actors.

For sure, while the Rome Statute delineates the Prosecutor's respective rights and duties, much will depend on the way the judges interpret the Statute's provisions and whether they accept to defer to the Prosecutor throughout his investigations, or whether they want to keep a tight control over any step he and the members of his Office takes. Will the judges accept to have the Prosecutor truly enjoy his solemnly proclaimed independence?

Concluding observations

As Justice Louise Arbour rightly pointed out before the Rome Statute came into existence, "*there is more to fear from an impotent than from an overreaching Prosecutor*".¹¹⁰ The experience so far is that the Office of the Prosecutor seems to stick scrupulously to the Rome Statute and that he has not used the possibility to start looking into a situation based on his *prioprio motu* powers. In reaction to multiple pieces of information received regarding the situation both in Iraq and in Venezuela, the Prosecutor indicated in February 2006 that, for the time being, "*the Statute requirements to seek authorization to initiate an investigation*" into either countries' situation had not been satisfied. This is but one example, which shows that the Prosecutor is not bound for a loose hunt.

As the current contribution indicates, The Prosecutor's independence, while affirmed in principle and on paper, is hampered by many constraints, both related to the Rome Statute's provisions and by practical limitations of a political or security nature. If ever there were fears among States Parties that the Office of the Prosecutor would turn into an uncontrollable body, this contribution has rather highlighted a number of features that could render the bulldog potentially toothless.

So far, the Prosecutor's Office's legitimacy has been greatly enhanced due to its cautious way of proceeding. For example, unlike the ICTY in its start-up phase, the Office of the Prosecutor has deliberately not proceeded to investigate relatively minor

¹⁰⁸ Rule 129 Rules of Procedure and Evidence.

¹⁰⁹ Rule 128 Rules of Procedure and Evidence.

¹¹⁰ L. Arbour, "The need for an independent and effective Prosecutor in the Permanent International Criminal Court", 17 *Windsor Yearbook of Access to Justice* (1999), 217.

crimes. All of this goes a long way to indicating that, no matter what assertions to the contrary have been made, the Office of the Prosecutor is very well aware of the fact that it is not operating in a legal vacuum but in a politically very sensitive area, where consensus among certain States Parties can change overnight. A legally correct solution may be politically unsustainable, leading to a situation in which the Prosecutor will not exercise his right to use its *propriu motu* powers, in order to ensure that the Court's long-term viability is not damaged.¹¹¹

The present contribution has indicated, through a number of examples and with no claim to being exhaustive, that the Office of the Prosecutor's independence is thoroughly subject to the Pre-Trial Chamber's oversight. The Prosecutor cannot and will not become the unaccountable body some were fearing. There are simply too many checks and balances.

Whether or not this state of affairs should be looked upon favourably, will ultimately depend on the way the first trials proceed: amidst a vast myriad of events, some "cases" will have been singled out against specific individuals. Strange as if this may seem at first sight, one will only be able to conclude that the Prosecutor has benefited from sufficient independence when some of those cases brought will result in an acquittal of the accused.

In the delicate environment the Office of the Prosecutor is operating, the line between success and failure is extremely thin. So far, the Prosecutor has been walking that line successfully. The real proof for eating the pudding will be during the trials phase.

¹¹¹ M.A. Fairlie, "Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop?", 39 *The International Lawyer* (2005), 842.